

U.S. Department of Homeland Security

# Final Plan for the Retrospective Review of Existing Regulations

August 22, 2011



## Table of Contents

I.	Overview .....	3
A.	Executive Summary of the Plan & Compliance with Executive Order 13563 .....	3
B.	Recent Accomplishments.....	4
C.	Quantifiable Benefits .....	5
II.	Scope of the Plan .....	9
A.	DHS Components Covered By the Plan .....	9
B.	Documents Covered by the Plan.....	10
III.	Public Participation.....	11
A.	Before the Release of the DHS Preliminary Plan .....	11
B.	Summary of Public Comments to the March 2011 DHS Notice .....	11
C.	Release of the DHS Preliminary Plan.....	16
D.	Summary of Public Comments to the DHS Preliminary Plan .....	17
IV.	Current DHS Efforts Already Underway for Retrospective Review of Regulations.....	28
A.	Overview.....	28
B.	Existing Formal Reviews.....	29
C.	Existing Informal Reviews.....	30
V.	Elements of the Plan/Compliance with Executive Order 13563.....	33
A.	DHS Officials Responsible for Retrospective Review .....	33
B.	DHS Approach to Retrospective Review.....	34
C.	Rule Selection, Prioritization, & Efficacy.....	36
D.	Process for Retrospective Review.....	43
E.	Candidate Regulations for Review .....	44
F.	Culture of Retrospective Analysis .....	45
G.	Independence of the Retrospective Review Team .....	45
H.	Actions to Strengthen Internal Review Expertise .....	47
I.	Coordination with other Federal Agencies .....	47
VI.	Elements of Retrospective Cost-Benefit Analysis .....	48
A.	Resource Considerations for the Cost-Benefit Analysis.....	48
B.	Factors to Consider when Conducting Retrospective Cost-Benefit Analyses .....	48
C.	Preliminary Expected Scope of Cost-Benefit Analyses Based on Public Comments.....	50
D.	Steps Taken to Ensure DHS has Data to Conduct a Robust Retrospective Analysis .....	51

Appendix A: Recently Published Regulations & ICRs..... 53  
Appendix B: In-Progress Reviews of Regulations & ICRs ..... 57  
Appendix C: Long-Term Retrospective Review Candidates..... 64

## U.S. DEPARTMENT OF HOMELAND SECURITY

### *Final Plan for the Retrospective Review of Existing Regulations*

August 22, 2011

#### I. Overview

##### A. Executive Summary of the Plan & Compliance with Executive Order 13563

Executive Order 13563 requires each Executive Branch agency to develop a preliminary plan to periodically review its existing regulations to determine whether any regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving its regulatory objectives. Before a rule has been promulgated and implemented, it can be difficult to be certain of its consequences, including its costs and benefits. Retrospective review can assist in evaluating the consequences and efficacy of agency regulations.

In May 2011, the U.S. Department of Homeland Security (DHS or Department) released its Preliminary Plan for Retrospective Review of Existing Regulations (Preliminary Plan). The Office of Management and Budget (OMB) subsequently provided guidance to agencies for transforming their preliminary plans into final plans.<sup>1</sup> Pursuant to the OMB guidance, this document represents DHS's Final Plan for the Retrospective Review of Existing Regulations (Plan or Final Plan). The DHS Final Plan is designed to create a process for identifying regulations that may be obsolete, unnecessary, unjustified, counterproductive, or excessively burdensome. The DHS retrospective review process is intended to facilitate the identification of rules that warrant repeal or modification, or strengthening, complementing, or modernizing, where necessary or appropriate.

This plan describes a number of initiatives that promise significant burden reductions. Appendix B to this Final Plan lists thirteen regulations that are currently under review. For example, DHS is finalizing a U.S. Customs and Border Protection (CBP) rule, "*Establishment of Global Entry Program*," which will establish an international "trusted traveler" program. The program will save air travelers valuable time, because CBP will be able to expedite clearance for individuals who enroll in this voluntary program. Over the past year (i.e., July 2010 to June 2011), enrollees in a pilot program used Global Entry kiosks nationwide 784,250 times for an estimated time savings of almost 100,000 hours,

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<sup>1</sup> See Memorandum for Heads of Executive Departments and Agencies from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, "Final Plans for Retrospective Analysis of Existing Rules" (June 14, 2011).

worth \$2.8 million. As the number of enrollees increase, the estimated time saved by international air travelers will also increase.

In addition, the Coast Guard is revising its regulations under the Maritime Transportation Security Act of 2002 (MTSA). Since the promulgation of the MTSA regulations, the Coast Guard has granted exemptions from MTSA provisions on an ad hoc basis. The Coast Guard has often granted these exemptions after facility operators submitted individual waiver requests to the Coast Guard, and the Coast Guard either approved or disapproved the individual waiver requests. Based on lessons learned, the Coast Guard is considering formalizing these exemptions. Through these revisions, the Coast Guard would formalize several categories of exemptions within the MTSA regulations; this, in turn, would reduce the burden associated with the current ad hoc waiver process. Based on this change, the Coast Guard estimates that it will no longer receive, and thus no longer have to process, approximately 50 individual waiver requests a year. Based on a reduction of 50 waivers a year, the estimated annual cost savings is be \$125,000 to industry and the Coast Guard.

Executive Order 13563 calls not for a single exercise, but for “periodic review of existing significant regulations,” with close reference to empirical evidence. It explicitly states that “retrospective analyses, including supporting data, should be released online wherever possible.” Consistent with the commitment to periodic review and to public participation, DHS will continue to assess its existing significant regulations in accordance with the requirements of Executive Order 13563. The Department welcomes public suggestions about appropriate reforms. If, at any time, members of the public identify possible reforms to streamline requirements and to reduce existing burdens, the Department will give those suggestions careful consideration.

## B. Recent Accomplishments

In the DHS Preliminary Plan, we highlighted several recently-issued rulemakings and information collection reviews (ICRs) that comply with, and further, the principles of Executive Order 13563. We highlight these rules and ICRs below; we provide additional detail about these rules and ICRs in Appendix A to this Plan. In addition, in Appendices B and C, we provide lists of rules and ICRs that are either currently under review or are candidates for future retrospective reviews.

To modify existing regulations in ways that further the principles of Executive Order 13563, DHS has removed outdated and redundant provisions, lessened regulatory burdens, and increased regulatory clarity. For example, by removing outdated provisions pertaining to its Land Border Carrier Initiative Program, U.S. Customs and Border Protection now relies on a more comprehensive voluntary industry partnership known as the Customs-Trade Partnership Against Terrorism (C-TPAT). In addition, U.S. Coast Guard (USCG or Coast Guard) recently updated standards in its regulation on inflatable personal flotation devices; the

newer standards reflect more recent technological and safety developments. And U.S. Citizenship and Immigration Services (USCIS) finalized an interim final rule related to Form I-9 (“Employment Eligibility Verification”), updating existing regulations to reflect current requirements and practices.

USCIS has also made substantial progress on an ongoing initiative related to the H-1B process. In March 2011, USCIS published a proposed rule that would require employers seeking to petition for H-1B workers subject to numerical limitations to first file electronic registrations with USCIS during a designated registration period. If finalized, this rule would reduce a petitioner’s administrative burdens and associated costs with preparing a completed H-1B petition. This action, if finalized, would also reduce paperwork burdens by an estimated 13,750 hours.

In two actions that preceded, but nevertheless promote, the retrospective review called for under Executive Order 13563, DHS revised two existing ICRs to make them significantly less burdensome on the public. Combined, the two revisions have reduced paperwork reporting burdens by over 3 million hours. DHS replaced the paper version of CBP’s “Non-immigrant Visa Waiver Arrival/Departure” form with an electronic system, thereby substantially reducing the burden for air travelers arriving in the U.S. DHS also reduced the burden on U.S. and international aircraft operations by assuming responsibility for checking passengers against government watch lists through the Transportation Security Administration’s (TSA) Secure Flight Program. These initiatives reflect DHS’s ongoing culture of retrospective review.

### C. Quantifiable Benefits

In refining the DHS approach to retrospective review and developing our Final Plan, we have continued to evaluate the public input we have received thus far, and we have identified additional regulatory changes that promote the principles of Executive Order 13563. These regulatory changes will reduce duplication of effort, streamline procedures, leverage existing resources, and use technologies – all of which result in maximizing efficiencies, realizing costs savings, and reducing regulatory burdens.

In this section, we highlight regulatory revisions, some of which we had identified previously and some of which we have identified since issuance of our Preliminary Plan, but all of which we estimate will result in quantifiable benefits. In addition to a narrative discussion of each rule, we include a table that summarizes the savings of these regulatory actions. The below numbers are preliminary estimates of savings; we will further refine our estimates as the retrospective and rulemaking processes progress.

*CBP Rule: Internet Publication of Administrative Seizure/Forfeiture Notices*

This regulatory change came about as a result of the President's SAVE Award (Securing Americans Value and Efficiency) initiative, an effort that seeks ideas from federal employees to make government more effective and efficient and ensure taxpayer dollars are spent wisely. The President selected this idea, which came from a CBP employee, as one of four finalists for the SAVE Award. This regulatory change will enable CBP to post web-based notifications of seized property pending forfeiture. This change is expected to save DHS approximately \$1 million each year.

This change will reduce administrative costs and improve the effectiveness of CBP's notice procedures, because Internet publication will reach a broader range of the public and provide access to more parties who may have an interest in the seized merchandise. In addition to modifying its regulations, CBP plans to establish and implement a system for posting all notifications of seized property pending forfeiture online rather than in print media. Online posting, in lieu of advertising through print media, will reduce costs and increase public access to DHS notices of seized property pending forfeiture. CBP also plans to coordinate with the Department of Justice (DOJ) to leverage existing technology systems for the web-based posting of these notifications.

Note that, in our Preliminary Plan, we had listed this rule in Appendix C (i.e., long term projects). We have decided to accelerate implementation of this rulemaking effort and now list this regulatory change in Appendix B (i.e., in progress reviews of regulations).

*USCIS Final Rule: Transitional Worker Classification for the Commonwealth of the Northern Mariana Islands (CNMI)*

This USCIS final rule, which will create a new, temporary, transitional worker classification (CW classification) for workers in the CNMI, will likely result in a meaningful cost savings. The transitional worker program will assist in providing for an orderly transition from the CNMI permit system to the U.S. federal immigration system. USCIS estimates that this rule will result in cost savings of \$6.8 million through 2014. The savings are attributable to the fact that multiple beneficiaries will now be allowed to be included in a single petition; this contrasts to the CNMI permit system administered by the CNMI Department of Labor, which requires an application and fee for each employee.

*USCG Rule: Updates to Maritime Security Regulations*

The Coast Guard regulations implementing the Maritime Transportation Security Act of 2002 provide security measures for vessel and port facility operations in U.S. ports. These regulations require owners or operators of vessels and port facilities to develop security plans based on security assessments and surveys, designate security officers, provide security-related training, require access

control for vessels and facilities, and require compliance with Maritime Security Levels.

Since the promulgation of the MTSA regulations, the Coast Guard has granted exemptions from MTSA provisions on an ad hoc basis. The Coast Guard has often granted these exemptions after facility operators submitted individual waiver requests to the Coast Guard, and the Coast Guard either approved or disapproved the individual waiver requests. Based on lessons learned, the Coast Guard is considering formalizing these exemptions.

Through this rulemaking, the Coast Guard would formalize several categories of exemptions within the MTSA regulations; this, in turn, would reduce the burden associated with the current ad hoc waiver process. The proposed categories of formal exemptions would likely include: certain facilities that receive low-risk cargoes, certain facilities that may be designated by the Captain of the Port as a Public Access Facility, and a shipyard facility operating continuously under an approved DOD security plan.

Based on this change, the Coast Guard estimates that it will no longer receive, and thus no longer have to process, approximately 50 individual waiver requests a year. Based on a reduction of 50 waivers a year, the estimated annual cost savings is \$35,000 to industry and \$90,000 to the Coast Guard. The potential total annual cost savings of this regulatory change would be \$125,000.

#### *CBP Final Rule: Establishment of Global Entry Program*

CBP is in the process of finalizing a notice of proposed rulemaking (NPRM) that will establish an international “trusted traveler” program called Global Entry. This voluntary program allows CBP to expedite clearance of pre-approved, low-risk air travelers arriving in the United States. Under the final rule, enrollees in this voluntary program could save an average of 7.6 minutes of wait time per trip by using Global Entry kiosks rather than waiting in the regular immigration processing line. This time savings has an estimated value of \$3.62 per trip. Over the past year (i.e., July 2010 to June 2011), enrollees used Global Entry kiosks nationwide 784,250 times for an estimated time savings of almost 100,000 hours, worth \$2.8 million.

#### *CBP Proposed Rule: Closing of the Port of Whitetail*

CBP is developing an NPRM that will propose to close the port of entry in Whitetail, Montana. The proposed change is part of CBP’s continuing program to more efficiently utilize its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public. Whitetail is one of the least trafficked ports, and the facility does not have the infrastructure to meet modern operational, safety, and technological demands for ports of entry. Major renovations would be required for CBP to continue operations at Whitetail, and

CBP estimates that the needed renovations would cost approximately \$8 million. Due to the closing of the adjacent Canadian port and the limited use of the Whitetail port, CBP believes that it would be inefficient to renovate the Whitetail facility. CBP estimates that the net benefit (estimated benefit less estimated cost) of the crossing closure would be about \$8.2 million the first year and \$396,000 each year thereafter.

*ICE Rule: Revisions to the Student and Exchange Visitor Information System (SEVIS) Regulations*

Immigration and Customs Enforcement's (ICE) SEVIS came online in summer 2002. ICE is working with the Department of State to implement the deployment of SEVIS II, the next generation of the system. SEVIS II will allow for the creation of customer accounts and the migration of school and sponsor records; it will also create full operating capacity. The new system will modernize the way that ICE interfaces with its regulated population. To implement these changes, it is likely that ICE will need to update the existing regulatory provisions that govern SEVIS and govern compliance with SEVIS requirements.

ICE estimates that many of the changes that are likely to result from SEVIS II will increase the overall usability of the system. For example, ICE estimates that the system will allow for streamlined data entry and recordkeeping. These changes will likely result in improvements for students, Designated School Officials (DSOs), and government users. ICE estimates that the total annual burden reduction of this rule will be approximately 11,000 hours, and the total annual savings of this rule will be approximately \$220,110.

*TSA Rule: Revision to the Alien Flight Student Program (AFSP) Regulations*

The Transportation Security Administration (TSA) is working on a rulemaking that would revise provisions related to the AFSP. TSA regulations require aliens seeking to train at Federal Aviation Administration-regulated flight schools to complete an application and undergo a "security threat assessment" (STA) prior to beginning flight training. There are four categories under which students currently fall; the nature of the STA depends on the student's category. TSA is considering changes to the AFSP that would improve the equity among fee payers. In addition, TSA is considering changes that would enable the implementation of new technologies to support vetting; specifically TSA is undertaking an information technology infrastructure modernization that will enable many process improvements. The streamlining of procedures is expected to result in savings to the AFSP students. Instead of paying approximately \$300 for an STA for each course of training (many students take multiple courses of training in a five-year period), TSA estimates the students would pay approximately \$130 for an STA that would be valid for five years. TSA estimates that the total savings to the alien flight students, over a five-year period, will be \$18,107 at a 7% discount rate.

