

OFFICE OF PERSONNEL MANAGEMENT

PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES

August 22, 2011

Plan Submitted Pursuant to Executive Order 13563

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

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

Executive Order (E.O.) 13563, Improving Regulation and Regulatory Review, requires every agency to put in place a plan for retrospective review of its existing significant regulations that is tailored to the agency's unique needs and that provides for public participation in that process. OPM's plan reflects its emphasis on outreach to the public and stakeholders, and its well-developed relationships with fellow agencies. OPM endorses the E.O.'s recognition that it is important to maintain a consistent culture of retrospective review and analysis throughout the executive branch. Whenever OPM issues a regulation, it does its best to be fully informed by the public and stakeholders about the likely consequences of the regulation, including its potential benefits and burdens. But the full impact of the regulation can only be ascertained after it takes effect. As described below, OPM's plan is designed (1) to formalize an approach for obtaining regular public input—particularly from the agencies, Federal employees, retirees, and others that we directly serve and regulate—to identify OPM regulations that may be outmoded, ineffective, insufficient, or excessively burdensome, and should therefore be considered for revision; and (2) to institutionalize a regular retrospective review procedure that is independent from its normal regulatory processes.

OPM emphasizes that Executive Order 13563 calls not for a single exercise, but for “periodic review of existing significant regulations.” 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, OPM intends to continue to assess its existing significant regulations in accordance with the requirements of Executive Order 13563. OPM welcomes suggestions about appropriate reforms. If, at any time, federal employees or members of the public identify possible reforms to modify, streamline, expand or repeal existing regulations, OPM intends to give those suggestions careful consideration.

II. Retrospective Review Efforts Currently Underway

Even before EO 13563 was issued on January 18, 2011, OPM had undertaken retrospective review of regulations over the past two years in connection with a number of Presidential initiatives and inter-agency workgroups. Here is a summary of our most significant review projects:

A. Student Programs and Presidential Management Fellows (PMF) program, 5 CFR part 213. In the Fall of 2009, OPM convened an inter-agency work group to examine the way the Federal Government recruits and hires students. The work group obtained input from agencies, current government interns and PMFs, students, academic organizations, and good government groups. It crafted a set of recommendations for the OPM Director. Subsequently, the President issued E.O. 13562 on Recruiting and Hiring Students and Recent Graduates. OPM is revising its regulations to implement the order, as informed by the recommendations of the interagency workgroup. The new regulations will streamline the process for hiring interns and recent grads by creating three clear pathways to Federal service. They will also increase transparency with respect to Federal job opportunities by establishing consistency and predictability across government for internship and recent grad opportunities. These regulations were published in proposed form in the Federal Register on August 5, 2011.

B. Community-Rated Federal Employee Health Benefits Program (FEHB) plans, including provisions of CFR Titles 5 (Administrative Personnel) and 48 (Federal Acquisition Regulation). Following passage of the Affordable Care Act (ACA) and issuance of implementing regulations by HHS, OPM initiated a review of its FEHB rate-setting methodology. The review focused on using a plan’s medical loss ratio (MLR), as defined in the ACA, when setting rates. An MLR-based rate setting approach would replace the current, burdensome rate-setting process for HMOs with a more refined and transparent calculation.

Based on its review, on June 29, 2011, OPM issued an interim final rule with a new rate setting methodology for most community-rated FEHB plans. This new methodology, which will be optional in 2012 and required in 2013 and beyond, is based on a plan’s MLR. This interim final regulation replaces an outdated and unstable rate setting process with a modern and transparent calculation. Under this new methodology, FEHB carriers will be relieved of the regulatory burden of determining two non-FEHB groups to offer for rate comparison. Instead, carriers will simply submit a version of the information used to determine the MLR as required by the ACA. The ACA established MLR as the national standard for rate setting in the commercial insurance market. The OPM interim final rule builds on the regulatory definition of MLR as promulgated by HHS in December 2010. This MLR-based rate setting process will

ensure the Government is receiving a fair market rate for Federal agencies and Federal employees.

