

OFFICE OF PERSONNEL MANAGEMENT

PRELIMINARY PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES

May 18, 2011

Plan Submitted Pursuant to Executive Order 13563

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

The Office of Personnel Management (OPM) establishes human resources policy for the Federal Government's 1.9 million Federal civilian employees, protects the merit system principles, and administers benefits programs for Federal employees, retirees, and their families. OPM's regulations appear in Title 5 of the Code of Federal Regulations. They cover a host of topics relevant to Federal employment, including but not limited to recruitment and hiring; application of veterans' preference rules; suitability and fitness for employment; employee pay and leave; performance management; and retirement, health insurance and other Federal employment benefits. Although OPM is not fundamentally a public regulatory agency, our regulations directly govern the activities of other Federal agencies and their employees, individuals seeking Federal employment (including veterans), Federal retirees and their survivors, and, in the near future, members of the public seeking health insurance under the Affordable Care Act. Accordingly, OPM's regulations frequently have at least an indirect effect on the general public and the national economy.

Executive Order (E.O.) 13563, Improving Regulation and Regulatory Review, requires every agency to put in place a plan for retrospective review of its existing significant regulations that is tailored to the agency's unique needs and that provides for public participation in that process. OPM's plan reflects its emphasis on outreach to the public and stakeholders, and its well-developed relationships with fellow agencies.

OPM endorses the E.O.'s recognition that it is important to maintain a consistent culture of retrospective review and analysis throughout the executive branch. Whenever OPM issues a regulation, it does its best to be fully informed by the public and stakeholders about the likely consequences of the regulation, including its potential benefits and burdens. But the full impact of the regulation can only be ascertained after it takes effect. As described below, OPM's preliminary plan is designed (1) to formalize an approach for obtaining regular public input—particularly from the agencies, Federal employees, retirees, and others that we directly serve and regulate—to identify OPM regulations that may be outmoded, ineffective, insufficient, or excessively burdensome, and should therefore be considered for revision; and (2) to institutionalize a regular retrospective review procedure that is independent from its normal regulatory processes.

Indeed, OPM has already undertaken some retrospective review that should result in a significant reduction in burdens to those who participate in activities that OPM oversees. For

example, as discussed in Section IV below, OPM is reviewing its recruitment and hiring regulations under 5 CFR part 330 for purposes of conforming to a Presidential memorandum aimed at reducing burdens on individuals interested in applying for Federal jobs. [See http://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process](http://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process). OPM's regulatory proposal will be designed to assist agencies to implement the changes the President has directed and to conform OPM's regulations to the President's directions. Among other things, the President has prohibited agencies from requiring applicants to complete burdensome essay questions as part of the initial application process. It has been a common practice by agencies over the years to require all applicants to submit such essays, with some requiring as many as five to ten essays. Applicants have had to devote hours of work, in some cases over several days, just to apply. Our new regulations, implementing the President's memorandum bring this practice to an end by requiring agencies to allow individuals to apply simply by submitting a resume, a process which takes just a few minutes. Also, in connection with this regulatory change, we are considering eliminating the Application for Federal Employment Optional Form 612. With the move to a resume-based hiring system, this form appears now to be obsolete, and its elimination would reduce by 93% the number of estimated burden hours for Federal job applicants. It would also conserve the resources that agencies currently must devote to reviewing these forms.

We have also identified some additional regulations for upcoming retrospective review (see Section V, below) because we think they are good candidates for revision in order to significantly reduce regulatory burdens. For example, we are reviewing the methodology used to set rates for community-rated Federal Employee Health Benefits Program (FEHB) plans. The current methodology is based on factors that have changed over time. Adopting a new rate-setting methodology would more closely reflect current conditions, be more transparent, and impose a reduced burden on carriers. We are also reviewing our retirement regulations to allow for greater use of information technology in order to speed up adjudication of retirement claims and reduce burdens on agencies and retirees.

II. Scope of Plan

E.O. 13563 directs agencies to review "significant regulatory actions." It incorporates the definition of "significant regulatory actions" from section 3(f) of E.O. 12866, which provides that a significant regulatory action is any regulatory action that is likely to result in a rule that may:

- A.** Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- B.** Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- C.** Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

- D.** Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

OPM routinely issues regulations arising out of the President's priorities and legal mandates, which can fall under categories B and D. For example, as noted above, we are currently working on proposed regulations that would assist agencies to implement the President's memorandum on hiring reform and conform OPM's regulations to the President's directions. Similarly, in response to a Presidential memorandum of June 17, 2009, OPM amended its own regulations and oversaw a government-wide review of other agencies' regulations to extend benefits to Federal employees' same sex domestic partners to the extent permitted by existing law (<http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discri>).