In the following chart, we have listed the above rules and our estimate as to their quantifiable benefits.

**Table 1: Estimated Quantifiable Benefits**

<b>Component</b>	<b>Rule</b>	<b>Quantified Benefits</b>
USCIS	Commonwealth of the Northern Mariana Islands Transitional Worker Classification	The rule will likely result in savings of \$6.8 million over the baseline through 2014.
USCG	Update to Maritime Security Regulations	The formal exemptions in this rulemaking will provide an estimated annual cost savings of \$125,000.
CBP	Internet Publication of Administrative Seizure/Forfeiture Notices	The estimated net benefit will be approximately \$1 million each year.
CBP	Establishment of Global Entry Program	Over the past year (July 2010 to June 2011), enrollees used Global Entry kiosks nationwide 784,250 times for an estimated time savings of almost 100,000 hours, worth \$2.8 million.
CBP	Closing of White Tail Crossing in Montana	The estimated net benefit of the crossing closure will be about \$8.2 million the first year and \$396,000 each year thereafter.
ICE	Revisions to the Student and Exchange Visitor Information System Regulations	The estimated total annual savings of this rule will be \$220,110, and the estimated total annual burden reduction will be approximately 11,000 hours.
TSA	Revision to the Alien Flight Student Program Regulations	The estimated total savings, over a five-year period, for alien flight students is \$18,107 at a seven percent discount rate.

**II. Scope of the Plan**

**A. DHS Components Covered By the Plan**

DHS's mission is to ensure a homeland that is safe, secure, and resilient against terrorism and other hazards. Our mission gives us five main areas of responsibility: (1) to prevent terrorism and enhance security; (2) to secure and manage our borders; (3) to enforce and administer our immigration laws; (4) to safeguard and secure cyberspace; and (5) to ensure resilience to disasters.

DHS carries out its mission through the Office of the Secretary and 28 components. Although this Plan covers all regulations issued by DHS components, the focus is on the regulations of six operational components with regulatory responsibilities:

U.S. Citizenship and Immigration Services (USCIS)

U.S. Coast Guard (USCG or Coast Guard)

U.S. Customs and Border Protection (CBP)

Federal Emergency Management Agency (FEMA)

U.S. Immigration and Customs Enforcement (ICE)

Transportation Security Administration (TSA)

## B. Documents Covered by the Plan

DHS's Plan, for the most part, covers existing "significant" regulations, i.e., regulations that are significant under the definition provided in Executive Order 12866. DHS does not, however, preclude the possibility of conducting retrospective reviews of "non-significant" regulations, and in fact, the attached Appendices (listing regulatory candidates for DHS retrospective review) include several "non-significant" regulations. DHS will consider all types of regulations, including interim final rules (IFRs), for retrospective review.

Within the universe of existing regulations, DHS will generally focus on regulations that have had some time – at least five years – to be tested. (DHS recognizes that there may be some regulations that warrant revision before five years, and where appropriate, DHS will consider those regulations for revision.) Established in 2003, DHS is a relatively new agency, and some of our regulations, especially those in the security arena, have only recently been promulgated. It is important that these regulations receive the opportunity to be fully implemented and tested. Moreover, allowing that implementation time will ensure that we have adequate information and data when it comes time to assess the effectiveness of these regulations.

To the extent possible, DHS will consider expanding its Plan to cover “significant” guidance documents, i.e., guidance documents that are significant under the definition in OMB’s Final Bulletin for Good Guidance Practices.

### III. Public Participation

#### A. Before the Release of the DHS Preliminary Plan

To facilitate the development of our Preliminary Plan, DHS sought input from the public through multiple means, including the publication of a *Federal Register* notice and the use of an online tool that facilitates interactive dialogue among members of the public.

On March 14, 2011, DHS published a Notice and Request for Comment (“Reducing Regulatory Burden; Retrospective Review Under Executive Order 13563”) in the *Federal Register* (76 FR 13526). The notice can be found at <http://edocket.access.gpo.gov/2011/pdf/2011-5829.pdf>. DHS solicited public input on two matters: (1) how DHS should structure its retrospective analysis review and (2) which DHS rules would benefit from a retrospective review. The public comment period ended on April 13, 2011. All public comments are available for viewing at [www.regulations.gov](http://www.regulations.gov). To access the comments, please conduct a search for Docket No. DHS-2011-0015.

In addition, on March 14, 2011, DHS launched an IdeaScale webpage to facilitate interactive dialogue among members of the public and stakeholders. IdeaScale is a web-based platform that allows users to actively share information and expertise in a collaborative manner. Through IdeaScale, individuals submitted ideas, commented on each others’ ideas, and voted on each others’ ideas. This social media tool provided an additional means for DHS to reach out to the public, and more importantly, to foster dialogue.

The IdeaScale dialogue “closed” on April 13, 2011; however, the “dialogue” remains viewable at <http://dhsretrospectivereview.ideascale.com>. To access the dialogue, please select “All Ideas” under the “Expired Categories” heading on the left side of the webpage. In addition, DHS has included a matrix of all ideas in the online docket for this initiative. To view the matrix, please visit [www.regulations.gov](http://www.regulations.gov) and conduct a search for DHS Docket No. DHS-2011-0015.

#### B. Summary of Public Comments to the March 2011 DHS Notice

In developing its Preliminary Plan and identifying rules for retrospective review, DHS has incorporated the input we received from the public. We conducted a review and analysis of the public comments, which we summarize below. DHS continues to evaluate, review, and assess the public comments.

## 1. Introduction

Our March 14<sup>th</sup> *Federal Register* notice provided commenters with a nonexhaustive list of questions to help facilitate the formulation of ideas. In the notice, we asked commenters to identify, with specificity, the regulation at issue and to explain why DHS should modify, streamline, expand, or repeal that regulation.

The public submitted comments to DHS through the Federal eRulemaking Portal ([regulations.gov](http://regulations.gov)), email, and IdeaScale. A variety of entities, including individuals, associations, and businesses, provided comments in response to the DHS notice. As of Monday, May 9, 2011, DHS had received approximately 35 comments via mail and email and no comments through [regulations.gov](http://regulations.gov). We posted all comments, including a matrix of ideas and comments from IdeaScale, on [regulations.gov](http://regulations.gov).

The IdeaScale page for DHS retrospective review attracted 178 users. Those users posted a total of 98 ideas; in response to those ideas, users submitted 76 comments and 174 votes. The three most popular ideas (i.e., the ideas that received the most votes) on our IdeaScale webpage were:

- (1) “Change the current State Standard and Enhanced Mitigation Plan update requirement” from 3 years to every 5 years to be consistent with current Local Hazard Mitigation Plan update requirements, and to eliminate additional funding “drain” on federal and state federal sources” (Received a total of 18 votes);
- (2) Encourage electronic record keeping by federal employees (Received a total of 7 votes); and
- (3) Streamline the security clearance process among Federal agencies (Received a total of 7 votes).

We discuss the first comment in further detail below. We do not include any further discussion of the second or third most popular ideas, because they do not relate to DHS regulations.

## 2. Overview

The public comments spanned a wide range of subjects, the majority of which were outside the scope of retrospective analyses of existing regulations. Those comments beyond the scope did not propose suggestions to improve the efficiency of particular DHS regulations or DHS’s process of promulgating regulations but rather challenged the Department’s statutory interpretations and policy decisions regarding particular regulations. Other comments suggested new interpretations of

existing regulations that would require legislative changes to implement. Some commenters suggested broad organizational ideas, such as reorganizing DHS, consolidating Department functions, or improving DHS databases, all of which fall outside the scope of retrospective regulatory review. Additionally, a few comments referenced regulations that are within the purview of other Federal agencies. DHS has forwarded those comments to the appropriate agencies.

Members of the public provided a few comments on how DHS should develop its Preliminary Plan. These comments, which among other things recommended that the process be open and transparent to the public and that DHS's process promote the goals of Executive Order 13563, were generally consistent with DHS's overall approach to retrospective review.

The overwhelming majority of public comments provided input on regulatory candidates for retrospective review. Our preliminary review of the comments has yielded some useful information regarding specific regulations that might benefit from retrospective review. In some cases, comments identified new regulations for retrospective review. In other cases, comments addressed issues for which DHS components are already conducting reviews. This feedback has helped guide our selection and prioritization of candidate rules for retrospective review in both the short term and long term.

### 3. Breakdown of Comments, by Regulation Category

For purposes of this Plan, we grouped DHS regulations into four broad functional categories: (a) security, (b) maritime safety and environmental protection, (c) immigration and border management, and (d) emergency management and assistance. We discuss the public comments in the context of those categories. We discuss only three categories below, however, because DHS did not receive any substantive public comments related to maritime safety and environmental protection.

#### a. Security

DHS received a comment regarding application of MTSA to the Great Lakes area; the comment recommended the creation of exemptions from MTSA requirements for certain facilities and vessels. The Coast Guard has already initiated a rulemaking to address requests for interpretation and guidance in complying with subchapter H. The Coast Guard is working on a NPRM and will address this comment when considering all comments received in response to the NPRM.

DHS also received a comment regarding TSA's AFSP rulemaking (49 CFR Part 1552). The commenter requested that lawful permanent resident

aliens be exempt from “security threat assessment” background checks in order to reduce redundancy. Prior to receiving this comment, TSA had formed a team—consisting of representatives from relevant program offices, vetting experts, economists, revenue staff, and attorneys—to conduct a review of TSA vetting. The statute that this rule implements applies for all aliens, and does not exclude lawful permanent aliens.<sup>2</sup> TSA, however, will consider whether there is an appropriate accommodation that could be made for lawful permanent residents as it develops its proposed rule on vetting.

DHS received a few comments related to the Chemical Facility Anti-Terrorism Standards (CFATS). One comment highlighted how multiple Federal agencies have overlapping jurisdiction over the same critical facilities, such as Electricity Generating Plants, which are regulated by DHS, the Department of Transportation (DOT), and the Federal Energy Regulatory Commission (FERC). Another comment recommended that DHS reconsider the application of CFATS to research laboratories, because they do not store concentrated volumes of chemicals of interest. This comment suggested that DHS should secure these facilities with a separate set of standards, protocols, and procedures for assessing the vulnerabilities and improving the security of chemicals of interest in a research setting. Finally, one commenter recommended that DHS modify its CFATS regulation to exempt gasoline from the regulation.

During the CFATS rulemaking in 2007, commenters raised similar issues, and DHS considered them in the final rule. Regarding the gasoline-related issues, DHS issued a *Federal Register* notice<sup>3</sup> in January 2010, seeking additional comment on several gasoline-related issues; comments received in response to that notice are currently under review. DHS is continuing to review these retrospective review-focused comments more closely to determine the appropriateness and scope of retrospective review of the CFATS regulation.

DHS received a comment suggesting that we reduce the burden associated with unclassified information protection regimes, such as Sensitive Security Information, Chemical Terrorism-Vulnerability Information, and Protected Critical Infrastructure Information. The Department plans to consider this comment in conjunction with administration efforts to implement Executive Order 13556, “Controlled Unclassified Information.”

#### b. Immigration and Border Management

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<sup>2</sup> 49 U.S.C. § 44939.

<sup>3</sup> See DHS/National Protection and Programs Directorate (NPPD) Request for Comments, *Chemical Facility Anti-Terrorism Standards*, 75 FR 2445 (Jan. 15, 2010).

Approximately half of the comments that DHS received related to the nation's immigration laws and policies. Many of the immigration-related comments were beyond the scope of regulatory efficiency and dealt with the status of individual immigration cases, sought relief under the current system, or requested clarification on immigration law.

Other comments fell within areas where USCIS has already begun conducting reviews of its regulations. For example, DHS received comments recommending the need to remove the administrative denaturalization regulations, and USCIS has incorporated this suggestion into its larger, ongoing plan for its Immigration Benefits Business Transformation final rule. Another comment recommended that the regulations governing the administrative appellate jurisdiction in immigration matters be reformed. USCIS plans to consider these comments more closely during its current reviews.

DHS also received comments suggesting that certain areas of immigration regulations should be modified, streamlined, expanded, or repealed. For example, DHS received comments suggesting revisions to various visa categories, such as employment-based categories (e.g., E, H, L, and O) and student categories (e.g., F, J, M, including optional practical training (OPT)), and traders and investors (i.e., E). The Department also received comments regarding certain naturalization provisions that commenters asserted were outdated or obsolete. Regarding employment-creation immigrant visa (EB) categories, DHS received comments requesting clarification on issues related to material changes for regional centers. DHS also received comments related to the processing of asylum applications that covered a range of issues such as employment authorization and membership in a particular social group. USCIS is reviewing these comments more closely and has preliminarily identified areas within its regulations to further evaluate for retrospective review.

One comment recommended ICE revise its regulations to provide that asylum seekers who have established credible fear should not be detained absent concerns about identity, flight risk, or security. ICE plans to review this comment further to determine whether the regulations can be modified. Another comment suggested that ICE regulations regarding SEVIS be updated to remove outdated non-SEVIS school procedures from the regulations, since, as of 2003, all schools should be enrolled with SEVIS. ICE is reviewing this comment more closely to determine the appropriateness and scope of retrospective review for SEVIS regulations.

Regarding CBP regulations, DHS only received a few relevant comments. One comment suggested that CBP merge titles 8 (immigration) and 19 (customs) of the Code of Federal Regulations (CFR) to eliminate redundant regulations and to have one set of regulations that covers

immigration and customs. CBP will continue to review its regulations so that CBP can, to the extent permissible by law and operational feasibility, improve consistency between titles 8 and 19.

Another commenter suggested that CBP modify the documentation requirements for used vehicles in 19 CFR Part 192 to cover the situation in which a new vehicle, imported on a duty-paid basis and where title was not transferred to the ultimate purchaser, needs to be exported. CBP plans to research this comment further to determine whether the regulations can be modified to address this concern.

c. Emergency Management and Assistance

DHS received a comment (the top-voted comment mentioned above) recommending that DHS change the current FEMA State Standard and Enhanced Hazard Mitigation Plan update requirement from every three years to every five years so that it is consistent with current Local Hazard Mitigation Plan update requirements. Commenters asserted that five years would be an appropriate timeframe for state mitigation plan updates for both efficiency and resource-limitation reasons. FEMA plans to review these suggestions and determine whether possible changes to 44 CFR sections 201.3-201.5 are warranted.

Another commenter stressed the importance of implementing and maintaining an ongoing planning process as set forth in these mitigation plans regardless of whether the update cycle was three or five years, adding that states and tribes should not perform updates at the last minute. This commenter suggested that DHS should reward those who show commitment and progress regarding their mitigation plans and processes to the extent they demonstrate a reduction in the need and costs for preparedness, response, and recovery and thus lead to fewer disaster declarations for American taxpayers. FEMA is reviewing this comment more closely to determine whether any regulatory changes may be warranted.

