

Department of Justice



# **Preliminary Plan for Retrospective Analysis of Existing Rules**

*May 18, 2011*

## *Executive Summary*

Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. As time passes and technologies, legal standards, and circumstances change, regulations may become outmoded, ineffective, insufficient, or excessively burdensome. Executive Order 13563 calls on each executive agency to prepare a preliminary plan under which it will periodically review its existing significant regulations and determine whether any should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving its regulatory objectives.

Pursuant to Executive Order 13563, the Department of Justice developed this preliminary plan for retrospective analysis in keeping with its resources, expertise, and regulatory priorities. The Department sought suggestions from regulated entities and the general public, and incorporated those suggestions throughout this plan. The Department also incorporated best practices from the extensive agency efforts already underway to review existing regulations, respond to petitions for rulemaking, modernize technologies, and engage the public.

Going forward, the Department proposes to establish a Department-wide working group that will institutionalize a culture of retrospective review and collaborate with rulemaking components to select rules for review, solicit public comment, and recommend revisions as necessary. The working group plans to review one to three rules each year, and the components have already identified several candidate rules that the group will evaluate through the retrospective review process described in this plan. Once the working group reviews these initial candidates, the Department plans to report to the public on the outcome of its assessment. Through this process, the Department seeks to build upon its commitment to open government and to promote evidence-based decision-making with respect to regulations.

## Background

The mission of the Department of Justice is to enforce the law and defend the interests of the United States according to the law, to ensure public safety against threats foreign and domestic, to provide federal leadership in preventing and controlling crime, to seek just punishment for those guilty of unlawful behavior, and to ensure fair and impartial administration of justice for all Americans. In carrying out its mission, the Department is guided by four core values: (1) equal justice under the law, (2) honesty and integrity, (3) commitment to excellence, and (4) respect for the worth and dignity of each human being.

The Department of Justice is primarily a law-enforcement agency, not a regulatory agency; it carries out its principal investigative, prosecutorial, and other enforcement activities through means other than the regulatory process. Over the past ten years, the Department has promulgated only a handful of “economically significant” or “major” rules (as defined by Executive Order 12866 and the Congressional Review Act, 5 U.S.C. §§ 801 *et seq.*, respectively). Because of the limited scope of its rulemaking activities, the Department also has limited in-house staff and resources devoted to the regulatory process, and has on some occasions worked with outside contractors to prepare regulatory impact analyses of its economically significant or major rules.

During Fiscal Year 2010, the Department published three major rules, each representing the culmination of a multi-year effort by the Department: the Civil Rights Division’s final rules implementing Titles II and III of the Americans with Disabilities Act of 1990 (ADA), and the Drug Enforcement Administration’s (DEA) interim rule on electronic prescriptions for controlled substances. That number was atypically large for the Department; in the previous nine years, the Department had published a total of only one other major rule, pertaining to the process for ordering controlled substances.

That said, the Department does have significant responsibility for implementing a number of statutes, including the ADA, the Controlled Substances Act (CSA), the firearms and explosives laws, the Prison Rape Elimination Act (PREA), and provisions of the Immigration and Nationality Act (INA) relating to the removal of aliens.<sup>1</sup>

### CORE VALUES

- *equal justice under the law,*
- *honesty and integrity,*
- *commitment to excellence, and*
- *respect for the worth and dignity of each human being.*

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<sup>1</sup> In Calendar Year 2010, the Department submitted 21 rules that did not meet the “economically significant” threshold for review under Executive Order 12866. Three were Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) procedural rules regarding acquisition of firearms or explosives; four were Bureau of Prisons (BOP) rules governing inmates; four were Civil Rights Division advance notices of proposed rulemaking relating to the ADA; four were DEA rules pertaining to controlled substances; one was an Executive Office for Immigration Review (EOIR) rule pertaining to removal proceedings; one was a proposed rule revising and consolidating agency asset forfeiture regulations; three related to implementation of the Sex Offender Registration and Notification Act; one related to PREA; and one related to removing existing rules for certification of state capital counsel systems.

Over a dozen DOJ components are involved in issuing new regulations, but the principal rulemaking components of the Department are:

- The Drug Enforcement Administration (DEA), which enforces federal controlled substances laws and regulations. Through its diversion control program (DCP), the DEA regulates drug manufacturers, distributors, importers, exporters, hospitals, doctors, pharmacists, and others involved with controlled substances, and tracks transactions involving designated chemicals that have legitimate uses but are subject to diversion for illicit purposes.
- The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which issues regulations implementing and enforcing federal laws relating to commerce in firearms and explosives and illegal trafficking in alcohol and tobacco.
- The Federal Bureau of Investigation (FBI), which issues regulations implementing the National Criminal History Instant Check System (NICS) for purchasers of firearms, rules governing the availability of criminal history records information maintained by the Criminal Justice Information Services (CJIS) Division, and rules relating to the Communications Assistance for Law Enforcement Act (CALEA).
- The Bureau of Prisons (BOP), which issues regulations governing the care, custody, and treatment of federal inmates.
- The Civil Rights Division, which issues regulations relating to the enforcement of the ADA, the Voting Rights Act, and other civil rights laws, and coordinates non-discrimination requirements for federal programs and activities.
- The Office of Justice Programs (OJP), and its constituent bureaus and offices, which issue regulations relating to grant programs and criminal information records systems.
- The Executive Office for Immigration Review (EOIR), which promulgates regulations relating to certain proceedings before Immigration Judges (IJs) and the Board of Immigration Appeals (BIA).