C. Domestic Partner Regulations. Pursuant to Presidential memoranda issued on June 17, 2009 (<http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discrim>), and June 2, 2010, (<http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>), OPM has reviewed its regulations and policies that govern pay, leave, and employee benefits to determine what changes are necessary to extend such benefits to the same-sex domestic partners of Federal employees. Where consistent with law, OPM has issued new regulations and policies, or is in the process of issuing new regulations, that extend or would extend various types of leave, allowances, and other benefits that have heretofore been limited to spouses, to employees' same-sex domestic partners. These changes are necessary to modernize these regulations and policies and promote the Federal Government as a 21st century employer on par with the private sector companies with which it must compete for talent. The actions that OPM has taken to date include:

- Issuance of a final regulation to allow Federal employees to use sick leave and other types of leave in connection with the needs of their domestic partners. See <http://www.federalregister.gov/articles/2010/06/14/2010-14252/absence-and-leave-definitions-of-family-member-immediate-relative-and-related-terms>.
- Issuance of a final regulation to allow the same-sex domestic partners of Federal employees to apply for coverage under the Federal long term care insurance program. See <http://www.federalregister.gov/articles/2010/06/01/2010-13015/federal-long-term-care-insurance-program-eligibility-changes>.
- Issuance of a proposed regulation that would add an employee's same-sex domestic partner to the list of individuals presumed to have an insurable interest in the employee, for purposes of providing a retirement annuity. See <http://www.federalregister.gov/articles/2011/03/03/2011-4791/presumption-of-insurable-interest-for-same-sex-domestic-partners>.
- Issuance of a revised policy that allows employees to take up to 24 hours of unpaid leave for (i) school and early childhood educational activities; (ii) routine family medical purposes; and (iii) elderly relatives' health or care needs in connection with the needs of the employee's same-sex domestic partner and the partner's children. See <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=3146>.
- Issuance of a proposed regulation to clarify that the children of same-sex domestic partners fall within the meaning of "child" for purposes of determining eligibility for child care subsidies under 5 CFR § 792.202.
- Issuance of a proposed regulation to clarify that domestic partners and their children qualify as "family members" for purposes of participating in employee assistance programs under 5 CFR § 792.101.

- Issuance of a proposed regulation that would allow agencies to hire non-competitively an employee's same-sex domestic partner upon the employee's return from an overseas assignment, under 5 CFR § 315.608.
- Issuance of a proposed regulation that would provide for an employee's same-sex domestic partner, and any children of the domestic partner, to be considered the employee's "dependents" for purposes of evacuation pay under 5 CFR § 550.402 and the separate allowance for employees stationed on Johnston Island under 5 CFR § 591.402.

D. National Security Sensitive Designation Standards, 5 CFR part 732. OPM has also issued proposed regulations to clarify the standards for designating whether Federal positions are national security sensitive. <http://www.federalregister.gov/articles/2010/12/14/2010-31373/designation-of-national-security-positions>. In crafting its proposed regulations, OPM received input from the Office of the Director of National Intelligence and the Department of Defense, its partners in security clearance reform efforts pursuant to EO 13467 (<http://edocket.access.gpo.gov/2008/pdf/08-1409.pdf>). The purpose of these regulations is to bring greater uniformity and efficiency to the process of determining an individual's eligibility to hold a national security position, thereby promoting reciprocal treatment of background investigations and agency determinations relating to security clearances and eligibility to hold a sensitive position, where appropriate. Providing for reciprocity will relieve agencies and employees of the burden of having to re-determine eligibility each time an individual performs work for a new agency.

III. Additional Rules To Be Reviewed Under OPM's Plan

In connection with crafting its plan for retrospective review of existing regulations, OPM has identified three other rules for review:

A. Recruiting and Selection. 5 CFR part 330. OPM is reviewing its recruitment and selection regulations, which appear in 5 CFR pt. 330. The purpose of this review is to assist agencies to implement and to conform OPM's regulations to the President's May 11, 2010, memorandum on hiring reform (<http://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process>), and to address any additional issues that have arisen in the meantime. An inter-agency task force advised OPM on issues related to recruitment and hiring, as did the Chief Human Capital Officers Council. We have considered that input, as well as additional information we have received from agencies and the public about hiring reform, and are currently working on proposed regulations to assist agencies to implement further the President's hiring reform initiative. These changes will significantly reduce the burden on Federal job-seekers by simplifying the application process and will provide Federal managers with more qualified candidates when making a selection. Moreover, in connection with these changes, we are considering elimination of the Application for Federal Employment Optional Form 612. Because agencies are now required to allow applicants to apply with a resume, there may no longer be any need for this form. Indeed, we estimate that elimination of the form would reduce by 93% the number of burden hours for job seekers, from

33,416,667 to 2,508,333. It would also conserve agency resources because they would no longer have to review the form.

B. Retirement Systems Modernization, 5 CFR part 850. OPM will review its part 850 regulations due to the termination of its Retirement Systems Modernization (RSM) project and an ongoing effort to improve and streamline retirement processing and customer service. As part of a new overall information technology plan now under development by OPM, discrete improvement efforts will focus on the timeliness and accuracy of CSRS and FERS retirement case processing and customer service to employees, former employees, annuitants, and survivors. The provisions of part 850 concerning electronic signatures, electronic record submissions, maintenance of electronic records, etc., will be reviewed and revised as necessary to complement the effort, and specific references to the RSM initiative will be deleted. In addition, OPM will also amend part 850 to account for any additional information and revised guidance issued since part 850 was published.