C. Release of the DHS Preliminary Plan

On May 26, 2011, through a blog posting on the DHS website, DHS announced the release of our DHS Preliminary Plan for Retrospective Review of Existing Regulations.<sup>4</sup> On the same day, we also made our Preliminary Plan available on the DHS OpenGovernment website.<sup>5</sup> Concurrent with DHS's release of its Preliminary Plan, OMB's Office of Information and Regulatory Affairs (OIRA)

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<sup>4</sup> The posting is located in the archive for May 2011 blog entries. See [http://blog.dhs.gov/2011\\_05\\_01\\_archive.html](http://blog.dhs.gov/2011_05_01_archive.html).

<sup>5</sup> The DHS Preliminary Plan is available in the library on the DHS website. See <http://www.dhs.gov/xlibrary/assets/dhs-ogc-preliminary-plan-for-retrospective-review.pdf>.

posted DHS's Preliminary Plan, along with all other federal agency preliminary plans, on the White House website.<sup>6</sup>

On June 6, 2011, DHS published a notice in the *Federal Register*, announcing the availability of, and requesting public comment on, the DHS Preliminary Plan. The notice can be found at <http://69.175.53.6/register/2011/Jul/06/2011-16865.pdf>. The comment period remained open through June 25, 2011, which was thirty days from the release of the Preliminary Plan.

#### D. Summary of Public Comments to the DHS Preliminary Plan

The DHS Plan recognizes and promotes the importance of public input. DHS has solicited and incorporated public input to develop our Preliminary, and also Final, Plan. Robust public comment will continue to be a central tenet of the DHS retrospective review process. Below, we discuss the public comments that we received in response to our release of the DHS Preliminary Plan.

##### 1. Overview

The public submitted comments through the Federal eRulemaking Portal ([regulations.gov](http://www.regulations.gov)) and by email. A variety of entities, including individuals, associations, and businesses, provided comments in response to the DHS Preliminary Plan. The public comments covered a variety of subjects and included suggestions on how DHS can improve its Preliminary Plan. The comments also identified additional regulations that DHS should consider for retrospective review. Several commenters resubmitted suggestions or recommendations that they made in response to DHS's March 14, 2011 *Federal Register* notice.

Some of the comments were outside the scope of the retrospective review of existing DHS regulations. These comments did not provide feedback related to DHS's Preliminary Plan or propose suggestions for the improved efficacy of DHS regulations; rather, these comments discussed DHS's statutory interpretations and policy decisions regarding particular regulations. Because these comments are out of the scope of this initiative, we do not discuss them below.

As of June 25, 2011, DHS had received 15 submissions from seven commenters. We have made all comments available on [regulations.gov](http://www.regulations.gov). Below, we address the pertinent ideas from each commenter.

##### 2. General Comments on DHS's Preliminary Plan

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<sup>6</sup> See <http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/DepartmentofHomelandSecurityPreliminaryRegulatoryReformPlan.pdf>.

Two comment submissions provided several specific ideas on how DHS could further develop and refine its Preliminary Plan. Concerning the scope of DHS's Preliminary Plan, one commenter, the Airports Council International – North America (ACI-NA), suggested that DHS should extend its retrospective review process beyond rules to cover TSA Security Directives (SDs).

The regulations providing for SDs originated with the Federal Aviation Administration (FAA) before TSA was created.<sup>7</sup> These regulations, and the authority of the FAA in this regard, transferred to TSA in the Aviation and Transportation Security Act.<sup>8</sup> The authority of TSA to issue SDs now appears in 49 CFR 1542.303 for airport operators and in 49 CFR 1544.305 for aircraft operators. TSA uses this authority to respond to emerging threats that require rapid response. For instance, TSA used its SD authority immediately following the attempt to destroy an aircraft on Christmas Day in 2009 and in response to an attempt to use Improvised Explosive Devices (IEDs) in cargo in 2010.

Although DHS's Plan does not cover TSA SDs, DHS notes the efforts that are already underway to review TSA SDs. As the ACI-NA indicated in its comment, the industry began a process to review all SDs issued to airport operators. TSA actively participates in that process, the In-Depth Security Review (IDSR) Working Group, which was created in October 2009.

The IDSR has undertaken a comprehensive review of all active airport operator SDs and airport security program (ASP) amendments to consider whether to modify, delete, and/or transfer from an SD to a security program amendment or a rulemaking. As a result of IDSR's recommendations, TSA has rescinded two ASP amendments; in addition, TSA has issued three ASP amendments using notice-and-comment procedures with the airport operators to move SD measures into airports' security programs with additional clarity and flexibility on how the security goal may be achieved. TSA will continue with this review process to gather additional input from the airport operators and make additional changes in SDs and airport security programs.

### 3. Comments related to the Three-Step Framework for Retrospective Review

DHS received various comments related to DHS's three-step framework for retrospective review – i.e., rule selection, prioritization, and efficacy.<sup>9</sup> We discuss the comments, by step, below.

#### a. Rule Selection

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<sup>7</sup> See Department of Transportation (DOT)/Federal Aviation Administration (FAA) Final Rule and Request for Comment, *Security Directives and Information Circulars*, 54 FR 28984 (July 10, 1989) (aircraft operators), and DOT/FAA Final Rule *Airport Security*, 66 FR 37274 (July 17, 2001) (airport operators).

<sup>8</sup> See Pub. L. 107-71 (Nov. 19, 2001), § 101 as codified at 49 U.S.C. § 114(d) and § 141.

<sup>9</sup> See section V.C. below.

The first step of DHS's three-step framework is the selection of rulemakings for retrospective review. One commenter recommended that DHS should focus primarily on two criteria when selecting rules for retrospective review – “changed circumstances” and “availability of updated data on costs and benefits.”

The commenter recommended that the “changed circumstances” factor should go before all other factors. In the DHS Preliminary Plan, DHS included this factor as one of several factors that the Department would consider when selecting rules for retrospective review. Changed circumstances encompasses the need for regulatory revision based on developments in technology, advances in science, changes in economic conditions, or other factors. The fact that DHS listed the “changed circumstances” factor as the final item in the list of selection factors (in the Preliminary Plan) does not diminish its value in the selection process. DHS's intention was to consider all factors when selecting rules for retrospective review.

After consideration of this comment, however, DHS now believes that there is one rule selection factor that is of primary importance – public feedback. Given that public input is the central tenet for driving and focusing DHS retrospective review, we believe it is important to elevate public feedback to the primary rule selection factor that DHS will use in driving the retrospective review of its regulations.

As a related matter, though, DHS notes that the rule selection factors are highly interrelated and are certainly not mutually exclusive. For example, the public could provide feedback indicating that changed circumstances (e.g., new technological developments) warrant a rule revision. DHS has revised the Plan to clarify that these factors are interrelated and that “public feedback” is the primary rule selection factor.

As noted above, one commenter recommended that DHS should focus primarily on “changed circumstances” and “availability of updated data on costs and benefits” when considering rules for retrospective review. Regarding the updated data on costs and benefits, the commenter suggested that DHS include a clear criterion for the “availability of updated data on costs and benefits.” The commenter reasoned that new data on the costs and benefits of rules could raise the opportunity for retrospective review.

DHS agrees that new information could raise the opportunity for retrospective review, but does not agree that it is necessary to add “availability of updated data on costs and benefits” as a separate rule selection factor. There are already many factors listed under the rule selection criteria (e.g., public feedback, feedback from the field, advisory

councils, reports of oversight entities) that allow DHS to consider new data on costs and benefits. In addition, there is already an “accident/incident data” factor which considers the “need for regulatory change in response to... accident or incident data or statistics.”

Another commenter recommended that DHS give more weight to public comments that offer specific information and data on why a rule is no longer efficient. The commenter believes that DHS should “resist the urge” to lend any weight to public input simply because the commenter speaks strongly about a rule. DHS agrees. Simply because a commenter takes a strong position about a rulemaking does not automatically warrant DHS inclusion of that rule as a candidate for retrospective review. In addition, DHS agrees that the public input is most helpful when it provides specific data and information. As discussed in the March 2011 *Federal Register* notice and stated in this Plan, “DHS will afford significantly greater weight to feedback that identifies... actionable data, or provides viable alternatives that meet statutory obligations and regulatory objectives.” DHS has edited the “public feedback” factor in this Plan to emphasize the value and importance of actionable data, such as cost and benefit data, from the public.

Another commenter suggested that the DHS Plan include a process for industry and the government to work collaboratively to determine which security rules DHS should review retrospectively. DHS believes that its Plan already accounts for that sort of collaboration, as evidenced by the “advisory councils” and “outreach to regulated entities” factors under the Plan’s selection criteria. Under the “advisory councils” factor, for example, DHS considers input and feedback from multiple advisory councils that advise DHS and its components. Similarly, under the “outreach to regulated entities” factor, DHS regularly and frequently solicits feedback from regulated entities on the impact and effects of existing regulations.

DHS also received a comment recommending that the Department’s retrospective review process be ongoing and that public input be routinely submitted, not solely in response to a published notice. DHS is open to public comment at all times. The issuance of a *Federal Register* notice, however, will serve as DHS’s formal mechanism for soliciting public comments.<sup>10</sup> As mentioned above, DHS’s Plan focuses on the critical and essential role of public input in driving and focusing retrospective review. DHS has solicited public feedback through each stage of the development of this Plan and plans to continue using public feedback to inform the retrospective review of existing DHS regulations.

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<sup>10</sup> See Section V.D. below (explaining that DHS will initiate its three-step framework—selection, prioritization, and efficacy—for retrospective review, on a three-year cycle, by publication of a *Federal Register* notice).

This commenter further suggested that the DHS Plan outline a process for seeking input from regulated parties and that DHS make use of that feedback before issuing proposed regulations. DHS believes that utilizing advance notices of proposed rulemaking (ANPRMs) offers a method to gain public input before proposing rules. In the past, DHS has issued ANPRMs to notify the public that DHS is considering an area for rulemaking and to solicit input, data, views, and arguments from the public on that particular matter. We believe that the Department's use of ANPRMs addresses this commenter's recommendation. We have added language to the Plan that underscores our interest in using ANPRMs, where feasible and appropriate, to seek the views of those who are likely to be affected.

b. Rule Prioritization

The second step of DHS's three-step framework for retrospective review is the prioritization of the rulemakings that DHS has selected. One commenter suggested that DHS's Plan contained a slight deregulatory bias and recommended that retrospective review be open to any change that would enhance net regulatory benefits, even if that change included the expansion of a rule. In the Preliminary Plan, DHS did not intend to convey a deregulatory bias. DHS has clarified in this Plan that, in certain circumstances, retrospective review could lead to the expansion of a rule.

Another comment stated that DHS's first factor for rule prioritization is the potential to enhance net benefits, and while the other factors are useful, they should be secondary to the overarching goal of enhancing net benefits. DHS agrees with the commenter that the "net benefits" criterion is the most important rule prioritization factor. We have revised the Plan accordingly, by indicating that "net benefits" is the primary factor for rule prioritization.

We note, however, that the secondary factors (e.g., "ability to amend without statutory change" or "resources") are also important and must be considered. For example, it might not be the best use of resources to expend time conducting a retrospective review of a rule that is statutorily-mandated and unlikely to change without statutory amendments when it would have been possible to complete several retrospective reviews for regulations that DHS has the discretionary authority to implement.

c. Rule Efficacy

The third step of DHS's three-step framework for retrospective review is to determine the efficacy of the regulation. For purposes of this Plan, we grouped DHS regulations into four broad functional categories (i.e., security, maritime safety and environmental protection, immigration and

border management, and emergency management and assistance) and identified factors specific to each category to assess efficacy.

One comment suggested that DHS should focus on the goal of enhancing net benefits when reassessing a rule, regardless of the rule's functional category under the DHS plan. DHS agrees with the commenter regarding the importance of net benefits, but as a practical matter, there are many factors (e.g., resources, priorities, statutory mandates, available expertise) that bear on the reassessment of a rule. For example, the expertise needed to conduct a retrospective analysis of an immigration rule is very different than the expertise needed to analyze a rule that was designed to prevent oil spills. Accordingly, DHS must consider all relevant factors and not limit itself only to net benefits.

DHS also received a comment suggesting that DHS consider whether coordinating its training efforts with other agencies and sharing other data on retrospective analyses might conserve agency resources and foster productive collaborations. In addition to coordinating with other agencies, a comment recommended that the DHS Plan include a process for coordination among DHS components. DHS values the collaborative process and plans to seek ways to coordinate training efforts and data with other agencies to possibly conserve agency resources. Regarding internal DHS coordination, as described in the Preliminary Plan, DHS has a well-established intra-departmental process for reviewing regulations. This process provides an opportunity for DHS components to coordinate on overlapping rulemaking subject matters and issues.

Another comment suggested that the DHS Plan incorporate, as a core element throughout the Plan, collaboration with the Intelligence Community regarding the determination of when a regulation is needed due to a continued security threat. The comment indicated that DHS should use this process to inform all aspects of the Plan, not solely the cost-benefit analysis. DHS agrees with this comment. DHS continuously assesses and reassesses the need to respond to new and different security threats. DHS's discussion of current intelligence in the Preliminary Plan was not intended to imply that we only consider current intelligence once a rule is actually selected for retrospective review. Accordingly, we have added clarifying language to the Plan.

One comment recommended that DHS incorporate retrospective review and data collection during the early rulemaking stages and design rules *ex ante* to facilitate later reviews. DHS agrees with the commenter. As noted in the Preliminary Plan and restated in this Final Plan, "DHS regulatory components will build in retrospective review at the earliest stages of regulatory development."

One comment suggested that the 19 day time period to comment on the Preliminary Plan was too short and recommended that DHS provide at least a thirty day comment period. As mentioned above, on May 26, 2011, the White House posted the DHS Preliminary Plan, along with the plans of other federal agencies, on the White House website. On the same day, DHS posted an announcement about the Preliminary Plan on the DHS Blog and made the Preliminary Plan available on the DHS Open Government website. DHS followed up with the publication of a *Federal Register* notice on June 6, 2011, again announcing the availability of the DHS Preliminary Plan and requesting public comment. The comment period remained open through June 25, 2011, which was 30 days from the release of the Preliminary Plan on May 26, 2011.

d. Cost-Benefit Analysis

One commenter suggested that DHS edit the factors that DHS considers when conducting retrospective cost-benefit analysis. The commenter noted the “cost-benefit or cost-effectiveness” factor focused on whether changed circumstances have affected costs, but did not mention a reassessment of the benefits. The commenter stated that changes in benefits should have also been considered. Regarding the “alternative regulatory approaches” factor, the commenter stated that the selected alternative should maximize net benefits, and for the “unintended effects” factor, DHS should be clear that both positive and negative effects should be considered. DHS agrees with all of these comments and has updated the Plan accordingly.

To evaluate the accuracy of prospective cost-benefit analyses, a comment suggested that DHS could consider studying whether any systematic biases in under- or over-estimating either costs or benefits existed by randomly selecting a sample of rules and comparing the *ex ante* and *ex post* estimates. While DHS agrees that such study could provide some information, DHS does not plan to “randomly” conduct retrospective cost-benefit analyses. DHS is focusing its resources on retrospectively analyzing rules that could reasonably be expected to yield net benefits if they were streamlined, modified, or removed.

DHS also received a comment recommending that DHS consider conducting a broader analysis of the distributional effects of a rule other than updating the costs to small businesses. The commenter stated that DHS should consider analyzing how the benefits and burdens fall across all affected subpopulations. We agree that DHS should consider distributional effects. According to OMB Circular A-4, “[t]he term ‘distributional effect’ refers to the impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography).”