In addition, the Department's Criminal, Civil, National Security, and Justice Management Divisions; the Office on Violence Against Women; the Executive Office for U.S. Trustees; the Professional Responsibility Advisory Office; and the Office of Information Policy issue regulations relating to the enforcement or implementation of laws within their authority. The U.S. Parole Commission issues regulations and standards relating to the granting of parole for federal offenders sentenced prior to 1988, and the granting of parole and supervised release for D.C. offenders; the Commission is part of the Department for administrative purposes but is substantively independent of the Attorney General's direction.

The Department will include all of its significant regulations, and all of its rulemaking components, in its plan for retrospective review.<sup>2</sup> At the same time, the preliminary plan focuses on those components

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<sup>2</sup> Non-significant regulations are not subject to the retrospective review requirements under Executive Order 13563 and therefore will not be part of the Department's preliminary plan.

with primary rulemaking responsibilities; the Department believes that it will be most productive, at least in the near term, to concentrate on the components that account for the greatest share of our regulations. In conducting its retrospective reviews, the Department will address not only existing regulations, but also pending proposed rules and interim rules that have not been finalized.

In carrying out the retrospective analysis process, the Department and its regulatory components will be sensitive to competing demands for available time and resources arising from other regulatory initiatives and obligations. The Department will balance the need to conduct retrospective reviews with its other ongoing regulatory obligations and other law enforcement priorities.

## Public Participation in Developing a Plan

The Department is committed to developing a plan for retrospective review that takes account of the needs and views of regulated entities and the public as a whole. Accordingly, before preparing its draft plan, the Department solicited the views of the public on how it might best undertake a retrospective review process.

On March 1, 2011, the Department published a Request for Information in the *Federal Register* (Reducing Regulatory Burden; Retrospective Review Under E.O. 13563, 76 Fed. Reg. 11163), with a 30-day comment period running through March 31. <<http://edocket.access.gpo.gov/2011/pdf/2011-4513.pdf>>. The notice solicited public comment on:

- (1) how best to promote meaningful periodic review of existing rules and identify rules that might be modified, streamlined, expanded, or repealed;
- (2) factors the agency should consider in selecting and prioritizing rules for review;
- (3) any existing regulations that have become ineffective or been overtaken by technological or other change and should be modernized;
- (4) any rules that can be revoked without impairing the Department's statutory obligations and policy objectives;
- (5) any rules that have not operated as well as expected; and
- (6) how the Department can best obtain and consider accurate and objective information about the costs, burdens, and benefits of existing regulations.

The Department received 10 public comments in response:

The *Society for Industrial and Organizational Psychology* and the *Center for Corporate Equality (CCE)* submitted separate comments urging that the Uniform Guidelines on Employee Selection Procedures and their corresponding Questions and Answers, which are among the regulations of the Equal Employment Opportunity Commission, codified at 29 C.F.R. part 1607, should be included among the initial regulations to be reviewed.

The *Leadership Conference on Civil and Human Rights* urged that review of existing regulations should not unnecessarily burden agency resources, hinder new rulemaking efforts, delay the issuance of new regulations and guidance that would enable the Department to fulfill its mission more effectively, or detract from the Department's important coordination responsibilities to ensure the uniform enforcement of our nation's civil rights laws.

Similarly, the *National Women's Law Center* urged that the Department's plan for retrospective analysis of significant regulations should not unnecessarily burden agency resources or hinder new rulemaking efforts, and stated that the process must account for values such as equity, human dignity, fairness, and distributive impacts, and for the fact that clear and comprehensive regulations interpreting civil rights laws reduce costs and help businesses and other entities measure risk more accurately.

The *American Association of People with Disabilities* urged the Department to proceed promptly to complete the rulemaking proceedings it initiated under the ADA on the Accessibility of Web Information and Services; Movie Captioning and Video Description; Accessibility of Next Generation 9-1-1; and Equipment and Furniture. The Department should also promptly issue proposed rulemaking to implement the ADA Amendments Act of 2008.

The *Institute for Policy Integrity at NYU School of Law* offered seven recommendations for developing procedural and substantive policies for conducting retrospective reviews:

- Retrospective reviews should avoid both deregulatory and pro regulatory biases.
- Agencies should use retrospective analysis to improve the quality of their prospective regulatory reviews.
- Agencies should adopt clear and publicly available guidelines for selecting rules to review.
- Retrospective analysis should include a thorough and balanced review of a rule's impacts, such as costs and benefits, distributional consequences, and other empirical effects.
- Agencies should design rules ex ante so that they can be easily and effectively monitored and evaluated.
- Retrospective review should be transparent and actively seek public participation.
- Agencies should foster independent and unbiased retrospective analysis of existing rules by appointing a review team of personnel separate from the authors of the initial rule.