Moreover, because we are the Federal Government's human resources advisor and regulate virtually all aspects of the Federal employment relationship, our regulations routinely (and of necessity, given applicable law) "interfere" with (or more precisely "limit") the exercise of agencies' discretion to take actions related to the recruitment, hiring, compensation, retention, and discipline of Federal employees, among other matters.

Due to the unique nature of our role within the government, we intend to make all of our regulations susceptible to retrospective review, not just those that fall within the "significant regulation" categories. We also routinely issue guidance on implementation of our regulations. We intend to review any such guidance in connection with our retrospective review of the regulations to which it relates. Our retrospective review plan will apply to every regulating component within OPM.

III. Public Access and Participation

OPM intends to seek public comment and conduct outreach on this preliminary plan before it is finalized. No later than June 1, OPM will publish its preliminary plan in the Federal Register and post it on its "Open OPM" website at <http://www.opm.gov/open/>. Members of the public will be able to submit comments through the Open OPM website. Their comments will also be viewable by the public (after any personal identifying information is removed). Making all of the comments viewable will allow for more robust participation by the public in the plan review process. The comment period will remain open until July 1.

While the comment period is open, OPM will take advantage of its established channels of communication with stakeholders to encourage them to review the plan and submit comments. This includes outreach through the various councils in which OPM participates, such as the Chief Human Capital Officers Council, the National Council on Federal Labor-Management Relations, and the Interagency Council on Veterans Employment. In addition, OPM hosts regular meetings of the veterans' service organizations and the Hispanic Advisory Council on Federal Employment.

Following the public comment period, OPM will review its preliminary plan and make revisions to respond to the public input received. OPM will finalize its preliminary plan by August 20.

OPM is well-positioned to obtain meaningful input from the public and stakeholders based on its previous successful engagement efforts. Over the past two years, OPM has aggressively sought public and stakeholder input through public meetings and hearings, advance notices of proposed rulemakings, outreach sessions with interested stakeholders – including Congress, trade associations, advocacy organizations, public interest groups, and academia – and tribal consultation.

Indeed, OPM has greatly benefited from public input concerning its regulations to implement E.O. 13562, Recruiting and Hiring Students and Recent Graduates (<http://www.whitehouse.gov/the-press-office/2010/12/27/executive-order-recruiting-and-hiring-students-and-recent-graduates>). Before we began to draft these regulations, OPM held a day-long public hearing where three panels of experts submitted testimony on the issues to be addressed in the regulations. We heard from agency chief human capital officers, labor organizations, veterans' service organizations, academia, and good government groups. We also invited members of the public to submit comments in advance of the hearing, then posted a transcript of the hearing and solicited further public comment. We solicited the views from leaders of the business world in a separate roundtable discussion we hosted on these topics. Once these regulations are issued in proposed form, OPM anticipates conducting one or more additional sessions where members of the public, including the students and recent graduates who will most directly be affected by these regulations, will have an opportunity to ask questions and provide their views on the proposed regulations.

In addition, we have engaged the Chief Human Capital Officers Council and the National Council on Federal Labor-Management Relations in an evaluation of performance management in the Federal Government, which could lead to revision of our performance management regulations. The work of these groups is reported to the public during the Labor Council meetings, which are conducted under the Federal Advisory Committee Act rules.

We will call again on these well-established relationships to assist us in crafting a final plan for retrospective regulatory review that will be effective and transparent.

IV. Current Agency Efforts Underway Independent of E.O. 13653

Over the past two years, OPM has already been conducting retrospective review of regulations in connection with a number of Presidential initiatives and inter-agency workgroups. Here is a summary of our most significant review projects:

- Pursuant to Presidential memoranda issued on June 17, 2009 (<http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discrim>), and June 2, 2010, (<http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>), OPM has

reviewed its regulations and policies that govern pay, leave, and employee benefits to determine what changes are necessary to extend such benefits to the same-sex domestic partners of Federal employees. Where consistent with law, OPM has issued new regulations and policies, or is in the process of issuing new regulations, that extend or would extend various types of leave, allowances, and other benefits that have heretofore been limited to spouses, to employees' same-sex domestic partners. These changes are necessary to modernize these regulations and policies and promote the Federal Government as a 21st century employer on par with the private sector companies with which it must compete for talent. The actions that OPM has taken to date include:

- Issuance of a final regulation to allow Federal employees to use sick leave and other types of leave in connection with the needs of their domestic partners. See <http://www.federalregister.gov/articles/2010/06/14/2010-14252/absence-and-leave-definitions-of-family-member-immediate-relative-and-related-terms>.
- Issuance of a final regulation to allow the same-sex domestic partners of Federal employees to apply for coverage under the Federal long term care insurance program. See <http://www.federalregister.gov/articles/2010/06/01/2010-13015/federal-long-term-care-insurance-program-eligibility-changes>.
- Issuance of a proposed regulation that would add an employee's same-sex domestic partner to the list of individuals presumed to have an insurable interest in the employee, for purposes of providing a retirement annuity. See <http://www.federalregister.gov/articles/2011/03/03/2011-4791/presumption-of-insurable-interest-for-same-sex-domestic-partners>.
- Issuance of a revised policy that allows employees to take up to 24 hours of unpaid leave for (i) school and early childhood educational activities; (ii) routine family medical purposes; and (iii) elderly relatives' health or care needs in connection with the needs of the employee's same-sex domestic partner and the partner's children. See <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=3146>.
- As noted above, OPM has also reviewed its recruitment and selection regulations appearing in 5 CFR pt. 330. The purpose of this review was to assist agencies to implement and to conform OPM's regulations to the President's May 11, 2010, memorandum on hiring reform (<http://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process>). An inter-agency task force advised OPM on issues related to recruitment and hiring, as did the Chief Human Capital Officers Council. We have considered that input and are currently finalizing proposed regulations to assist agencies to implement the President's memorandum. These changes will

significantly reduce the burden on Federal job-seekers by simplifying the application process and will provide Federal managers with more qualified candidates when making a selection. Moreover, in connection with these changes, we are considering elimination of the Application for Federal Employment Optional Form 612. Because agencies are now required to allow applicants to apply with a resume, there may no longer be any need for this form. Indeed, we estimate that elimination of the form would reduce by 93% the number of burden hours for job seekers, from 33,416,667 to 2,508,333. It would also conserve agency resources because they would no longer have to review the form.

- OPM has also issued proposed regulations to clarify the standards for designating whether Federal positions are national security sensitive. <http://www.federalregister.gov/articles/2010/12/14/2010-31373/designation-of-national-security-positions>. In crafting its proposed regulations, OPM received input from the Office of the Director of National Intelligence and the Department of Defense, its partners in security clearance reform efforts pursuant to EO 13467 (<http://edocket.access.gpo.gov/2008/pdf/08-1409.pdf>). The purpose of these regulations is to bring greater uniformity and efficiency to the process of determining an individual's eligibility to hold a national security position, thereby promoting reciprocal treatment of background investigations and agency determinations relating to security clearances and eligibility to hold a sensitive position, where appropriate. Providing for reciprocity will relieve agencies and employees of the burden of having to re-determine eligibility each time an individual performs work for a new agency.

V. Elements of Preliminary Plan

OPM's plan will advance an enduring culture of retrospective analysis, because it demonstrates a commitment from the highest levels of the agency and institutionalizes a consistent, independent approach to retrospective review:

OPM's plan is comprehensive. As mentioned above, all OPM regulations from all OPM regulating components will be subject to retrospective review.

OPM's plan provides for independent expert review. OPM's General Counsel will serve as the designated official responsible for the oversight of the regulatory review process. The General Counsel is the third-ranking official at OPM and directly reports to the OPM Director, providing both legal and policy advice. In addition, the Office of General Counsel (OGC) is accustomed to providing independent review of the activities of OPM's other components. Though OGC generally does not draft regulations, it is responsible for reviewing all regulations drafted by the agency's various program components. Indeed, all regulations must be cleared by the General Counsel before they can be proposed. It follows that the General Counsel is well-positioned to perform the functions, and OPM's existing structure ensures that OGC is already set up as an independent entity that drives a culture of thoughtful, retrospective analysis throughout the agency.

OPM's plan formalizes public participation. OPM is formalizing a process for obtaining public feedback on priorities for retrospective review. OPM will post a Federal Register notice no later than March 1 of each year on its Open OPM website, <http://www.opm.gov/open/>, inviting the public to offer suggestions for regulations OPM should review. During the period that the Federal Register notice is open, OPM will also reach out directly to stakeholders primarily through the various councils and workgroups in which it participates, listed above.

OPM's plan for prioritizing review is transparent. OPM has identified the factors it will consider in prioritizing regulations for retrospective review. OPM will thus evaluate the input from the public and stakeholders and consider the following factors:

- The need to revise regulations to advance Administration initiatives;
- The need to revise regulations to advance OPM Director initiatives;
- The dollar impact on the economy of existing regulations;
- Administrative burdens imposed by the regulations;
- Opportunities for simplifying regulatory requirements;
- Opportunities for increasing transparency;
- The time that has elapsed since the last major overhaul of the regulation; and
- Any other factor deemed relevant by the Director.