To clarify our approach on distributional effects, DHS plans to consider the impacts on all of the types of small entities considered under the Regulatory Flexibility Act, including small businesses, small organizations, and small governmental jurisdictions. In addition, if, during the course of conducting a retrospective analysis, DHS believes that a subpopulation, such as lower income individuals, is bearing a disproportionate cost or receiving a disproportionate benefit of the rule, then DHS would consider and discuss these distributional effects. DHS has revised the Plan to incorporate this clarification.

One commenter responded to language in the Preliminary Plan, which explained that no commenters had provided input on the use of cost-benefit analysis for the category of maritime safety and environmental protection regulations. This commenter highlighted the value of cost-benefit analysis in the context of maritime safety and environmental protection regulations. The commenter suggested that DHS consider consulting with other agencies, such as the Environmental Protection Agency (EPA), that have experience with cost-benefit analysis in these contexts. DHS agrees with the commenter that cost-benefit analysis is useful for maritime safety and environmental protection regulations. DHS currently uses cost-benefit analysis to develop regulations. DHS also notes that we consult with other federal agencies, such as EPA, when necessary.

#### 4. Suggestions on Rules to Consider for Retrospective Review

In response to our Preliminary Plan, we received public feedback on additional regulations that we should consider for retrospective review. We have grouped these comments below by functional category. Of the four functional categories, DHS only received public comment for regulations in two of those categories (i.e., security, and immigration and border management). Because we did not receive public comment related to the other two categories (i.e., maritime safety and environmental protection, and emergency management and assistance), we do not discuss those two categories below.

##### a. Security

One comment recommended that TSA and CBP streamline regulations so that aviation employees are not required to submit biometric and biographic data multiple times to support background checks. TSA and CBP are working toward reducing redundant background checks and are exploring ways to share biometric and biographic data to reduce the burden on aviation workers to the greatest extent possible under current statutory requirements. For example, TSA has issued a rule that allows TSA to deem security checks conducted by other agencies to be

comparable to TSA security checks to reduce the need for multiple checks.<sup>11</sup>

Another comment suggested that DHS employ notice-and-comment rulemaking when making any change to CFATS, especially Appendix A. The National Protection and Programs Directorate (NPPD), like all DHS components, is committed to public input. NPPD continuously reviews its programs to make improvements and plans to utilize notice-and-comment rulemaking, where feasible, to make those improvements.

This commenter also recommended that NPPD employ an appeals process for facility risk-based tier determinations under CFATS. The current CFATS rule, as promulgated, does not contain an appeals process for tier determinations. Although that is the case, NPPD believes that technical conferences (between DHS and facilities) have provided an exchange of information directly related to DHS's decisions; they have also provided opportunities for local changes that may satisfy the facility's concerns. NPPD will continue to evaluate concerns such as this for any future regulatory action related to CFATS.

b. Immigration & Border Management

One commenter resubmitted comments related to the processing of asylum applications, such as employment authorization under 8 C.F.R. § 208.7 and the expansion of the categories of persons eligible for work authorizations under 8 C.F.R. § 274a.12. The commenter urged DHS to select and prioritize these changes to the regulations and used DHS's selection and prioritization factors in the Preliminary Plan to support these assertions. DHS plans to review this comment more closely and potentially consider these regulations for retrospective review.

Another commenter recommended that DHS (and the Department of Treasury) consider whether regulations concerning the importation of ancient coins should be modified or eliminated. Commenters asserted that CBP regulations restrict the importation of rare coins based on their type rather than on their find spot as required by the Convention on Cultural Property Implementation Act. The commenters also contended that the regulations impose prohibitive compliance costs on importers, especially small importers, of rare coins, and that the regulations require the production of documentation that does not exist or is expensive and cost prohibitive to produce. Since the importation of rare coins falls under the purview of the Department of Treasury, this comment is not within the scope of DHS's Plan. DHS has forwarded this comment to the Department of Treasury.

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<sup>11</sup> See TSA Final Rule, *Air Cargo Security Requirements*, 71 FR 30478 (May 26, 2006).

One commenter extensively discussed the various administrative procedures applicable when an arriving traveler makes a claim of citizenship. The commenter stated that it is inappropriate for CBP to refer an arriving traveler who is making a claim to U.S. citizenship to an Immigration Judge via any expedited removal process. The commenter concluded that a joint DOJ-DHS rulemaking is needed. This comment refers to subject matter that overlaps between three DHS components – ICE, USCIS, and CBP. DHS is reviewing this comment more closely to determine the appropriateness and scope of future retrospective review.

DHS also received a comment that encouraged CBP to quickly finalize the Global Entry regulations to make the program permanent, expand the number of participating airports, and expand eligibility to citizens of other countries that participate in the program. The Global Entry final rule is currently under development, and DHS anticipates issuance of the final rule in the near future. Additionally, DHS is actively working to expand the Global Entry program to additional U.S. airports and to include nationals from additional countries.

Furthermore, a commenter recommended that CBP eliminate the National Security Entry and Exit Registration System (NSEERS) program. The commenter asserted that NSEERS is redundant and that CBP instead should utilize information from the Advanced Passenger Information System records, Passenger Name Records, and US-VISIT Entry process.

Over the past several years, DHS has implemented several new automated systems that capture arrival and exit information on nonimmigrant travelers to the United States, and DHS has determined that NSEERS, which recaptures this data manually when a nonimmigrant is seeking admission to the United States, is redundant and no longer provides any increase in security. DHS has since determined that it is not necessary to subject nationals to special registration procedures. Accordingly, on April 28, 2011, DHS published a notice in the *Federal Register*,<sup>12</sup> which removed all of the designated countries from compliance with the special registration procedures under NSEERS.

One comment recommended that CBP eliminate the I-94 paper form and the General Customs Declaration to simplify the overall arrival process for passengers. CBP is constantly working to enhance the passenger processing experience. In fact, CBP recently automated the form I-94W in 2010 and is working to automate other paper forms that passengers and airlines use.

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<sup>12</sup> See DHS Notice, *Removing Designated Countries from the National Security Entry-Exit Registration System*, 76 FR 23830 (Apr. 28, 2011).

One comment suggested that CBP reinstate certain air transit programs so that nonimmigrant aliens can transit the United States without a visa. The commenter reasoned that CBP could utilize the Advanced Passenger Information System and Passenger Name Records and the Electronic System for Travel Authorization system, to provide the necessary level of security to reinstate the program. At this time, DHS does not have plans to issue regulations reviving air transit programs.

One commenter pointed out that U.S. airports that have a low level of international service (typically small commercial or general aviation airports) operate under what is known as “user fee status” and pay CBP directly for services provided. The commenter urged CBP to consult with the user fee airports about improving the Memorandum of Understanding (MOU) that airports enter into with CBP to obtain “user fee status.” The commenter asserted that an improved MOU would enhance operations and potentially reduce costs for both parties. In addition, the commenter encouraged CBP to take a more flexible approach and consider the unique characteristics of individual airports. Further, the commenter recommended that CBP evaluate the benefit of a version of the MOU with less onerous requirements for user fee airports that only receive pre-cleared international flights. CBP is currently developing an NPRM that would propose various amendments to the user fee airport status regulations. CBP will consider these comments in the course of that rulemaking. CBP urges the commenter to submit these comments, and any others that might arise based on the NPRM, during the comment period for that document.

DHS received another comment recommending that DHS and DOJ coordinate their regulations regarding representation of aliens and appearances in immigration cases, contained in 8 CFR part 292, and part 1292, respectively, so that the regulations are more clear. DHS is reviewing this comment more closely and will consult with DOJ, as appropriate.

DHS also received a comment suggesting that USCIS revise 8 CFR 212.8, which covers labor certification requirements, to remove outdated language and cross-references. USCIS plans to remove the referenced outdated provisions and language in conjunction with its Transformation rulemakings, which are currently under development.

Finally, one comment recommended that USCIS promulgate regulations for the Systematic Alien Verification for Entitlements (SAVE) and E-Verify programs. DHS notes that currently these programs operate by legally enforceable agreements with users of the programs; the agreements establish the terms and conditions of participation. DHS plans to review

this comment more closely to determine whether regulations are warranted.

#### **IV. Current DHS Efforts Already Underway for Retrospective Review of Regulations**

##### **A. Overview**

DHS and its components already engage in efforts—independent of Executive Order 13563—to facilitate the retrospective review of DHS regulations. DHS and its components regularly identify rules that are in need of change, whether because those rules are obsolete, unnecessary, or unjustified; because they contain gaps or loopholes; or because they require supplementation or clarification.

Not unexpectedly, the formalization of retrospective review within DHS varies by component, as a function of the component's mission, size, organizational structure, resources, staffing, and regulatory priorities. The formation of DHS in 2003 brought together a large number of entities, each with its own mission, culture, and approach to retrospective review of its regulations.

For this and other reasons, DHS has taken significant steps to create a unified and integrated Department, focusing on accountability, efficiency, and transparency to enhance its performance and to become a leaner, smarter agency better equipped to protect the nation. To further the unification and integration of the Department in the regulatory arena, DHS has taken the following steps:

- DHS has established a headquarters-level office that oversees the Department's regulatory processes. The Regulatory Affairs Law Division (RLD) within the Office of the General Counsel (OGC) manages and coordinates the review and clearance of virtually all DHS and component regulatory actions. An Associate General Counsel and the Chief Regulatory Economist lead the division.
- Each DHS regulatory component has a designated Component Regulatory Coordinator, who oversees and manages the regulatory program within his or her respective component. Component Regulatory Coordinators work closely with OGC-RLD.
- DHS has a well-established intra-departmental circulation process for the review of rulemakings. This process provides an opportunity for all DHS components that might have equities in particular rulemakings to review and assess those rulemakings.
- In recent years, DHS has developed and implemented several training and educational initiatives (e.g., workshops and roundtables) for DHS professionals who work in the area of regulatory affairs. These events are

not only an opportunity for employees to learn about the federal rulemaking process and developments in administrative law, but they are also opportunities for DHS professionals to network with their regulatory counterparts, to identify best practices, and to share lessons learned in the regulatory arena.

DHS has leveraged these existing practices, as well as the component-specific practices described below, in developing our Preliminary and Final Plans. We will continue to use these practices and expand upon them as we implement our Plan for retrospective review.

## B. Existing Formal Reviews

Although retrospective review processes in the Department are component-specific, we have found that there are several common practices across components. Not surprisingly, the two largest DHS regulatory components that promulgate the highest number of regulations—Coast Guard and USCIS—have the most extensive processes.

### 1. Section 610 Reviews

Section 610 of the Regulatory Flexibility Act (RFA)<sup>13</sup> instructs agencies to review regulations that have or will have a significant economic impact upon a substantial number of small entities. The review should be conducted on a ten-year cycle for final rules.

A few DHS components, such as the Coast Guard, use a formalized process for these reviews. The Coast Guard maintains an internal list of regulations subject to a section 610 review, has a designated staff attorney conduct annual checks on the need for reviews, regularly updates a database of review deadlines, and notifies program offices of review deadlines. In addition, whenever there are such section 610 reviews, the Coast Guard publishes a *Federal Register* notice that informs the public about the review and that solicits public comment. If the Coast Guard ultimately decides to leave the rulemaking as is, it publishes a second *Federal Register* notice to respond to any public comments to the first notice.

### 2. Other Legally-Required Reviews

DHS components must also conduct reviews of their regulations as otherwise required by law. For example, recently, in section 608 of the Coast Guard Authorization Act of 2010, Congress directed that “[a]t least once every 10 years, the Secretary shall review and revise the standards

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<sup>13</sup> 5 U.S.C. § 610.

under subsection (a) to ensure that the standards meet the requirements of this section.” Subsection (a) requires that when establishing standards for certain equipment, the Coast Guard must ensure that standards are “(1) based on performance using the best available technology that is economically achievable; and (2) operationally practical.” To comply with these requirements, the Coast Guard is preparing to institute a process similar to the one it uses for section 610 reviews.

### 3. Unified Agenda Review

All DHS components also use the Unified Agenda of Regulatory and Deregulatory Actions (“Unified Agenda”) as a way to review existing regulations. The Unified Agenda, published twice a year, describes the regulatory actions that each Federal agency has recently completed or expects to issue in the next year. The agendas are listed by the issuing agency; the DHS portion of the Unified Agenda contains information on regulations issued by DHS and its components. The Unified Agenda is available online at [www.reginfo.gov](http://www.reginfo.gov), and select portions are published in the *Federal Register*.

USCIS, in particular, has engaged in a comprehensive review of its rules in the Unified Agenda. In the past few years, USCIS has been able to finalize rules for which no comment was received, thereby closing those entries on the Unified Agenda. In addition, USCIS is working on two rulemakings that would finalize an additional 11 rules (that did receive public comment). Until now, these rules had been carried in the Unified Agenda for years. USCIS is also working on a long-range plan to finalize its remaining interim rules.

Similarly, FEMA has taken an active approach with its review of its entries in the Unified Agenda. FEMA has identified rulemakings that have been pending on the Unified Agenda for some time, and it is now seeking to revise and update those rules that are outdated and to close out entries that are defunct.

## C. Existing Informal Reviews

Beyond formal reviews, all DHS components engage in ongoing and regular informal reviews of their existing regulations. Again, while the precise nature of the informal review is component-specific, there are several efforts common across DHS components. Across the board, several DHS components conduct retrospective reviews based on the input they receive from advisory councils, field personnel, internal working groups, and regulated entities.

### 1. Use of Advisory Councils

Numerous DHS components benefit from the input of multiple advisory councils. DHS components consult with, and receive feedback from, advisory councils on an ongoing basis.

CBP, for example, receives feedback from two bodies. The Advisory Committee on Commercial Operations of Customs and Border Protection, which operates under the provisions of the Federal Advisory Committee Act (FACA), advises on matters involving the commercial operations of CBP. The Trade Support Network, established pursuant to the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 19 U.S.C. § 1413(b)(1)) to help fulfill the requirement for consultation with the trade community, including importers, brokers, shippers, and other affected parties, advises on the modernization of trade processes, including those that support revenue and homeland security functions.

The Coast Guard receives recommendations from numerous committees established under the FACA. As an example of the success of real-world application of these concepts, the Coast Guard utilized the National Maritime Security Advisory Committee (NMSAC) and the Chemical Transportation Advisory Committee (CTAC) to identify the portions of the Coast Guard's maritime security regulations that need review and revision. The feedback from NMSAC and CTAC prompted the Coast Guard to initiate a rulemaking project to review and update its maritime security regulations.

Similarly, FEMA benefits from the input of two FACA committees, one of which is the National Advisory Council (NAC). The NAC, which provides advice on regulatory matters, has recently been actively involved in advising FEMA on revisions to its individual assistance and public assistance programs.

## 2. Feedback from Field Personnel

Input from field personnel plays a critical role in assisting DHS to determine which regulations require review and possibly revision.

Within TSA, for example, Transportation Security Inspectors, in the course of conducting compliance inspections, sometimes learn of rules that are being misinterpreted or are difficult to interpret.

Within CBP, officers stationed in ports and field offices frequently provide input based on observations (e.g., inconsistencies among the ports) and issues (e.g., complaints from the trade or public) they encounter in the field.