The *Council on Governmental Relations* urged that goals of the retrospective review should be to:

- Harmonize regulations and information systems between agencies and statutes and eliminate unnecessary duplication.
- Eliminate regulations that do not add value or enhance accountability.
- Provide targeted exemptions for research universities similar to protections provided for small entities under the Regulatory Flexibility Act (RFA).
- Ensure that regulations are meeting their goals in terms of performance, rather than simply in terms of process.
- Extend coverage provided under the Unfunded Mandates Reform Act (UMRA) to research universities.
- Allow institutions to better account for new regulatory costs and charge these costs to federal awards.
- Simplify sub-recipient monitoring requirements.
- Reinforce the original intent of the Single Audit Act.
- Prohibit voluntary committed cost sharing across the federal government and create a mandatory cost sharing exemption for research universities.

The Council also suggested the appointment of a high-level official within OMB's Office of Regulatory Affairs (OIRA) to serve as a Federal Ombudsman, responsible for addressing university regulatory concerns and for seeking ways to increase regulatory efficiency.

The *American Immigration Lawyers Association (AILA)* suggested several factors to consider in selecting and prioritizing rules and reporting requirements for review: the impact/benefit to the public; significant economic considerations; historical context; nexus to the underlying statute/congressional intent; and national interest consideration. AILA also identified a number of EOIR regulations that should be modified, streamlined, expanded or repealed, including:

- BIA and immigration court practices and procedures;
- Procedures for asylum and withholding of removal; and
- Procedures regarding removability of aliens and the apprehension and detention of aliens ordered removed.

Finally, the commenter suggested new areas for the promulgation of regulations, including ineffective assistance of counsel procedures and full discovery in removal proceedings.

The *Post-Deportation Human Rights Project* and other groups urged that the Department eliminate regulatory provisions in 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), which bar noncitizens from pursuing motions to reopen or motions to reconsider with the BIA or the Immigration Court after they have departed or have been removed from the United States, consistent with a petition for rulemaking submitted to the Department on August 10, 2011.

The *American Immigration Council* urged the Department to address the need for regulatory reform with respect to the departure bar for motions to reopen; ineffective assistance of counsel claims; procedures for cases involving noncitizens with mental disabilities; and the employment authorization asylum clock.

The Department's preliminary plan incorporates many of these suggestions. As urged by the Leadership Conference and the National Women's Law Center, and as discussed above, the Department is mindful of the need to balance retrospective review efforts against other affirmative rulemaking and enforcement activities. As envisioned by Executive Order 13563, the preliminary plan establishes a rigorous retrospective review process consistent with resources and regulatory priorities. The recommendations of the Institute for Policy Integrity regarding transparency inform many provisions of the preliminary plan, as does the Council for Government Relations' emphasis on avoiding unnecessary duplication. Specific regulations identified as candidates for retrospective review will be considered by the Department as part of its process going forward.



## Agency Efforts Already Underway

Even before issuance of Executive Order 13563, the Department's components have been reviewing current regulations in response to public input, updating and improving procedures, and engaging in outreach efforts with affected entities and individuals. In light of these important efforts, the Department is well-positioned to develop and implement a more systemic plan for retrospective review, and this plan can build on and expand upon practices that are already in place.

### Retrospective Review of Existing Regulations

Several DOJ components have recently completed or are currently engaged in retrospective review of existing or proposed regulations. Earlier this year, for instance, EOIR undertook a retrospective review of its existing and proposed regulations and withdrew two pending proposed rules: "Suspension of Deportation and Cancellation of Removal for Certain Battered Spouses and Children; Motions to Reopen for Certain Battered Spouses and Children," RIN 1125-AA35, and "Rules Governing Immigration Proceedings," RIN 1125-AA53. EOIR determined that the proposed rules are no longer necessary as their intended purpose has been satisfied through other regulations, BIA precedent, and agency guidance documents.

Similarly, the Civil Rights Division recently conducted an extensive review of regulations implementing Titles II and III of the ADA, pertaining to state and local government services and public accommodations and commercial facilities. In conjunction with the revision of those ADA regulations, the Civil Rights Division conducted a retrospective review under section 610 of the Regulatory Flexibility Act, 5 U.S.C. 610, designed to identify changes that would reduce unnecessary burdens or respond to changed circumstances. The final Title II and Title III ADA regulations (published at 75 Fed. Reg. 56164 and 56236 (Sept. 15, 2010)), include a number of regulatory changes that eliminate duplication or overlap in federal accessibility requirements and result in greater harmonization with model accessibility codes promulgated by the International Code Council and the American National Standards Institute. See 75 Fed. Reg. 56245-46. Also as a result of the review, the Civil Rights Division published four advance notices of proposed rulemaking in areas that were the subject of public comment but not addressed in the final rules. (RIN Nos. 1190-AA61, Accessibility of Web Information and Services; 1190-AA62, Accessibility of Next Generation 9-1-1; 1190-AA63, Movie Captioning and Video Description; and 1190-AA64, Equipment and Furniture.)