C. Human Resources Systems and Metrics Reporting, 5 CFR part 250. OPM plans to revise its part 250 regulations to clarify the requirements agencies must fulfill regarding systems and metrics for managing their human resources. We expect to identify ways to streamline the procedures agencies are required to follow, as well as to clarify certain definitions related to strategic human resources management, such as the Human Capital Assessment and Accountability Framework (HCAAF). We also will seek ways to make the Human Capital Management Reports agencies are required to submit less burdensome. Streamlining and improving these reporting requirements will conserve agency resources while still complying with congressional mandates.

IV. Public Access and Participation

A. Plan for Retrospective Analysis. Pursuant to the requirements of E.O. 13563, OPM actively sought public comment and conducted outreach on our preliminary plan before creating a final plan for retrospective analysis of existing rules. OPM published its preliminary plan in the Federal Register on June 2, 2011. In addition, OPM posted the plan on its “Open OPM” website at <http://www.opm.gov/open/>. Members of the public were able to submit comments through the Open OPM website for 30 days, until July 1, 2011. Their comments were viewable by the public (after any personal identifying information was removed).

OPM received a total of three public comments. These comments did not address OPM’s proposal to review the regulations listed for initial review in Section V “Elements of Preliminary Plan.” Instead the comments concerned changing training on commercial procurement purchases, recruitment of Native Americans and Hispanics into the Federal workforce, and the review of regulations supporting potential future executive orders on diversity.

In addition, OPM used its established channels of communication with stakeholders and encouraged them to review the plan and submit comments. OPM’s outreach efforts included sending the plan to the members of the various councils in which OPM participates, including the Chief Human Capital Officers Council, the National Council on Federal Labor-Management Relations, the Interagency Council on Veterans Employment, and the Hispanic Advisory Council on Federal Employment. We provided our preliminary plan to these groups in mid-July and asked for any comments to be submitted by July 27, 2011. The majority of stakeholders declined

to make any comments and those that did send comments were supportive of OPM's preliminary plan. No comment recommended changes to OPM's preliminary plan.

B. Obtaining Public Input Going Forward. In addition to the specific outreach strategy for its plan for retrospective review, OPM has a culture that emphasizes obtaining meaningful input from the public and stakeholders. During the past two years, for example, OPM has aggressively sought public and stakeholder input on many difference initiatives and proposals through public meetings and hearings, advance notices of proposed rulemakings, outreach sessions with interested stakeholders – including Congress, trade associations, advocacy organizations, public interest groups, and academia – and tribal consultation.

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

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

V. Elements of OPM's Final Plan

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

A. Scope. OPM's plan for retrospective review of existing regulations is comprehensive, going beyond the requirements of the executive order E.O. 13563 directing agencies to review "significant regulatory actions." The final plan incorporates the definition of "significant regulatory actions" from section 3(f) of E.O. 12866, which provides that a significant regulatory action is any regulatory action that is likely to result in a rule that may:

- 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;

- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

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

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

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

B. Oversight. OPM's plan calls for high-level oversight from outside the regulating entities within the agency. Thus, OPM's General Counsel will serve as the designated official responsible for the oversight of the regulatory review process. The General Counsel is the third-ranking official at OPM and directly reports to the OPM Director, providing both legal and policy advice. In addition, the Office of General Counsel (OGC) is accustomed to providing independent review of the activities of OPM's other components. Though OGC generally does not draft regulations, it is responsible for reviewing all regulations drafted by the agency's various program components. Indeed, all regulations must be cleared by the General Counsel before they can be proposed. It follows that the General Counsel is well-positioned to perform

the functions, and OPM's existing structure ensures that OGC is already set up as an independent entity that drives a culture of thoughtful, retrospective analysis throughout the agency.

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

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

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

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

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

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

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

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

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

Finally, OPM will seek to ensure that regulations are written and implemented in ways that will lend themselves to experimental evaluation and independent review to assess the effectiveness of regulations. When appropriate and consistent with law, OPM will consider undertaking advance testing of regulatory alternatives, perhaps through pilot projects or demonstration projects, followed by a study of their consequences.

IV. Publishing the Agency's Plan Online

OPM will publish its final plan on its Open OPM website (<http://www.opm.gov/open>) by August 22, 2011. OPM Policy Counsel Mauro Morales will be responsible for posting updates to the plan. He can be reached at (202) 606-1700 or mauro.morales@opm.gov.