## 3. Information from Program Offices

Input and feedback from program offices are essential to DHS component efforts to determine which regulations may need revisions. Program officials who implement and enforce the regulations and manage the day-to-day operations of the regulatory program (across DHS components) provide regular and frequent feedback on DHS regulations.

For example, in CBP, program offices may identify the need for a regulatory change and initiate a regulatory review by drafting an internal issue paper for consideration by CBP headquarters. In addition, CBP often administers internal surveys to determine whether programs and processes are working as they should and if improvements can be made.

#### 4. Input from Internal Working Groups

Various DHS components establish internal working groups, comprised of operations, policy, and legal staff, to consider regulatory issues.

CBP, for example, has established internal working groups on Import Safety, and on Securing America's Borders and Ports of Entry. These working groups will often identify regulations that are outdated, difficult to implement, or that fail to meet the needs of the agency, and subsequently recommend amendment to such regulations.

In addition, the immigration components of the Department—CBP, ICE, and USCIS—meet quarterly to discuss regulatory issues and the regulatory intersections between components.

#### 5. Outreach to Regulated Entities

Through regular and frequent outreach to regulated entities, DHS components receive important feedback on the impact and effects of existing regulations. This feedback assists components in determining whether further regulatory review is warranted and what regulatory fixes may be appropriate.

USCIS, for example, hosts town hall meetings, including ones exclusively focused on regulatory matters, through its Office of Public Engagement.

Similarly, TSA, through its leadership (e.g., Assistant Administrators, Federal Security Directors, and General Managers), frequently consults with stakeholders, such as at trade association meetings and Sector Coordinating Council meetings. Through these venues, TSA often learns of issues and concerns regarding its regulations.

CBP also engages in such outreach. CBP seeks input through public surveys; for example, CBP is currently developing and administering two

public surveys, one seeking input from international travelers arriving at U.S. ports of entry regarding the entry process, and one seeking input from commercial entities regarding their use of and experience with the Automated Commercial Environment System. In addition, CBP's Office of Field Operations and Office of International Trade regularly conduct outreach with industry stakeholders (e.g., carriers, shippers, importers, brokers, sureties, etc.).

## V. Elements of the Plan/Compliance with Executive Order 13563

### A. DHS Officials Responsible for Retrospective Review

#### 1. Overall Oversight

Consistent with his role as the Regulatory Policy Officer under Executive Order 12866, the General Counsel of DHS will oversee the overall implementation of the DHS Retrospective Review Plan.

Position: General Counsel of the U.S. Department of Homeland Security  
Name: Ivan K. Fong

The General Counsel has designated two officials within his office, both of whom occupy Senior Executive Service (SES) or equivalent positions, to manage the retrospective review process for the Department.

Position: Associate General Counsel for Regulatory Affairs  
Name: Christina E. McDonald

Position: Chief Regulatory Economist  
Name: David L. Houser

#### 2. Oversight within Operational Components with Regulatory Responsibility

To further reinforce its commitment to retrospective review and to ensure high-level visibility in the components where the regulations are drafted and developed, DHS has also designated senior officials, who occupy SES or equivalent positions, for DHS operational components with substantial regulatory responsibility.

##### U.S. Customs and Border Protection

Position: Executive Director, Regulations and Rulings  
Name: Sandra Bell

##### Federal Emergency Management Agency

Position: Director, Office of Policy & Program Analysis  
Name: David Kaufman

U.S. Immigration & Customs Enforcement

Position: Assistant Director for Policy

Name: Rachel Canty (Acting)

Transportation Security Administration

Position: Assistant Administrator for Transportation Sector Network Management

Name: John P. Sammon

U.S. Coast Guard

Position: Judge Advocate General and Chair of the Coast Guard Marine Safety and Security Council

Name: Rear Admiral F. J. Kenney

U.S. Citizenship and Immigration Services

Position: Chief, Office of Policy & Strategy

Name: Denise Vanison

B. DHS Approach to Retrospective Review

DHS consists of 28 components, each with different missions, organizational structures, stakeholders, resources, and regulatory frameworks. Regulated entities of DHS range from individuals to States to local, tribal, and private sector entities. Some DHS components, such as TSA, were created in the wake of 9/11 while others, such as CBP and the Coast Guard, have been in existence for centuries.

DHS took these differences into account in developing its Preliminary and Final Plans. The goal is to provide DHS regulatory components with a series of tools, factors, and mechanisms that they can employ, as appropriate, for their respective regulatory programs. This framework, which contains a series of performance standards, will provide DHS components with the flexibility to tailor their individual retrospective review programs to their unique needs, functions, resources, and capabilities.

To develop its Preliminary and Final Plans, in addition to seeking public comment, DHS OGC convened a Department-wide Working Group. The Working Group consisted of representatives from operational components with regulatory responsibilities, including CBP, USCIS, USCG, FEMA, ICE, NPPD, TSA, as well as the DHS Office of Policy. To acknowledge the integral and critical role that economists play in conducting retrospective analyses, attorneys and economists were equally represented in the Working Group process. The Working Group conducted a series of productive meetings over the past few months to formulate ideas and to discuss and consider elements for inclusion in the DHS Preliminary and Final Plans. Both the DHS Preliminary Plan and DHS

Final Plan are the product of the consensus recommendations of the Department-wide Working Group.

A central tenet of the DHS Plan is the critical and essential role of public input in driving and focusing DHS retrospective review. Because the impacts and effects of a rule tend to be widely dispersed in society, members of the public—especially the regulated entities of our rulemakings—are likely to have useful information, data, and perspectives on the benefits and burdens of our existing regulations. In developing the Plan, DHS has sought public comment at various stages.

DHS intends to continue to solicit input, including actionable and relevant data, from the public on which regulations DHS should consider for modification, streamlining, expansion, or repeal, so as to make DHS's regulatory program more effective or less burdensome in achieving its regulatory objectives. Furthermore, in light of the Plan's focus on public feedback, DHS plans to encourage the use of Advance Notices of Proposed Rulemaking (ANPRMs). ANPRMs offer another means by which DHS can obtain public input at an early stage. DHS is committed to utilizing ANPRMs, where feasible and appropriate, to notify the public that DHS is considering an area for rulemaking and to solicit public feedback before issuing proposed regulations.

As discussed in further detail below, DHS has attached several appendices to this Final Plan. One of those appendices – Appendix B – includes a list of rules for which DHS is currently conducting retrospective reviews and considering regulatory revisions. In Appendix B, among other things, DHS provides a summary of each rule, identifies the Regulatory Identification Number (RIN) (where available) associated with each rule, and includes an explanation of why DHS has chosen that rule for retrospective review. Generally speaking, DHS selected these rules for review, because regulatory revisions, in these situations, will allow DHS to streamline procedures and requirements, leverage existing resources, reduce duplication, and/or use new technologies. For specific reasons related to each rule, please see the far right column in Appendix B.

In addition, please note that for each of the regulations listed in Appendix B, DHS has, or will, include each regulation in the Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda). The Unified Agenda provides additional information about each regulation, such as an abstract of the rule and the legal authority for the rule. To locate a regulation in the Unified Agenda, please see <http://www.reginfo.gov/public/do/eAgendaMain>, and search for the regulation by its RIN. As of the issuance of this Final Plan, the Unified Agenda for Spring 2011 was available online.

Consistent with the direction of Executive Order 13563, DHS has developed this Plan after a careful balancing of our available resources and current regulatory priorities against our continuing obligation to promulgate critical regulations. DHS has an extensive and active regulatory agenda, including numerous

rulemakings that address legislative initiatives and fulfill statutory mandates. Given current budgetary resources, DHS is not able to hire additional staff for retrospective review. In light of current regulatory priorities (much of it driven by statutory mandates), DHS is not able to regroup or dedicate existing staff exclusively to provide the level of retrospective review we would prefer. As a result, DHS will be limited in its ability to conduct extensive retrospective cost-benefit analyses. DHS will, however, leverage existing processes, formalize previously informal processes, and use current regulatory personnel to implement this Plan. Subject to the availability of appropriations, DHS could expand its Plan to encompass dedicated staff for retrospective review and more formalized processes for retrospective cost-benefit analyses.

## C. Rule Selection, Prioritization, & Efficacy

### 1. Overview

This DHS Plan sets forth a framework for reviewing existing significant regulations and identifying those that may be obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. The goal of the Plan is to assess whether it is necessary for DHS to modify, streamline, expand, or repeal any Department rules.

The DHS framework includes a three-step process that DHS and its regulatory components will use.

- First, after consideration of the factors identified below, regulatory components will select regulations as candidates for retrospective review.
- Second, using the separate factors also listed below, regulatory components will prioritize the selected candidates and identify those upon which they should focus their efforts.
- Third, regulatory components will assess the effectiveness of the selected regulations based on an analysis of a final set of factors identified below.

### 2. Rule Selection – Factors to Consider

When selecting regulations as candidates for retrospective review, DHS will consider a variety of factors, including any combination of the factors listed below. While all of the below factors are important, we believe that “public feedback” is critical to focusing the DHS retrospective review and thus should be the primary factor for consideration. DHS stresses, however, that these factors are highly interrelated. For example, “public feedback” can provide the mechanism by which we receive useful

information regarding developments in technology, advances in science, or changes in economic conditions, all of which can, in turn, inform the “changed circumstances” factor.

*Primary Factor.*

- *Public Feedback.* Public feedback regarding potential improvements to a regulation. This feedback includes comments that DHS solicits through notices and stakeholder contacts, as well as unsolicited feedback in the form of rulemaking petitions and complaints. DHS will afford significantly greater weight to feedback that identifies specific regulations, includes actionable data, or provides viable alternatives that meet statutory obligations and regulatory objectives. Feedback that simply states that a stakeholder feels strongly that DHS should change a regulation, but does not contain specific information on how the proposed change would impact the costs and benefits of the regulation, is much less useful to DHS. DHS is looking for new information and new economic data to support any proposed changes.

*Secondary Factors.*

- *Experience of Program Officials.* Need for regulatory change based on the experience of the agency personnel who implement and enforce the regulations and manage the day-to-day operations of the regulatory program. For example, have program managers identified gaps in regulations or determined that information once deemed important is no longer necessary? Have program officials determined that the regulation is not working as originally intended?
- *Feedback from the Field.* Need for regulatory change based on information from officers, inspectors, and other employees based in the field. For example, are inspectors receiving feedback relevant to regulations during site visits? Have officers noted inefficiencies in regulatory implementation?
- *Enforcement Challenges.* Need for regulatory change based on enforcement or compliance issues. For example, has DHS had to issue a large number of waivers pursuant to a particular regulatory provision? Is DHS facing challenges in enforcing particular provisions of a regulation?
- *Advisory Councils.* Input and feedback from advisory councils that routinely advise DHS and/or its components.
- *Reports of Oversight Entities.* Need for regulatory change in response to findings, studies, and/or recommendations of oversight entities,

such as the National Transportation Safety Board, Government Accountability Office (GAO), USCIS Ombudsman, or DHS Office of the Inspector General.

- *Accident/Incident Data.* Need for regulatory change in response to accidents and incidents, or as a result of accident or incident data or statistics. For example, have accident rates failed to decrease despite the promulgation of a regulation intended to lower accident rates?
- *Changed Circumstances.* Need for regulatory change based on technological developments, advances in science, changed economic conditions, or other factors. For example, can a new technology be employed to reduce the burden of the regulation?

### 3. Rule Prioritization – Factors to Consider

Once DHS has identified regulatory candidates for retrospective review, DHS will assess any combination of the below factors to determine how best to prioritize the selected regulations in light of the Department's limited resources.

While all factors are important, DHS has identified “net benefits” as the factor of primary importance. This comports with Executive Order 13563's direction for agencies to “select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits....” As DHS prioritizes its rules for retrospective review, DHS will consider “net benefits” as the primary rule prioritization factor.

#### *Primary Factor.*

- *Net Benefits.* To the extent possible, identify regulations, which if modified, would result in the greatest increases in net benefits or reductions in net costs. DHS will seek to measure net benefits against a baseline. The baseline is the best assessment of how the world will look in the future with the regulation in place. This will be compared to an estimate of how the world would look if the regulation were modified, streamlined, expanded, or removed. DHS will afford higher priority to those regulations that are likely to generate higher net benefits (or greater reductions in net costs).

#### *Secondary Factors.*

- *“Significance” Designation of the Rule.* The significance designation of the rulemaking under Executive Order 12866. DHS will afford higher priority to rulemakings that are “economically significant” (i.e., that 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). These regulations have larger economic impacts; where changes to these regulations are deemed appropriate and necessary, such changes are likely to result in greater net benefits.

- *RFA Review.* The applicability of other legal requirements, such as a ten-year review required under the RFA (5 U.S.C. 610). To the extent that DHS is already conducting a legally-required review of a rule, DHS will consider conducting a retrospective analysis in conjunction with the legally-required review.

*Duplication & Harmonization.* The extent to which amendments to DHS regulations could reduce or eliminate overlap, duplication, or conflict with other federal regulations; and the extent to which amendments to DHS regulations could result in better harmonization with existing federal regulations. DHS will also consider areas where current regulations have a significant impact on international trade and investment and, if applicable, analyze existing international standards or regulatory approaches as possible alternatives.

- *Ability to Amend without Statutory Change.* The ability of DHS to modify or amend the selected regulation without seeking statutory changes. DHS will afford higher priority to regulations that can be amended without statutory changes.
- *Previous Revision.* The amount of time that elapsed since DHS last amended the regulation and the nature of amendment, whether substantive or minor. As a general matter, DHS will afford higher priority to regulations that have not been substantively updated for extended periods of time. Of course, this will require a careful balancing, as there may sometimes be newer regulations that pose immediate problems that need addressing.
- *Resources.* The ability of DHS to conduct the retrospective review in light of resources, staffing capabilities, regulatory or leadership priorities, and/or national or international incidents.

#### 4. Rule Efficacy – Factors to Consider

Once DHS selects a regulation for retrospective analysis, DHS will conduct a review of the regulation to determine whether the regulation is effectively and efficiently meeting its regulatory objectives while simultaneously minimizing burdens. In reviewing regulations (and in developing regulations), DHS continues to look for ways to use disclosure

as a regulatory tool. As OMB has explained, “properly designed disclosure requirements can significantly improve the operation of markets, leading consumers to make more informed decisions.”<sup>14</sup>

For purposes of this Plan, we have grouped DHS regulations into four broad functional categories: (1) security, (2) maritime safety and environmental protection, (3) immigration and border management, and (4) emergency management and assistance. DHS will add cyber-security as a fifth category when DHS regulations in this category are promulgated. Additionally, in the future, DHS may add further categories, as necessary.

To assess the efficacy of a regulation, DHS will consider and analyze factors specific to the regulation category. The identification of different factors for each category is necessary, because each rulemaking category is inherently different and each rulemaking category has different types of data available for analysis.

### Security

To combat terrorism and other threats to the homeland, DHS promulgates security regulations that regulate, for example, the aviation industry, maritime industry, and high-risk facilities in the chemical sector. The majority of TSA and NPPD regulations, as well as some CBP and Coast Guard regulations, are security regulations.