The Asset Forfeiture and Money Laundering Section (AFMLS) of the Criminal Division, in its role as Chair of the Asset Forfeiture Working Group, has led efforts to revise regulations relating to civil asset forfeiture procedures. Asset forfeiture regulations are currently found in disparate locations, in 28 C.F.R. parts 8 (FBI) and 9 (Main Justice, including ATF); and 21 C.F.R. part 1316 (DEA). Moreover, many provisions were rendered obsolete by the Civil Asset Forfeiture Reform Act (CAFRA), which enacted comprehensive reforms that significantly affected forfeiture procedures. AFMLS has collaborated with FBI, DEA, ATF, U.S. Marshals Service, and the Justice Management Division's Asset Forfeiture Management Staff to create a set of revised regulations to implement the CAFRA reforms and consolidate the seizure and forfeiture regulations of the DOJ investigative agencies. The revised regulations are expected to be published in final form later this year.

ATF also has begun a rulemaking process that will lead to promulgation of a revised set of regulations governing the procedure and practice for disapproval of applications for explosives licenses or permits. This new set of regulations, 27 C.F.R. part 771, will replace the regulations previously codified at 27 C.F.R. part 71 (2002), many of which are outmoded and needed to be revised (RIN 1140-AA40).

The Office of Information Policy (OIP) recently completed a thorough review of regulations implementing the Freedom of Information Act, codified at 28 C.F.R. part 16, Subpart A. The Department published the revised regulations in the *Federal Register* on March 21, 2011, as a notice of proposed rulemaking with a thirty-day public comment period. And the Department's Professional Responsibility Advisory Office (PRAO), is currently engaged in a retrospective review of 28 C.F.R. part 77, published as an interim rule in the *Federal Register* on April 20, 1999.

## Responses to Petitions for Rulemaking

Department components also review and revise their existing regulations in response to petitions for rulemaking. When a Department component receives a petition, it carefully reviews the request, formulates a position, and decides whether to initiate a rulemaking proceeding. Following this internal review, the component provides a formal written response to the petitioner, either explaining that it will initiate a rulemaking and describing the ways in which the regulation will be modified, or identifying the reasons why the regulation will not be modified. Department components occasionally publish responses to petitions in the *Federal Register*, see, e.g., Notice of Denial of Petition, 66 Fed. Reg. 20,038 (Apr. 18, 2001), and the Department will consider adopting a policy encouraging publication where appropriate, in the interest of greater transparency.

EOIR has begun review of several of its regulations in response to petitions for rulemaking submitted by interested immigration groups. In light of intervening legislation, one such petition seeks the revocation of longstanding regulations that bar aliens from filing motions to reopen their removal proceedings, after they have been deported or been removed from the United States. In response to other petitions, EOIR is reviewing rules that bar immigration judges from reviewing the custody of "arriving aliens" who enter the United States at a port of entry and seek asylum based upon a credible fear of persecution or torture in their native country; exempt certain motions to reopen in asylum cases from current limits on the number of times such motions may be filed; and set standards for removal proceedings involving mentally incompetent respondents. Finally, EOIR is reviewing a petition requesting that it promulgate new rules providing for the appointment of counsel for indigent respondents in certain removal proceedings.

Additionally, ATF recently began review of a petition requesting, in part, amendments to the regulations relating to the making and transferring of a firearm under the National Firearms Act. After careful consideration of the petition, ATF will make a decision as to whether a rulemaking proceeding will be initiated.

## Technological Modernization

DEA recently has made several improvements to its information technology capabilities, in an effort to enhance its enforcement capabilities, reduce costs, streamline the regulatory compliance process for registrants, and keep the public informed. Underperforming contracts were terminated and a new

section was created within the DEA's Diversion Control Program (DCP) to manage all DCP information technology projects, improving program efficiency and responsiveness for both registrants and the public. The new unit is continually modernizing information systems, and it is responsible for improving the efficiency of regulatory control systems and providing enhanced automated enforcement tools for use by the DCP.

One notable improvement has been modernization of the Controlled Substances Ordering System (CSOS), which now provides registrants with an electronic platform that reduces their costs while ensuring a more efficient and effective controlled substance ordering process. The DCP also streamlined the application process for all DEA registrants by implementing an online system for both new and renewal applications. The DCP is also working to improve the quality and accessibility of reporting systems that generate data important to its enforcement and control efforts, in part by providing for a more efficient means by which registrants may submit such reports.

## **Public Engagement**

Many of the Department's regulatory components regularly solicit and consider feedback from regulated entities and the public more generally. The Department will build on these public engagement practices in its retrospective review process, soliciting views directly from the public and also relying on components to bring forward suggestions derived from their own engagement efforts.

The FBI, for instance, receives extensive input from the Advisory Policy Board (APB), a federal advisory committee composed of 33 representatives from criminal justice agencies and national security agencies throughout the United States. The APB is responsible for reviewing certain policy, technical and operational issues related to the programs administered by the FBI's Criminal Justice Information Services (CJIS) Division. Those programs are used primarily by state and local law enforcement entities and state criminal history repositories, all represented through the APB.