The OPM General Counsel, in consultation with the regulating components within OPM, will evaluate the information received from the public and stakeholders and recommend to the OPM Director a priority list for retrospective review.

OPM's plan adopts a predictable timeframe. OPM is adopting a consistent timeframe for identifying the regulations that will be subject to retrospective review. No later than September 1 of each year, OPM will publish on its Open OPM website its list of priorities for retrospective review for the next fiscal year. OPM will identify no fewer than 4 regulations for retrospective review each year. If, as a result of its review, OPM decides to revise or eliminate any regulations, it will explain the basis for its decision in the Federal Register notice proposing the revision or elimination of the regulation.

OPM's plan provides for robust coordination. OPM will use existing processes to coordinate with other Federal agencies. As a general rule, all OPM regulations are circulated to all agencies through the inter-agency review process managed by OIRA. In addition, OPM consults regularly with other agencies on numerous issues, including regulatory matters. OPM

also routinely coordinates its new initiatives, including major regulatory changes, with the Chief Human Capital Officers Council and the other councils in which it participates.

OPM's plan includes a strong initial review list. OPM has a strong list of initial candidates for retrospective review. We anticipate completing review of the following regulations within 12 months:

- Student Programs and Presidential Management Fellows (PMF) program, 5 CFR part 213. In the Fall of 2009, OPM convened an inter-agency work group to examine the way the Federal Government recruits and hires students. The work group obtained input from agencies, current government interns and PMFs, students, academic organizations, and good government groups. It crafted a set of recommendations for the OPM Director. Subsequently, as discussed above, the President issued E.O. 13562 on Recruiting and Hiring Students and Recent Graduates. OPM is revising its regulations to implement the order, as informed by the recommendations of the interagency workgroup. The new regulations will streamline the process for hiring interns and recent grads by creating three clear pathways to Federal service. They will also increase transparency with respect to Federal job opportunities by establishing consistency and predictability across government for internship and recent grad opportunities.
- Community-rated Federal Employee Health Benefits Program (FEHB) plans, including provisions of CFR Titles 5 (Administrative Personnel) and 48 (Federal Acquisition Regulation). This will build on the work that OPM began earlier this year by proposing a new FEHB rate-setting methodology based on a plan's medical loss ratio (MLR) as defined in the Affordable Care Act. The MLR-based rate setting proposal would replace the current, burdensome rate-setting process for HMOs with a more refined and transparent calculation. A thorough review of these regulations will ensure that the FEHB Program is getting a fair rate for Federal agencies, Federal employees, and the tax-paying public.
- Retirement Systems Modernization, 5 CFR part 850. OPM will review its part 850 regulations due to the termination of its Retirement Systems Modernization (RSM) project and an ongoing effort to improve and streamline retirement processing and customer service. As part of a new overall information technology plan now under development by OPM, discrete improvement efforts will focus on the timeliness and accuracy of CSRS and FERS retirement case processing and customer service to employees, former employees, annuitants, and survivors. The provisions of part 850 concerning electronic signatures, electronic record submissions, maintenance of electronic records, etc., will be reviewed and revised as necessary to complement the effort, and specific references to the RSM initiative will be deleted. In addition, OPM will also amend part 850 to account for any additional information and revised guidance issued since part 850 was published.
- Human resources systems and metrics reporting, 5 CFR part 250. OPM plans to revise its part 250 regulations to clarify the requirements agencies must fulfill

regarding systems and metrics for managing their human resources. We expect to identify ways to streamline the procedures agencies are required to follow, as well as to clarify certain definitions related to strategic human resources management, such as the Human Capital Assessment and Accountability Framework (HCAAF). We also will seek ways to make the Human Capital Management Reports agencies are required to submit less burdensome. Streamlining and improving these reporting requirements will conserve agency resources while still complying with congressional mandates.

VI. Components of Cost Benefit Analysis

Though a traditional cost-benefit analysis is not typically applicable to OPM regulations, we will solicit public feedback on how to measure the costs and benefits of existing regulations for purposes of considering them for retrospective review.

We will also make use of the databases available to us when the data can assist us in conducting a robust retrospective analysis. For example, OPM maintains the Central Personnel Data File (CPDF). Agencies report information about their employees to the CPDF on a quarterly basis, including demographic information, job information, the agency and location of employees, and other aspects of the on-board Federal workforce.

VII. Publishing the Agency's Plan Online

OPM will publish its final plan on its Open OPM website (<http://www.opm.gov/open>) by August 20, 2011. OPM Policy Counsel Mauro Morales will be responsible for posting updates to the plan. He can be reached at (202) 606-1700 or mauro.morales@opm.gov.