The primary factor that will inform the DHS review of security regulations will be the nature and substance of current intelligence on the threat sought to be mitigated. DHS will consult with members of the Intelligence Community to assess whether the threat that initially supported the development of the rule continues to be credible and substantial. DHS’s review of security regulations will also be informed by the results of security inspections and by interactions between component personnel and regulated entities.

In response to public comments received in response to the DHS Preliminary Plan, we note that DHS’s review of intelligence is not limited to retrospective review purposes. DHS continuously assesses and reassesses the need to respond to new and different security threats through rulemaking and other means.

### Maritime Safety & Environmental Protection

DHS, through the Coast Guard, issues regulations covering maritime safety and environmental protection. The primary factor that will inform

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<sup>14</sup> See OMB/OIRA Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, p. 37 (2009).

the DHS review of maritime safety and environmental protection regulations will be analyses of the safety data that the Coast Guard maintains.

Through execution of its missions, the Coast Guard gathers, receives, and analyzes data, including some information that relates to regulatory efficacy. The Coast Guard will continue to use this information, the significant sources of which we have highlighted below, to assess the need for revision to maritime safety and environmental protection regulations:

- Data analysis of the Coast Guard statistics allows the Coast Guard to identify problems that current regulations are not addressing and to consider whether there is a lack of regulation or whether an existing regulation is targeting the wrong cause. The Marine Information for Safety and Law Enforcement (MISLE) system, for example, includes information on investigations of marine casualties and pollution incidents.
- Casualty investigations identify potential issues that led to the casualties, including possible failure of regulations (or possible failure of enforcement or compliance).
- Safety inspections often identify compliance, enforcement, and interpretation issues for existing regulations.
- During vessel and equipment reviews, the Coast Guard reviews vessel and equipment design, construction, and performance for compliance with Coast Guard regulatory standards. The Coast Guard evaluates whether technological developments have made any of its regulatory standards outmoded or obsolete and whether other changing factors in the marine environment affect or should be reflected in the Coast Guard's regulations.
- Participation in voluntary consensus standards bodies enables the Coast Guard to evaluate new technical standards and assess whether changes are necessary to Coast Guard regulations.

#### Immigration & Border Management

DHS also issues regulations that administer immigration and citizenship benefits, secure and manage our borders, and regulate people and goods entering and exiting the United States. CBP, USCIS, ICE, and NPPD/United States Visit and Immigrant Status Indicator Technology (US-VISIT) promulgate immigration regulations. CBP, along with the Coast Guard, ICE, and NPPD/US-VISIT, promulgate regulations that address border management. The primary factor that will inform the DHS

review of immigration and border management regulations will be the degree to which operational and other efficiencies are achieved, consistent with statutory requirements and DHS's obligation to enforce the law.

Approximately half of the comments DHS received in response to our March 2011 solicitation of public comments raised immigration issues. While commenters did not cite to any particular data supporting a need for change, commenters consistently indicated confusion and frustration with certain immigration matters. The DHS regulatory process is not the mechanism to change provisions of the INA or to address concerns about specific immigration benefits; however, the DHS regulatory process can seek to reduce regulatory burdens.

Guided by the public comments, with respect to immigration and border management regulations, DHS will seek to maximize efficiencies by streamlining processes, clarifying requirements, implementing technological advancements, and reducing paperwork burdens thereby reducing compliance costs, eliminating redundancies, and reducing confusion.

#### Emergency Management and Assistance

DHS, through FEMA, promulgates a wide range of regulations concerning emergency management and assistance. A major portion of these regulations covers disaster preparedness, response, recovery, and mitigation. FEMA provides disaster assistance in these areas through grants to State, local, and Tribal governments; certain nonprofit organizations; and individuals. FEMA's regulations also cover the National Flood Insurance Program, which FEMA administers, as well as flood mitigation grants, emergency preparedness planning, and priority use of resources.

The primary factor that will inform the DHS review of its emergency management regulations will be the degree to which operational and other efficiencies are achieved, as informed by program feedback from grant recipients and advisory committees, external stakeholders, and internal program reviews. The overarching goal is to provide assistance after a disaster in a timely, efficient, and effective manner, and to ensure all FEMA programs are streamlined to the maximum extent possible.

In response to our March 2011 *Federal Register* notice, DHS received very few public comments related to the emergency management and assistance regulations. Nonetheless, we believe that DHS can seek to reduce the regulatory burden of FEMA regulations. In its retrospective review, FEMA will seek to maximize efficiencies by removing or revising defunct or outdated regulatory provisions; proposing regulatory revisions

that will result in more effective and timely assistance to the emergency management community, disaster survivors, and other stakeholders; and by reducing paperwork burdens, thereby reducing compliance costs, eliminating redundancies, and reducing confusion.

D. Process for Retrospective Review

Specific processes may vary by DHS component; however, DHS expects its overall retrospective review process to function generally in the following manner. On a three-year cycle, DHS and/or a DHS component will initiate the three-step process described above in Section V.C.1 of this Plan by (1) publishing a general notice seeking public comment, and (2) issuing an internal data call within the Department and/or component. Both efforts will seek input on regulations that may benefit from retrospective review. Given that DHS issued a public notice in 2011, the next cycle would begin in 2014.

At the initiation of a cycle, DHS may issue a general notice that applies to all DHS regulations (such as the one issued in March 2011), may issue a notice that focuses on a specific category of regulations (i.e., security; marine safety and environmental health; immigration and border management; or emergency management and assistance) or may issue a notice that applies to a particular regulatory component (e.g., CBP, USCIS, USCG, FEMA, ICE, or TSA).

Depending on resources, DHS may also seek public comment through additional methods, such as public hearings or webinars. DHS may also use interactive online venues, such as “EO 13563 Exchange” on Regulations.gov, to encourage increased public participation.

Consistent with the notice that DHS issued in March 2011, subsequent notices will request that commenters identify, with specificity, the regulation at issue, providing the CFR citation where available. DHS will also request that commenters provide, in as much detail as possible, an explanation of why the regulation should be modified, streamlined, expanded, or repealed, as well as specific suggestions of ways the Department can better achieve its regulatory objectives. DHS will encourage interested parties to provide specific data that document the costs, burdens, and benefits of existing requirements. Comments that repeat debates over recently-issued rules will be not be useful.

In addition to the public notice, DHS and/or DHS components will also issue an internal data call, seeking input on regulations that may benefit from retrospective review. The data call will seek input from a wide range of Department personnel, including program officials who manage the specific regulatory programs and field personnel who enforce and implement the regulations.

Upon reviewing the feedback, and considering the other factors relevant to rule selection, DHS components will select rules, if appropriate, for retrospective

review according to the criteria outline in section V.C.2. Following the selection of rules, DHS will prioritize the rules based on the factors relevant to rule prioritization, according to the criteria outline in section V.C.3. As discussed above, our primary prioritization factor is the increase in net benefits that a modification of a rule would yield.

DHS components will report regularly on the progress of their retrospective reviews to the Department during their regulatory planning meetings with OGC-RLD. As necessary, OGC-RLD will provide periodic status updates on all DHS retrospective review projects to the General Counsel.

Absent extenuating circumstances, the retrospective review for prioritized regulations should be completed within the three-year cycle. If a rulemaking is deemed necessary, the rulemaking need not be fully completed during that three-year period, although DHS and/or DHS components would initiate rulemaking, consistent with resources and regulatory priorities, during that three-year period and would make all efforts to promulgate the rulemaking as expeditiously as possible.

Consistent with current practice, DHS and/or DHS components would continuously accept feedback on an ongoing basis from all sources. DHS may, at any time, choose to supplement the retrospective review projects identified in the three-year cycle with projects based on a review of any other data or input.

In addition to the triennial review, DHS will conduct regular review of its Unified Agenda entries, consistent with the twice-per-year cycle established by the Regulatory Information Service Center. DHS and its components will seek to finalize interim rules and to take action or close out regulatory actions that have been pending on the Unified Agenda for an extended number of years.

#### E. Candidate Regulations for Review

The attached appendices contain a list of DHS's candidates for retrospective review. We have identified regulations and information collection reviews (ICRs) at three different stages.

- Appendix A lists recently published regulations and ICRs that DHS has modified in ways consistent with the principles of Executive Order 13563. These are regulations for which DHS has conducted a review, decided to amend existing provisions, and completed the regulatory revisions.
- Appendix B lists our in-progress retrospective review rules. These are regulatory provisions for which DHS has conducted preliminary assessments and determined that a regulatory change is likely warranted.

- Appendix C lists our long-term retrospective review candidates. These are regulations, which DHS will consider for retrospective review over the next three years, but for which retrospective review has not yet commenced.

#### F. Culture of Retrospective Analysis

DHS is firmly committed to developing and maintaining a strong, ongoing culture of retrospective review. We will do so by leveraging existing practices, as well as establishing new mechanisms, including the possibility of building mechanisms into prospective regulatory impact analyses that could facilitate retrospective analyses. We will engage high-level policy makers, senior leadership, and component regulatory coordinators to support and encourage the conducting of retrospective analyses. We will educate operational and program staff, legal and economic staff, and policy staff to conduct retrospective analyses.

DHS will reinforce the importance of retrospective analysis through training and educational initiatives. DHS will encourage the development of new and innovative ways of conducting retrospective review by organizing forums that provide an opportunity to share lessons learned and determine best practices. DHS will hold component regulatory offices accountable for producing retrospective reviews by requiring regular updates on the status of ongoing and upcoming retrospective reviews.

To foster a culture of retrospective analysis, DHS regulatory components will build in retrospective review at the earliest stages of regulatory development. DHS components will incorporate a discussion of retrospective analysis goals into their rulemaking project planning. Incorporating these goals at the beginning of the rulemaking process will help to ensure that the component considers retrospective analysis through the lifespan of the regulation. It will also enable regulatory components to better identify ways to measure the future effectiveness of a rule from the start of the planning process.

#### G. Independence of the Retrospective Review Team

The Department has identified the following measures, some of which are existing practices, to ensure that DHS's retrospective review team and process maintains sufficient independence from the offices responsible for writing and implementing regulations.

The current organizational structure of that DHS rulemaking program fosters an environment that supports independent analysis.

- First, many of the DHS component regulatory offices are separate from the program offices that implement regulations. For example, CBP's Regulations and Rulings office is responsible for drafting regulations and conducting

economic analyses; they are in a separate chain of command from the program offices (e.g., Office of Field Operations) that implement regulatory programs. FEMA's Office of Chief Counsel and headquarters program offices work closely together in the development and drafting of regulations; field offices largely handle the implementation. Similarly, TSA develops its regulations through the work of teams of policy experts, economists, and attorneys, and with the input of field offices; again, field offices largely handle the implementation.

- Second, the DHS regulatory process provides a layer of independent review. The DHS OGC, specifically RLD, oversees and manages the regulatory program at DHS. OGC-RLD, which is led by the Associate General Counsel for Regulatory Affairs and the DHS Chief Regulatory Economist, is wholly independent from DHS operating components (which would include any program offices located in a component).

Attorneys and economists in OGC-RLD review virtually all Departmental and component regulations for legal sufficiency and consistency across the Department. In addition, OGC circulates all rules through an intra-departmental circulation process; this allows all DHS components to review and offer input regarding rules. The internal, independent review and oversight process that applies to DHS component regulations will likewise apply to DHS retrospective review.

In addition to the two structural elements noted above, DHS has sought to further reinforce independence of retrospective review teams by including the following additional measures:

- DHS has designated senior-level officials within each component to be accountable and responsible for retrospective review in their components.
- In some circumstances, DHS components use advisory committees as a way to receive independent input on whether regulatory change is needed.
- For regulations that are within the scope of the Memorandum of December 17, 2010, on "Scientific Integrity" from John P. Holdren, Director of the Office of Science and Technology Policy, to Heads of Executive Departments and Agencies," DHS may request peer review from federal agencies or other independent entities such as the National Academy of Sciences, to the extent funding is available. The memorandum is available at <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>.
- Finally, DHS may establish internal, interdisciplinary teams of DHS employees (e.g., regulatory attorneys, regulatory economists, and policy analysts) to conduct peer reviews of retrospective reviews. Resource-

permitting, DHS would establish a standing working group, whereby participants would serve on a rotating basis for a defined period of time.

#### H. Actions to Strengthen Internal Review Expertise

DHS and its components will strengthen internal review expertise by conducting internal training. Given available resources, however, DHS is unable, at this time, to regroup employees or hire new staff.

Training will focus on conveying the importance of retrospective review as a means of analysis and on educating staff on the specific elements of this Plan. DHS and its components will train employees on retrospective review through a variety of means, including the ones listed below.

- DHS OGC currently hosts periodic internal roundtables to discuss issues and new developments related to administrative law and policy and to foster an open forum for the exchange of ideas. OGC is committed to including retrospective review as a future, and perhaps recurring, discussion topic at roundtables.
- DHS OGC hosts periodic conferences and workshops on various aspects of the rulemaking process. These events are designed to educate DHS employees on the federal regulatory process and to provide an opportunity for the sharing of best practices. OGC is committed to including retrospective review as a module at these events.
- Almost all DHS component regulatory offices provide training on an annual basis and/or to new regulatory employees. DHS components are committed to incorporating modules on retrospective review into these training sessions.

#### I. Coordination with other Federal Agencies

As evidenced by the following examples, DHS works regularly with a wide range of other federal agencies with related jurisdiction or similar interests.

- USCIS works with DOJ, the U.S. Department of Health and Human Services, U.S. Department of Labor (DOL), and U.S. Department of State.
- U.S. Coast Guard works with many federal agencies, including the Department of Transportation (DOT), Environmental Protection Agency, Food and Drug Administration (FDA), Maritime Administration, National Oceanic and Atmospheric Administration, and Occupational Safety and Health Administration.

- CBP works with many federal agencies, including the U.S. Census Bureau, U.S. Department of Commerce (DOC), Consumer Product Safety Commission, FDA, DOJ, and U.S. Department of the Treasury.
- FEMA works with the U.S. Department of Housing and Urban Development.
- ICE works with DOL and DOJ, including the Executive Office for Immigration Review.
- TSA works with DOT, including the FAA.

DHS and its components coordinate frequently, regularly, and closely with other federal agencies on rulemaking development. Coordination takes the form of periodic meetings, formal working groups, informal staff discussions, and the sharing of draft regulations. In many cases, DHS components issue joint rules with other federal agencies. DHS will continue to leverage these existing relationships and arrangements that enable rule-related coordination with other federal agencies.

## VI. Elements of Retrospective Cost-Benefit Analysis

### A. Resource Considerations for the Cost-Benefit Analysis

DHS is committed to the retrospective analysis of its existing regulations. DHS, however, must carefully balance the resource requirements of retrospective cost-benefit analysis against its continuing obligation to promulgate critical regulations, many of which are required by statute. Executive Order 13563 recognizes that this Plan must be “consistent with law and [the agency’s] resources and regulatory priorities. . . .” Given available resources, DHS is unable, at this time, to hire new staff to implement this Plan. In addition, due to the specialized nature of this type of work, it would not be practical to assign non-regulatory personnel to this type of task. Rather, the personnel necessary to conduct retrospective cost-benefit analyses will be taken from rulemaking teams, which are already responsible for implementing existing regulatory priorities.