The Civil Rights Division engages actively with the communities affected by its regulations. It regularly coordinates and presents on interagency panels and at conferences for recipients of federal financial assistance and advocacy groups, providing training and conducting outreach to both broad and targeted audiences that have included mayors, local Chambers of Commerce, state and local governments, and businesses nationwide. Additionally, all members of the public – including recipients of federal financial assistance – have access to the Division's Title VI, ADA, and Immigration Non-Discrimination Hotlines. For instance, the ADA Information Line, a toll-free telephone line that operates 24 hours a day, allows the public to order ADA information and educational materials. The ADA Home Page ([www.ada.gov](http://www.ada.gov)) permits the public to use the Internet to gain access to the Department's regulations, technical assistance materials, status reports, and settlement agreements.

The Civil Rights Division also solicits public input early in the rulemaking process wherever possible, in part through issuance of advance notices of proposed rulemaking (ANPRM). For example, in advance of revisions to the Title II and Title III ADA implementing regulations, the Division published an ANPRM in September 2004 to solicit input from affected parties. In July 2010, the Division published four additional ANPRMs, and not only provided an opportunity for written comments but also held full-day public hearings in three different locations across the country. In addition to rulemaking, the Civil Rights

Division responds to questions and concerns of affected parties by issuing Frequently Asked Questions and Answers, tips and tools, and promising practices documents.

DEA also interacts frequently with its regulated communities, hosting regularly scheduled conferences with regulated industries at which it provides training and solicits input. For instance, in January 2011, DEA held a public meeting to discuss the development of procedures for safe and effective disposal of controlled substances. The meeting allowed interested persons – the general public including ultimate users, pharmacies, law enforcement, reverse distributors, and other third parties – to express their views before implementation of any regulation. In addition, DEA participates in industry conferences and meetings on a regular basis, and maintains a website ([www.DEAdiversion.usdoj.gov](http://www.DEAdiversion.usdoj.gov)) that includes extensive historical and all current information concerning its Diversion Control Program.

EOIR also meets regularly with affected parties, conducting a semi-annual meeting with the American Immigration Lawyers Association (AILA) to discuss a wide range of issues relating to agency practices, including rulemaking. EOIR's most recent AILA meeting, held on April 7, 2011, included a discussion of the retrospective review process.

## Going Forward

The Department plans to strengthen its process of retrospective review by creating a Department-wide working group that will collaborate with components while conducting thorough reviews of existing significant regulations. The working group will invite suggestions from components, select rules for review, solicit public comment, analyze the rules against defined metrics, and recommend revisions as necessary. This process will supplement ongoing regulatory initiatives that aim to promulgate new regulations or respond to statutory developments, changes in circumstances, or perceived needs. The Department's goals are to institutionalize a culture of retrospective analysis, strive toward evidence-based regulation, and invite a regulatory process that is open, transparent, and accountable.

While the Department plans to implement robust processes for retrospective review, these processes must be balanced against prospective rulemaking obligations.<sup>3</sup> Several public commenters opined that retrospective analysis should not unduly burden agency resources or hinder new rulemaking efforts. The Department plans to balance retrospective and prospective obligations by reviewing one to three rules each year and tailoring that review to both the resources and the expertise of the Department.

### Institutionalizing a culture of retrospective analysis

The Department intends to strengthen its culture of retrospective analysis by involving both Department and individual component leadership in regulatory review and decision-making, thus expanding its capacity for retrospective analysis and creating a review process that is independent of the Department's rulemaking offices.

First, the Department plans to create an internal working group to review existing regulations and recommend revisions. This working group will include staff from the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the Office of Legal Policy, the Office of Legal Counsel, the Civil Rights Division, the Office of Justice Programs, and the Justice Management Division. This working group structure will allow the Department to centralize its internal expertise and resources, bringing together leadership offices with an overarching view of the Department's regulatory efforts and components with expertise in statistics or experience in managing various issues related to the operation of the Department. Department-wide leadership of the group will also ensure sufficient independence from the components responsible for writing and implementing the Department's regulations. In addition, the Deputy Attorney General, James Cole, and the Assistant Attorney General for the Office of Legal Policy, Christopher Schroeder, will ensure accountability by assuming

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<sup>3</sup> For example, the Civil Rights Division will be devoting substantial resources to completing the four pending rulemaking actions begun last year to address the requirements of the ADA, as discussed above, in addition to undertaking a new rulemaking project to implement the ADA Amendments Act (RINs 1190-AA59, 1190-AA61, 1190-AA62, 1190-AA63, and 1190-AA64). DEA is planning to devote substantial efforts to developing disposal regulations under the Secure and Responsible Drug Disposal Act, as well as finalizing the interim regulations published last year on electronic prescriptions for controlled substances. The Department will also be developing a final rule to promulgate national standards under the Prison Rape Elimination Act (PREA).

responsibility for monitoring both the process and its results. The point of contact e-mail address is [olpregs@usdoj.gov](mailto:olpregs@usdoj.gov).

Second, the Department will continue to coordinate with regulatory components to ensure that senior officials, and not only the individuals responsible for writing and implementing regulations, are engaged in the retrospective review process. The Department's regulatory components, and especially its principal rulemaking components, have been active participants in preparing this preliminary plan, submitting comprehensive information about their rulemaking activities and outreach efforts, offering detailed thoughts on a proposed framework for the Department's retrospective review process, and suggesting candidate regulations for the Department's retrospective analysis. As a result, the Department's components understand the importance of an ongoing retrospective review process, and are committed to incorporating this process into their prospective development of regulations.

The Department plans to build on this productive working relationship by instituting regular meetings of the working group and designated representatives of the Department's regulatory components. Those meetings will provide an opportunity for components to share best practices regarding public outreach, transparency, and retrospective review of certain regulations – describing, for instance, how they have used public feedback to identify rules that might be candidates for the retrospective review process or new metrics for evaluating their own regulations. The working group also will use these meetings to update component representatives on its efforts, reinforcing the Department's commitment and helping to create a “feedback loop” that will allow components to incorporate the working group's perspective into their affirmative rulemaking activities.

Third, several of the larger regulatory components will continue to strengthen their capacity to assist in retrospective analyses. For example, DEA has realigned its regulatory drafting unit so that each regulation writer reports directly to the head of the Office of Diversion Control. EOIR has established the position of Chief Regulatory Counsel to provide advice to the General Counsel and OGC staff on regulatory matters, and contemplates this position supporting both the working group and the General Counsel in the periodic review of regulations. Similarly, ATF plans to support the efforts of the working group by providing input from its scientists and laboratory personnel as appropriate and necessary.

Finally, the Department recognizes that it will be necessary to assess its capacity for retrospective review as this process goes forward. After observing the functioning of the retrospective review program for one year, the working group may consider whether staff changes are necessary, and whether additional resources or expertise are needed, from within the Department, from other agencies, or, resources permitting, through new staffing.

## **Developing a process for retrospective review**

The Department has identified selection criteria for the rules its internal working group will review retrospectively. Candidate rules for review are those that:

- impose high costs or burdens on the public;
- require outdated reporting practices, such as paper-based processes without an electronic alternative;

- affect a large number of entities or have disproportionate distributional impacts on certain entities, such as small businesses;
- could result in greater net benefits to the public if modified;
- overlap, duplicate, or conflict with other federal rules, or, to the extent applicable, with State and local rules;
- have been in place for long periods of time so that updating may be appropriate;
- have been overtaken by new technologies or unanticipated circumstances;
- could be replaced by other regulatory alternatives; or
- have been the subject of petitions for rulemaking.

The Department contemplates that its components—primarily those with significant rulemaking activities—and the public—through petitions for rulemaking or other similar submissions to the Department—will submit candidate rules that meet these criteria to the working group for consideration. After the working group has evaluated suggestions of candidate rules, it will prioritize the suggestions and select one to three rules per year to review.

After the working group selects a rule for retrospective review, the Department will seek public comment on the rule’s effectiveness, opportunities for harmonization or modernization, potential regulatory alternatives, actual costs and benefits (as opposed to the projected costs and benefits when the rule was promulgated), burdens of compliance, distributional equity to small businesses and other identified groups, and unintended effects. The Department encourages the public to comment on these metrics.

The Department’s internal working group will review the public comments and conduct a balanced review of the rule or regulation according to these same metrics. The working group will also seek input as needed from the component responsible for a particular regulation. After carefully considering both public comment and internal guidance, the working group will consider whether streamlining, repeal, amendment, or expansion is necessary and appropriate.

Once the working group formulates a recommendation, the group will forward that recommendation to the appropriate leadership offices for policy approval. With both the Deputy Attorney General’s Office and the Associate Attorney General’s Office represented on the working group, the goal is an expeditious process for consideration of recommendations developed pursuant to the working group and public input.

If the leadership offices approve the recommendation, the working group will ask the responsible component to draft a rulemaking document proposing the necessary revisions. The working group will establish timetables for actions by the responsible component that are appropriate in light of the nature and extent of the proposed revision. The component will then circulate the proposed rule and associated documents through the normal rulemaking clearance process to other interested and affected components of the Department for concurrence. Following component-level concurrence in rulemaking, the component will forward the rule to the appropriate leadership offices for policy approval and permission to submit to OIRA as necessary.

As each individual review concludes, the Department will provide public reports regarding the outcomes of the process. This “report card” will demonstrate simply and clearly how the rule measured against the Department’s metrics for selecting candidate rules for review, and whether changes were made as a result of the Department’s retrospective review. This way, the public will have a standardized way to evaluate whether their ideas and recommendations are being appropriately considered, and whether the Department is acting upon the review metrics in an efficient, effective, and transparent manner. An example of this report card is attached as Appendix A to this preliminary plan; the public is encouraged to comment on this aspect of the Department’s plan.