### B. Factors to Consider when Conducting Retrospective Cost-Benefit Analyses

When estimating the impact of a rule before it takes effect (*ex ante* estimates), the baseline from which the costs and benefits are determined is the best assessment of the way the world would look absent the proposed action.<sup>15</sup> When the benefits and costs of a rule are estimated after the rule has taken effect (*ex post* or retrospective estimates), the analysis estimates what has actually happened due to

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<sup>15</sup> See OMB Circular A-4, p. 15.

issuance of the rule. It should be noted that a retrospective analysis designed to determine the accuracy of *ex ante* estimates does not, by itself, provide full guidance on the desirability of reforming the existing regulation. For example, the costs and benefits of rescinding a regulation are not the inverse of the costs and benefits of promulgating a regulation. The compliance cost savings of rescinding an existing regulation will be lessened by the sunk costs (e.g., one-time equipment costs).

When DHS or any of its components conducts a retrospective cost-benefit analysis, this analysis should provide information as to whether the rule is meeting its objectives; whether changed circumstances warrant revisions or revocation; and whether the rule meets the cost-beneficial or effectiveness measures originally considered. Based on the varying types of rules that DHS issues, we have identified several significant factors that DHS and components will consider when conducting a retrospective cost-benefit analysis. Therefore, to determine whether removal of a rule is warranted, it is important to compare costs and benefits with and without the rule on a “going-forward” basis.

1. *Cost-Benefit or Cost-Effectiveness.* Update the population of affected entities and compare the actual costs, benefits, or cost-effectiveness metrics of the regulation to those estimated in the analysis to determine if the regulation is still justified or warranted. Determine whether changes in technology or unanticipated changes in business practices decreased (or increased) the anticipated compliance costs or benefits.
2. *Distributional Effects & Small Entity Analysis.* Update and review the small entity analysis in accordance with the RFA to ensure that DHS accurately calculated the estimated costs and populations of small entities. DHS plans to consider the impacts on all of the types of small entities considered under the Regulatory Flexibility Act, including small businesses, small organizations, and small governmental jurisdictions. In addition, if, during the course of conducting a retrospective review, DHS believes that a subpopulation, such as lower income individuals, is bearing a disproportionate cost or receiving a disproportionate benefit of the rule, then DHS would consider and discuss these distributional effects too.
3. *Alternative Regulatory Approaches.* Determine whether the regulation could be achieved as effectively through an alternative regulatory approach that would impose less economic burden on regulated industries, particularly on small entities, given the new information available from the *ex post* review. Consistent with Executive Order 13563, DHS should select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits.

4. *Public Input.* Request and incorporate any comments received from the public on the costs and benefits of the rule to help ensure the component has as much available information as reasonably possible.
5. *Unintended Effects.* Determine if there are any unintended effects or interactions as a result of the rule. Both positive and negative unintended effects should be examined.
6. *Further Analysis.* Given resource availability, determine whether it is necessary to conduct further research (e.g., contracting a research study and/or conducting a public hearing) in order to fully inform the analysis.

C. Preliminary Expected Scope of Cost-Benefit Analyses Based on Public Comments

After reviewing the public comments received in response to our March 2011 *Federal Register* notice, IdeaScale webpage, and DHS Preliminary Plan, and after considering the discussions at the Department-wide Working Group on retrospective review, our preliminary analysis indicates that a significant number of retrospective analyses will not require extensive cost-benefit studies.

With respect to the rule categories of immigration and border management, and emergency management and assistance, the public comments revealed that reducing compliance costs by streamlining processes, clarifying requirements, and reducing paperwork burdens may be the major types of revisions needed in those areas. In fact, the top-voted comment in IdeaScale recommended that DHS change the current FEMA State Standard and Enhanced Hazard Mitigation Plan update requirement from every three years to every five years, so that it would be consistent with current Local Hazard Mitigation Plan update requirements. Commenters claimed that five years would be an appropriate timeframe for state mitigation plan updates for efficiency reasons. An analysis of this type of change is likely a straightforward one, whereby the FEMA economists would estimate the reduction in paperwork burden costs for a five-year plan instead of a three-year plan.

With respect to the category of security regulations, commenters raised issues indicating that the Department needs to consult with the Intelligence Community to assess whether a given regulation is supported by a continued security threat. Assuming there is a continued threat, the Department should consider whether there are more cost-effective alternatives available to meet statutory obligations and regulatory objectives.

With respect to the category of marine safety and environmental protection regulations, commenters did not provide any input, including any cost-benefit information, on that category of regulations.

Finally, in some instances, when revising regulations to streamline requirements or to reduce confusion about compliance requirements, quantifying such savings can be very difficult. The Department may not find it useful to engage in retrospective cost-benefit analyses when savings are difficult to quantify but the qualitative benefit of adopting the change is obvious. There is a cost to the public for delaying common-sense regulatory changes.

#### D. Steps Taken to Ensure DHS has Data to Conduct a Robust Retrospective Analysis

##### 1. Challenges to Obtaining Data

The Department believes obtaining quality data could be a challenge for the retrospective analyses of its regulations. GAO has reached similar conclusions, noting, in the past, that the inability to obtain the information and data needed to conduct retrospective analyses is a major barrier to such reviews.<sup>16</sup>

Thus far, there has been a lack of substantive cost-benefit data from the public. For example, in our March 2011 *Federal Register* notice, we specifically posed questions such as—“What information, especially new or additional information or data, regarding the costs and benefits of these regulations are available?”—to help facilitate public comments in this area. We did not receive any substantive information or data from the public that would assist us in conducting retrospective cost-benefit analyses.

##### 2. Available Sources of Data

Despite the challenges of obtaining information, DHS does have some useful sources available to help determine if a rule should be revised or removed. As previously explained in Section IV.C “Existing Informal Reviews,” there are existing data sources that can be harnessed to inform a retrospective cost-benefit analysis. DHS also uses several internal data systems, which may be useful when conducting cost-benefit retrospective analyses.

For example, a key tool used by the Coast Guard to provide information for its regulatory evaluations is the Marine Information for Safety and Law Enforcement (MISLE) system. It includes data and information from investigations of marine casualties and pollution incidents. These investigations will typically provide a description of the accident, an estimate of the amount of contaminant released, number of injuries or

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<sup>16</sup> Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews, p. 35, GAO-07-791 (July 2007).

fatalities, and property damage (if applicable). MISLE can assist the Coast Guard in determining if regulations intended to reduce oil spills and increase maritime safety are having the expected effect. It should be noted, however, that MISLE does not specifically identify the effectiveness of any particular regulation or cumulative influence of multiple regulations.

In addition, depending on the nature of the regulation being considered, CBP uses a variety of internal databases to assist with its regulatory evaluations. For example, CBP uses its Operations Management Reporting (OMR) data warehouse to track the volume of travelers and conveyances entering the United States at each port. It uses its Borderstat database to track wait times at U.S. borders. And it uses Automated Commercial Environment (ACE) to access data on the volumes and values of goods entering the United States. Many of CBP's regulations have a potential impact on the number of travelers or conveyances entering the United States or the time they spend waiting to be processed. As part of a retrospective review, CBP might extract information from these databases to study traveler volumes and wait times before and after a rule goes into effect.

Finally, DHS will continue to avail itself of the wealth of publicly available economic information produced by other government agencies. DHS routinely uses information from agencies such as the Bureau of Labor Statistics, DOC, and DOT to inform our *ex ante* estimates. These external sources of information provide data on a host of important variables such as wage rates, turnover rates, and industry populations. To the extent practicable, DHS plans to use information from other federal agencies to assist with our retrospective reviews.

## Appendix A: Recently Published Regulations & ICRs

Component	RIN	CFR Cite or OMB Control Number	Previous Stages	Title	Summary	Accomplishment
USCIS	1615-AB69	8 CFR 274a	Interim Final Rule published 12/17/2008 73 FR 76505	<u>Documents Acceptable for Employment Eligibility Verification</u>  Final Rule published 4/15/2011 73 FR 2125	This rule finalized an interim final rule that amended the DHS regulations governing the types of acceptable identity and employment authorization documents and receipts that employees may present to employers for completion of Form I-9, "Employment Eligibility Verification."	This rule updated existing regulations to reflect current requirements and practices. This regulation also improved the integrity of the Form I-9 process.

<p>USCIS</p>	<p>1615-AB71</p>	<p>8 CFR 214.2(h)</p>	<p>No previous rulemakings</p>	<p><u>Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations</u></p> <p>NPRM published 3/3/2011 76 FR 11686</p>	<p>This rule proposes to require employers seeking to petition for H-1B workers subject to the statutory cap to first file electronic registrations with USCIS during a designated registration period.</p>	<p>The rule, if finalized, would reduce petitioners' administrative burdens and associated costs with preparing a complete H-1B petition prior to knowing whether the statutory limit has been reached. USCIS anticipates that this new process will reduce administrative burdens and associated costs on employers who currently must spend significant time and resources compiling the petition and supporting documents for each potential beneficiary without certainty that the statutory cap has not been reached. The proposed mandatory registration process also will alleviate administrative burdens on USCIS service centers that process H-1B petitions.</p>
<p>USCG</p>	<p>1625- AB60</p>	<p>46 CFR Part 160, subpart 160.076</p>	<p>No previous rulemakings</p>	<p><u>Inflatable Personal Floatation Devices</u></p> <p>Direct Final Rule published 3/30/2011 76 FR 17561</p>	<p>This direct final rule updated Coast Guard regulations related to structural and performance standards for inflatable recreational personal flotation devices. These updates were requested by industry as well as recognized as necessary by Coast Guard personnel.</p>	<p>This rule updated the standards that are incorporated by reference into 46 CFR part 160, subpart 106.076. The previous standards were outdated. The newer standards contain technological and safety developments.</p>

<p>CBP</p>	<p>1651-AA68</p>	<p>19 CFR 123.71–76</p>	<p>NPRM published 12/17/2009 74 FR 66932</p>	<p><u>Land Border Carrier Initiative Program</u></p> <p>Final Rule published 2/8/2011 76 FR 6688</p>	<p>This final rule amended CBP regulations by removing the provisions pertaining to the Land Border Carrier Initiative Program (LBCIP). The LBCIP was established as a voluntary industry partnership program under which participating land and rail commercial carriers would agree to enhance the security of their facilities and conveyances to prevent controlled substances from being smuggled into the U.S.</p>	<p>This rule updated CBP regulations by removing the outdated provisions regarding the LBCIP. CBP has developed a more comprehensive voluntary industry partnership program known as the Customs-Trade Partnership Against Terrorism (C-TPAT) and is focusing its partnership efforts on the further development of C-TPAT. C-TPAT builds upon the best practices of the LBCIP, while providing greater border and supply chain security with expanded benefits to approved participants.</p>
<p>CBP</p>	<p>n/a</p>	<p>ICR 1651-0111</p>	<p>Effective 6/29/2010</p>	<p><u>Electronic Communication: Arrival and Departure Record</u></p>	<p>For air travelers arriving in the United States, CBP replaced the paper version of Form I-94W “Non-Immigrant Visa Waiver Arrival/Departure” with the automated system, Electronic System for Travel Authorization (ESTA).</p>	<p>By utilizing the ESTA submission for air travelers arriving in the United States and thus eliminating the paper version of Form I-94W, CBP reduced the reporting burden for air travelers arriving in the United States by an estimated 1,695,750 hours.</p>

TSA	n/a	ICR 1652-0046, 1652-0003	Effective 12/2010	<u>Administrative Simplification; Secure Flight; Aircraft Operator Security</u>	TSA reduced the burden of U.S. and international aircraft operators by assuming responsibility for checking passengers against government watch lists through TSA's Secure Flight program. The mission of the Secure Flight program is to enhance the security of domestic and international commercial air travel through the use of improved watch list matching provided by TSA officials.	By assuming responsibility for checking passengers against government watch lists through TSA's Secure Flight program, TSA reduced the reporting burden for U.S. and international aircraft operators by an estimated 1,500,000 hours.
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## Appendix B: In-Progress Reviews of Regulations & ICRs

Component	RIN	CFR Cite or OMB Control Number	Previous Stages	Rule	Summary	Reason for Review
USCIS	1615-AB83	8 CFR Parts 1-499	No previous rulemakings	<u>Immigration Benefits Business Transformation: Increment I</u>	Current USCIS immigration benefits span a great number of regulations that rely on paper forms and non-integrated information technology systems. This rule amends the regulations to accommodate USCIS's phased multi-year business transformation initiative to restructure its business processes and related information technology systems.	<ul style="list-style-type: none"> <li>• Improve efficiency by reflecting electronic system developments.</li> <li>• Eliminate the capture and processing of redundant data.</li> <li>• Facilitate the automation of USCIS forms and the potential to reduce the number of USCIS forms.</li> </ul>
USCIS	1615-AB95	8 CFR Parts 103, 212, 214, 220, 245, 248, and 274a	No previous rulemakings	<u>Immigration Benefits Business Transformation: Nonimmigrants; Students and Exchange Visitor Program</u>	This rulemaking primarily focuses on 8 CFR Part 214, which covers the nonimmigrant classes, including the requirements for admission, extension, maintenance of status, and the Student and Exchange Visitor Information System (SEVIS).	<ul style="list-style-type: none"> <li>• Provide the public with a more user-friendly organization of regulatory requirements.</li> <li>• Reduce public confusion.</li> </ul>

<p>USCIS</p>	<p>1615-AB71</p>	<p>ICR 1615-0009</p>	<p>n/a</p>	<p><u>Electronic Communications; Registration Requirement for Petitioners Seeking to File H-1B Petitions</u></p>	<p>USCIS is proposing to require employers seeking to petition H-1B workers subject to numerical limitations to first file electronic registrations with USCIS during a designated registration period. If necessary, registrations will be randomly selected to file H-1B petitions. This registration process will reduce the petitioner’s administrative burdens and associated costs with preparing a complete H-1B petition prior to knowing whether the statutory limit has been reached.</p>	<ul style="list-style-type: none"> <li>• This action will result in an estimated burden reduction of 13,750 hours.</li> </ul>
<p>USCIS</p>	<p>1615-AB76</p>	<p>8 CFR Parts 103, 214, 274a, and 299</p>	<p>Interim Final Rule published 10/27/2009 74 FR 55094</p>	<p><u>Commonwealth of the Northern Mariana Islands Transitional Worker Classification</u></p>	<p>This final rule creates a new, temporary, transitional worker classification for workers in the Commonwealth of the Northern Mariana Islands (CNMI). The transitional worker program is intended to provide for an orderly transition from the CNMI permit system to the U.S. Federal immigration system.</p>	<ul style="list-style-type: none"> <li>• This rule will result in an estimated savings of \$6.8 million over the baseline through 2014.</li> <li>• The savings are attributable to the fact that multiple beneficiaries will now be allowed to be included in a single petition.</li> </ul>