The working group will repeat the above-described process annually beginning with a request for candidate rules from each component or the public. The working group will also collaborate with the Department’s primary rulemaking components to engage in a systemic review of their rules as time and resources permit. Once the Department has built a sufficient baseline against which to measure how effectively this system is working, it plans to implement training as necessary for staff developing and writing regulations, in order to ensure that ex post analysis informs ex ante formulation and development of rules.

## **Candidate Rules Already Identified for Retrospective Review**

After consultation with the relevant components, the Department has identified multiple rules that it plans to evaluate during the next two years through the retrospective review process described above:

- **21 C.F.R. §§ 1303, 1315:** These regulations apply quotas to registered manufacturers of Schedule I and II controlled substances and certain List I chemicals. The quotas are intended to control the available quantities of the basic ingredients needed for the manufacture of certain substances, to reduce the risk of diversion while ensuring sufficient availability to satisfy the legitimate needs of the United States. Notably, these regulations have not been reviewed or revised since they were first implemented in the early 1970’s. DEA’s preliminary evaluation suggests that the existing process may be unnecessarily cumbersome for applicants because it requires paper-based applications and multiple contacts with DEA. The working group will review all of the quota and related regulations, including regulations governing the methods used to calculate quotas, the application process, and the relationship between the quota system and other methods of diversion control. Following this review, the working group will collaborate with DEA to explore strategies to modernize the quota system to achieve greater efficiency and effectiveness and reduce the burden on applicants.
- **27 C.F.R. §§ 447.43, 479.111:** The regulations in 27 C.F.R. 447 and 479 generally provide that firearms, ammunition, and defense articles may not be imported into the United States except pursuant to a permit. Section 447.43 provides that import permits are valid for one year from their issuance date. If shipment cannot be completed during the period of validity of the permit, another application must be submitted for a permit to cover the unshipped balance. Likewise, with respect to the importation of National Firearms Act (NFA) firearms, section 479.111 provides that import permits are valid for one year from the date of approval. These rules have not been revised since 1992. Working with ATF, the working group will consider whether these regulations could be revised to achieve the same regulatory objective in a manner that is less burdensome for both industry and ATF. Specifically, sections 447.43 and 479.111 could be



amended to extend the term of import permits for firearms, ammunition, and defense articles from one year to two years. The additional time would allow importers sufficient time to complete the importation of the authorized commodity before their permits expired, and eliminate the need for importers to submit new and duplicative import applications. ATF believes that extending the term of import permits would result in substantial cost and time savings for both ATF and the industry, which includes many small businesses. ATF's initial estimate is that such a change might reduce the number of permit applications submitted by importers each year from approximately 9,000 to as few as 4,500.

- **8 C.F.R. parts 1103, 1211, 1212, 1215, 1216, 1235:** These regulations address practices and procedures governing immigration into and removal from the United States. They affect individuals seeking immigration benefits and relief from removal; immigration practitioners representing individuals before the government; and the Departments of Homeland Security, State, and Health and Human Services. Many of these regulations have not been reviewed since the Homeland Security Act of 2002, Pub. L. 107-296, transferred certain immigration responsibilities to the Department of Homeland Security (DHS) and required a reorganization of title 8 of the C.F.R. in February 2003. After internal consideration and review, EOIR has identified numerous provisions that duplicate or should be better harmonized with DHS regulations. Those regulations primarily address the responsibilities of DHS, including appeals of DHS decisions (8 C.F.R. part 1103), documentary requirements for aliens (8 C.F.R. parts 1211 and 1212), control of aliens departing from the United States (8 C.F.R. part 1215), procedures governing conditional permanent resident status (8 C.F.R. part 1216), and inspection of individuals applying for admission to the United States (8 C.F.R. part 1235). In order to provide greater clarity to the public regarding the distinct responsibilities of DHS and EOIR, the working group will collaborate with EOIR to eliminate unnecessary duplication.
- **8 C.F.R. part 1003:** In order to ensure harmonization with DHS's regulations and in response to the public comments received as a result of the Department's Request for Information, published on March 1, 2011 (76 FR 11163), the working group will review the provisions of 8 C.F.R. part 1003 addressing motions to reopen, motions to reconsider, venue, and immigration court practices and procedures. The working group will work with EOIR to remove outdated procedures and references in these regulations and will collaborate with EOIR to solicit public comment on these regulations. Throughout this process, the working group will also consider substantive revisions as appropriate.

The Department fully expects that the retrospective review process will be fruitful in these identified instances, leading to recommendations that allow the Department to fulfill its regulatory mission in more effective and less burdensome ways.

## **Maintaining the retrospective review process over time**

Once the working group completes its retrospective review of the rules discussed above, the group will solicit candidate rules from the rulemaking components annually. The group also will consider suggestions from the public on an ongoing basis. As an initial matter, the Department will solicit candidate rules from the public when it posts this plan for comment. The working group also will renew

that public solicitation periodically, and will consider what means of public solicitation – Federal Register notice, website postings, etc. – is most effective in encouraging active public participation.

For rules subject to periodic reviews under the Regulatory Flexibility Act, 5 U.S.C. § 610, the group will coordinate scheduling with the components so that the two reviews can be conducted simultaneously. In all other instances, the working group will prioritize candidate rules using the metrics identified in Part V.B and Executive Order 13563. Over time, the Department’s working group intends to coordinate with all regulatory components to develop a periodic review schedule that will be frequent enough to accomplish the intended goals of the Executive Order.

In planning for retrospective analysis in future years, the working group and the individual regulatory components will balance the plans for retrospective analysis so that they will not overwhelm (or, alternatively, be overwhelmed by) the needs of the Department’s overarching agency missions.

## Transparency, Participation and Collaboration

The Department views the instant effort as a part of building a culture of openness and a way to promote informed decision-making. In this regard, the three pillars of Open Government – transparency, participation, and collaboration – are equally applicable to the Department’s preliminary plan for retrospective analyses of rules.

**Transparency:** The Department intends to publish its preliminary plan in the *Federal Register* shortly after it is submitted to OMB on May 18, 2011. To facilitate public comment, the Department also will post the preliminary plan and provide an opportunity for comment on its Open Government website at <http://www.justice.gov/open>. After receiving public input, the Department will revise its preliminary plan in ways that are responsive to the public views received.

Once finalized, the Department will make its plan available to the public, and post the final version on its Open Government website. Over time, the Department also will post on this site the results of the retrospective reviews conducted pursuant to Executive Order 13563, including publicly available “report cards” on the success of individual reviews.

**Participation:** The Department is committed to public participation, both as a mechanism to select candidate rules for review and as a means to understand how effectively regulations are working in practice. Accordingly, the Department intends to solicit public feedback through requesting comment on this preliminary plan, as well as additional candidate rules for review; encouraging petitions for rulemaking and other similar methods of notifying the Department of gaps in existing rules or areas where regulations are not achieving their intended effects; and seeking comment on the actual effects of particular rules. In soliciting candidate rules, the Department will invite public comments that identify why particular rules should be prioritized for review under the standards established in Part V.B above.

**Collaboration:** Interagency coordination and collaboration is a well-established and regular aspect of the Department's current rulemaking activities. The Department intends to build on this practice, focusing on harmonization across agencies with similar jurisdictions and collaboration with affected industry and stakeholders.

For example, ATF will continue to coordinate regularly with other federal agencies that have similar jurisdiction or interests. One such example is ATF's and the Occupational Safety and Health Administration's coordination on the development and improvement of standards affecting the storage of explosives. Similar efforts are underway as ATF works with the Department of Homeland Security on the safe storage of certain chemicals, including explosives. These are just two examples of ATF's extensive interagency efforts; it is also engaged with the Consumer Product Safety Commission, as well as other components within DOJ, to develop integrated plans to achieve consistent regulatory standards within its jurisdiction.

DEA also coordinates extensively with the Food and Drug Administration (FDA) and other agencies at the Department of Health and Human Services (HHS) on a wide range of issues relating to DEA's diversion control program for controlled substances and listed chemicals. In addition, DEA actively solicits input from interested individuals and groups.

With respect to immigration-related regulations, the Department coordinates extensively with DHS. Going forward, the Department intends to institute bi-monthly coordination meetings with DHS officials on immigration matters, including issues arising during the retrospective review process. This increased communication and coordination will serve as a model for the Department where it has overlapping or particularly closely shared responsibility with another agency to achieve particular goals.

Finally, the Department also works closely with other agencies on civil rights matters. The Civil Rights Division is responsible for ensuring effective implementation of Title VI and other civil rights laws across federal programs, and in that capacity, provides assistance and oversight to federal agency civil rights offices and reviews agency reports on implementation of civil rights laws, in part to identify areas where greater inter-agency coordination is needed. Executive Order 12250 provides that federal regulations that effectuate Title VI (and other civil rights statutes, including Title IX of the Education Amendments of 1972) must be approved by the Attorney General. 42 U.S.C. § 2000d-1; E.O. 12250 at § 1-1. In addition, the Department is a member of the U.S. Access Board and participates as one of twelve federal members in the development of ADA accessibility guidelines and accessibility standards required by the Rehabilitation Act. The Department meets periodically with other federal agencies, including the Departments of Transportation, Health and Human Services and Education, to coordinate the implementation of disability nondiscrimination requirements, and provides guidance and training to other agencies on those subjects, as well.

# APPENDIX A

## Report Card for Retrospective Review

Rule Title and RIN: \_\_\_\_\_

Step 1: Selection Criteria	Yes	No	Additional Information
High Costs or Burdens			
Outdated Reporting Practices			
Affects a Large Number of Entities			
Causes Distributional Inequities			
Potential for Greater Net Benefits			
Overlaps, Duplicates, or Conflicts with Other Rules			
In Effect for Extended Period			
Overtaken by New Technologies or Circumstances			
Available Regulatory Alternatives			
Subject of Petition for Rulemaking			
<b>Step 2: Public Input</b>			
Ineffective in Achieving Stated Regulatory Goal			
Opportunity for Harmonization or Modernization			
Potential Regulatory Alternatives			
Actual Costs and Benefits Different than Projected			
Burdensome Compliance			
Distributional Inequities			
Unintended Effects			

Outcome of Retrospective Review:

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