USCG	1625-AA16	46 CFR Subchapter B	<p>Interim Final Rule published 6/26/1997 62 FR 34505</p> <p>NPRM published 11/17/2009 74 FR 59353</p> <p>Supplemental NPRM published 3/23/2010 75 FR 13715</p>	<p><u>Implementation of the Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978 as amended, and Changes to Domestic Endorsements</u></p>	<p>The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978 as amended, sets forth minimum training and demonstrations of proficiency requirements for merchant mariners. It provides a consistent set of training and competencies for merchant mariners operating in U.S. and international waters. The Coast Guard has codified these Convention standards in the U.S. Code of Federal Regulations. The Coast Guard develops these standards with other international parties at the International Maritime Organization of the United Nations. The Coast Guard also develops similar standards of training and proficiency requirements for mariners that work only in U.S. waters.</p>	<ul style="list-style-type: none"> <li>• Update requirements to address gaps in minimum training requirements for seafarers.</li> <li>• Implement amendments by revising current regulations to ensure that the United States complies with their international obligations.</li> <li>• Provide additional flexibility for sea service and training requirements.</li> <li>• Clarify STCW requirements in response to requests for interpretation and guidance.</li> </ul>
USCG	TBD	46 CFR Parts 10, 11, 12 and 15	<p><u>No previous rulemakings</u></p>	<p><u>Elimination of TWIC for Certain Mariner Populations (Implementation of Section 809 of the 2010 Coast Guard Authorization Act)</u></p>	<p>Section 809 of the Coast Guard Authorization Act of 2010 eliminated the requirement that certain mariners must obtain a Transportation Worker Identification Credential (TWIC). The Coast Guard is working on regulatory provisions that would implement section 809. Related to this, the Coast Guard is also considering regulatory changes that would provide an exemption from paying certain fees for a subset of the above mariner population.</p>	<ul style="list-style-type: none"> <li>• Eliminates TWIC requirements for certain mariners.</li> <li>• Eliminates trips to TWIC Enrollment Centers for certain mariners.</li> </ul>

USCG	1625-AB38	33 CFR Chapter 1, Subchapter H	Final Rule published 10/22/2003 68 FR 60448	<u>Update to Maritime Security Regulations</u>	<p>The Coast Guard regulations implementing the Maritime Transportation Security Act of 2002 (MTSA) provide security measures for vessel and port facility operations in U.S. ports. Among other things, these regulations require owners or operators of vessels and port facilities to develop security plans. Since promulgation of the MTSA regulations, the Coast Guard has granted exemptions from MTSA provisions on an ad hoc, individual basis.</p> <p>Through this rule, the Coast Guard would formalize several categories of exemptions, which, in turn, will reduce the burden associated with the current ad hoc waiver process.</p>	<ul style="list-style-type: none"> <li>• Clarify MTSA requirements in response to requests for interpretation and guidance.</li> <li>• These regulatory revisions would provide annual cost savings of \$125,000.</li> </ul>
CBP	1651-AA94	19 CFR Part 162	Final Rule published 02/22/2005 70 FR 8509	<u>Internet Publication of Administrative Seizure/Forfeiture Notices</u>	<p>Current regulations provide for publication of notices of seizure and intent to forfeit seized merchandise in local newspapers for seized merchandise appraised at more than \$5,000, and by posting the notice at the local customhouse for seized merchandise appraised at \$5,000 or less. This regulation would allow for online posting of such information.</p>	<ul style="list-style-type: none"> <li>• This regulatory change would provide an estimated annual savings of \$1 million.</li> </ul>
CBP	1651-AA93	8 CFR 100 and 19 CFR 101	No previous Rulemaking	<u>Closing of White Tail Crossing</u>	<p>CBP is developing a proposal to close the port of entry in Whitetail, Montana. Whitetail is one of the least trafficked ports, and the facility does not have the infrastructure to meet modern operational, safety, and technological demands for ports of entry.</p>	<ul style="list-style-type: none"> <li>• Assess whether facilities have the infrastructure to meet modern operational, safety, and technological demands for ports of</li> </ul>

						<p>entry.</p> <ul style="list-style-type: none"> <li>The net benefit (estimated benefit less estimated cost) of the crossing closure would be about \$8.2 million the first year and \$396,000 each year thereafter.</li> </ul>
CBP	1651-AA73	8 CFR 103.7 (amended) & 8CFR 235.7a (added)	NPRM published 11/19/2009 74 FR 59932	<u>Establishment of Global Entry Program</u>	Current CBP regulations do not include provisions for all of CBP's trusted traveler programs and those that are included are set forth in different provisions and are not comprehensive. For example, the trusted traveler pilot program, Global Entry, is not yet incorporated in the regulations. CBP issued a notice of proposed rulemaking to incorporate Global Entry into the regulations and is working on a final rule.	<ul style="list-style-type: none"> <li>Provide transparency to the public.</li> <li>Make the program a permanent regulatory program.</li> <li>Initiate the process of incorporating comprehensive regulations for CBP trusted traveler programs.</li> <li>Enrollees in this voluntary program could save an average of 7.6 minutes of wait time per trip by using Global Entry kiosks.</li> </ul>
ICE	1653-AA44	8 CFR 214.2 and 214.15	Final Rule published 12/11/02 67 FR 76255	<u>Revisions to SEVIS regulations</u>	The Student and Exchange Visitor Information System (SEVIS) is an electronic filing and adjudication system for schools that seek to enroll foreign nonimmigrant students. SEVIS improves data collection and	<ul style="list-style-type: none"> <li>Remove outdated provisions. (Commenters requested revision to these regulations.)</li> </ul>

					<p>reporting, enhances customer service, facilitates compliance with regulations, and helps ICE better monitor school and exchange programs.</p> <p>ICE is working with the Department of State to implement the deployment of SEVIS II, the next generation of the system.</p>	<ul style="list-style-type: none"> <li>• The estimated total annual burden reduction will be approximately 11,000 hours.</li> <li>• The estimated total annual savings of this rule will be approximately \$220,110.</li> </ul>
TSA	1652-AA35	49 CFR Part 1552 subpart A	Interim Final Rule published 9/20/2004 69 FR 56324	<u>Revisions to the Alien Flight Student Program AFSP regulations</u>	<p>The Alien Flight Student Program (AFSP) rulemaking, among other things, requires a prospective alien flight student to undergo a background check called a “security threat assessment” before each training event. TSA charges each alien flight student a fee intended to cover the costs of the vetting.</p>	<ul style="list-style-type: none"> <li>• Improve the accuracy of vetting fees and equity among fee payers.</li> <li>• Enable the implementation of new technologies to support vetting.</li> <li>• Increase efficiency by enabling existing threat assessment processes to be leveraged.</li> <li>• The estimated total savings, over a five-year period, for alien flight students is \$18,107 at a seven percent discount rate.</li> </ul>

TSA	1652-AA01	49 CFR Part 1511	Interim Final Rule published 2/20/2002 67 FR 7926	<u>Aviation Security Infrastructure Fee (ASIF)</u>	The Aviation Security Infrastructure Fee (ASIF) rule provides that each air carrier pays fees based on what that carrier spent on certain security measures in the calendar year 2000. Under the statute, after fiscal year 2005, TSA may re-evaluate how much each carrier pays, including using market share or other appropriate measure.	<ul style="list-style-type: none"> <li>• Update the fee distribution among air carriers as a result of market share changes since 2000.</li> </ul>
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## Appendix C: Long-Term Retrospective Review Candidates

Component	CFR Cite or OMB Control Number	Rule	Summary	Reason for Consideration
USCIS	8 CFR Parts 103, 105, 204, 205, 210, 212, 214, 245a, 274a, 299, 320, 322, and 341	<u>Requirements for Filing Motions and Administrative Appeals</u>	These regulations cover the requirements for filing motions and administrative appeals. Currently, applicants and petitioners are not required to exhaust administrative remedies before seeking judicial review of an unfavorable decision. Several commenters raised issues relating to the streamlining of procedures before the Administrative Appeals Office (AAO).	<ul style="list-style-type: none"> <li>USCIS will consider these comments in reviewing its existing AAO regulations.</li> </ul>
USCIS	8 CFR Part 208	<u>Procedures for Asylum and Withholding of Removal</u>	Several commenters addressed the current regulations governing asylum covering a range of issues, including, but not limited to, the parameters of the “particular social ground” for asylum and employment authorization eligibility and the “clock.”	<ul style="list-style-type: none"> <li>USCIS will coordinate with ICE and consider these comments when reviewing its asylum regulations to provide clear guidance for applicants.</li> </ul>
USCIS	8 CFR Part 214	<u>Nonimmigrant Classes</u>	Several commenters addressed the current regulations related to temporary workers. The comments spanned the extensive range of nonimmigrant visa categories, including but not limited to, the expansion of optional practical training, the expansion of dual intent to other visa categories, blanket visa category L procedures, and provisions related to visa categories O and P.	<ul style="list-style-type: none"> <li>USCIS will consider these comments when reviewing its temporary worker regulations to provide clear guidance for employers.</li> </ul>

<p>USCIS</p>	<p>8 CFR Part 245</p>	<p><u>Adjustment of Status to that of Person Admitted for Permanent Residence</u></p>	<p>Several commenters requested revisions to the current regulations governing adjustment to permanent resident status covering a range of issues, including, but not limited to, permitting earlier filing of adjustment applications to improve DOS visa number tracking, permitting overseas travel for various categories of nonimmigrants while an adjustment application is pending, and permitting spousal employment authorization for adjustment applicants.</p>	<ul style="list-style-type: none"> <li>• USCIS will consider these comments when reviewing its adjustment provisions to provide clear guidance for applicants.</li> </ul>
<p>USCIS</p>	<p>8 CFR 274a.12</p>	<p><u>Classes of aliens authorized to accept employment</u></p>	<p>Several commenters suggested changes to existing regulations to expand the categories of aliens and spouses eligible for employment authorization.</p>	<ul style="list-style-type: none"> <li>• USCIS will consider these comments when reviewing its employment authorization regulations.</li> </ul>
<p>USCG</p>	<p>33 CFR Parts 26, 161, 164, and 165 (68 FR 60559)</p>	<p><u>Automatic Identification System; Vessel Carriage Requirement (For Vessel Traffic Service areas)</u></p>	<p>Current regulations contain vessel carriage requirements, and technical and performance standards for an automatic identification system (AIS). These regulations promulgated in 2003 implemented the AIS vessel requirements of the Maritime Transportation Security Act of 2002 and the International Maritime Organization requirements adopted under International Convention for the Safety of Life at Sea, 1974, as amended.</p>	<ul style="list-style-type: none"> <li>• The Coast Guard will consider evaluating the effectiveness of the rule in increasing navigation safety, reducing risk of accidents, and enhancing maritime domain awareness.</li> </ul>

<p>USCG</p>	<p>46 CFR Part 4 (70 FR 75954)</p>	<p><u>Marine Casualties and Investigations; Chemical Testing Following Serious Marine Incidents</u></p>	<p>Current regulations require that mariners or their employees involved in a serious marine incident are tested for alcohol use within 2 hours of the occurrence of the incident as required under the Coast Guard Authorization Act of 1998. These regulations also require that most commercial vessels have alcohol testing devices on board, and authorize the use of saliva as an acceptable specimen for alcohol testing.</p>	<ul style="list-style-type: none"> <li>• The Coast Guard will review whether the reporting requirements and on-board testing device requirements have increased enforcement of the Coast Guard drug testing requirements.</li> </ul>
<p>USCG</p>	<p>33 CFR Parts 151 and 153 (70 FR 74668)</p>	<p><u>Reporting Marine Casualties</u></p>	<p>Current Coast Guard regulations governing marine casualty reporting require “significant harm to the environment” as a reportable marine casualty, and by requiring certain foreign flag vessels, such as oil tankers, to report marine casualties that occur in waters subject to U.S. jurisdiction, but beyond U.S. navigable waters, when those casualties involve material damage affecting the seaworthiness or efficiency of the vessel, or significant harm to the environment.</p>	<ul style="list-style-type: none"> <li>• The Coast Guard will consider evaluating whether the data received under the reporting requirements fulfill the purpose of the requirements and whether any modifications to regulations are necessary.</li> </ul>

USCG	33 CFR and 46 CFR	<u>Material Incorporated by Reference in 33 CFR and 46 CFR</u>	Currently, many Coast Guard regulations rely on material incorporated by reference to set technical standards for vessels and equipment regulated by the Coast Guard. The materials incorporated by reference are often consensus standards developed by national and international standards bodies, who continually update their standards. The Coast Guard does not yet have a system to periodically review the materials incorporated by reference into Coast Guard regulations and ensure we have the most updated standard acceptable to the Coast Guard incorporated by reference.	<ul style="list-style-type: none"> <li>• The Coast Guard will consider updating regulations that contain material that has been previously incorporated by reference.</li> </ul>
CBP	8 CFR part 280	<u>International Carrier Bonds</u>	Current regulations have two separate procedures for the assessment and collection of carrier fines depending on whether the violation involves cargo or persons.	<ul style="list-style-type: none"> <li>• CBP will review these regulatory procedures to determine whether they can streamline them.</li> </ul>
FEMA	44 CFR 206.47	<u>Increased Federal Cost Share and Reimbursement for Force Account Labor for Public Assistance Debris Removal</u>	Currently, this rule does not allow for reimbursement of force account labor for debris removal activities. This rule also does not allow for increased cost share when applicant has a debris management plan.	<ul style="list-style-type: none"> <li>• FEMA will consider ways to increase the efficiency of debris removal in a disaster (e.g., by providing an incentive to applicants to develop and adopt a FEMA-approved debris management plan.) FEMA will consider expanding and strengthening these regulations.</li> </ul>
FEMA	44 CFR 201.3	<u>State Standard and Enhanced Mitigation Plan</u>	Currently, this rule requires applicants for hazard mitigation assistance to update the Standard and the Enhanced State Mitigation Plans every 3 years.	<ul style="list-style-type: none"> <li>• FEMA will consider whether it would be more efficient to extend the review period to 5 years for each of the plans as requested by public commenters.</li> </ul>

<p>FEMA</p>	<p>ICRs: 1660-0072, 1660-0073, 1660-0054, 1660-0025, 1660-0114, 1660-0116, 1660-0119, 1660-0120, 1660-0121, 1660-0122, 1660-0123, 1660-0124, 1660-0125</p>	<p><u>Electronic Communications; Grants Management Integrated Environment (GMIE) System</u></p>	<p>FEMA’s grant processes rely on multiple grant management systems and manual processes to perform grant management functions. FEMA is working to improve its grant processes and systems by pursuing the GMIE system initiative. FEMA has identified several grant programs that would be impacted by this initiative by enhancing the accuracy of the agency’s burden on the public, while reducing the burden on small entities.</p>	<ul style="list-style-type: none"> <li>• This action could result in an estimated burden reduction of 2,860,526 hours.</li> <li>• The expected completion date of this initiative is December 2016.</li> <li>• This would consolidate the many different systems and manual processes that are currently being used and allow FEMA to collect grants electronically.</li> </ul>
<p>NPPD</p>	<p>6 CFR Part 27</p>	<p><u>Chemical Facility Anti-terrorism Standards</u></p>	<p>This regulation requires facilities possessing certain chemicals at threshold levels, as specified in Appendix A of the rule, to submit information to help DHS identify chemical facilities that pose potential high levels of security risks and to impose additional information and security requirements on high-risk facilities. Several commenters requested that DHS reconsider various provisions of the regulation, including Appendix A, including but not limited to, provisions applicable to research laboratories and universities, gasoline storage facilities, Liquefied Natural Gas facilities, and mixtures containing chemicals of interest.</p>	<ul style="list-style-type: none"> <li>• NPPD will evaluate these comments as it considers any updates to the current regulation and Appendix A.</li> </ul>