

Department of State
Preliminary Plan for Retrospective Analysis of Existing Rules
May 18, 2011

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

Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. The Department of State's plan is designed to create a defined mechanism for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Its review processes are also intended to facilitate the strengthening, complementing, or modernizing rules where necessary or appropriate.

II. Scope of Plan

- a. **There are no sub-agencies within the Department of State for including in this plan.**

- b. **Check all the types of documents covered under this plan:**

- Existing regulations
- Significant guidance documents
- Existing information collections
- Unfinished proposed rules
- Other (Specify _____)

III. Public Access and Participation

- a. The Department of State is responsible for carrying out the nation's foreign policy, representing the United States, promoting U.S. business, protecting American citizens, ensuring U.S. border security, telling America's story to the world, and providing the platform from which all U.S.G. agencies operate abroad. It is essential that we take every opportunity to engage the public as we do this vital work on its behalf. Our era is one in which news from around the world is accessible to everyone on a moment-by-moment basis. Reflecting this new era, the Department has invested heavily in the use of social media, such as Facebook®, Twitter®, blogs, and wikis for internal collaboration and external engagement. We continually must engage the public in our work, which is why the Department's website presents up-to-date information on the issues of the day in foreign affairs and development assistance. Our Open Government website

(<http://www.state.gov/open>) provides a central location where one can follow the Department's efforts on key initiatives including the release of datasets at www.data.gov. The latest information on our Preliminary Plan, along with links to various government and other sites, is hosted at <http://www.state.gov/>.

The Department of State published a notice in the *Federal Register* on March 15, 2011 seeking public comment on developing our Preliminary Plan. You may find the notice located at <http://www.state.gov>, in the "About State" tab, Rules and Information Collection link.

b. Brief summary of public comments to notice seeking input:

We received two comments from the public in response to our initial *Federal Register* notice, from the American Immigration Lawyers Association (AILA) and the Institute for Policy Integrity at New York University School of Law. The AILA comments are described in Section V. c. of this plan. The latter group submitted a generic letter regarding how agencies should do the plans, but did not include specific comments for State.

IV. Current Agency Efforts Already Underway Independent of E.O. 13563

a. Summary of pre-existing agency efforts (independent of E.O. 13563) already underway to conduct retrospective analysis of existing rules:

The Department is responsible for implementing the President's foreign policy. The fundamental activities of diplomacy are based on generation of trust, and the establishment of common dialogue. Most of these activities involve nuance of language in creating a shared understanding. Today, offices in the Department focus on a wide spectrum of issues, including counterterrorism, nuclear arms proliferation, climate change, human rights, institution building, protection of American citizens, issuance of visas to foreigners, and international trade and finance. The complexity of these issues requires extensive collaboration with other U.S. Government agencies at overseas posts and in Washington, as well as with foreign governments, non-governmental organizations, and other partners.

The Department recognizes that a key part of its mission is to engage the American public on the nation's foreign policy. The explosive growth in the Internet and social media tools has enabled greater citizen participation than was possible. As a result, the Department receives ongoing feedback on our regulations, Foreign Affairs Manual, public notices and information collections from the public at-large, DHS and other government agencies and other interested stakeholders. Our Exchange Visitor Program holds public meetings with private sector, academic and governmental program sponsors for providing oversight and compliance feedback.

b. What specific rules, if any, were already under consideration for retrospective analysis?

See the latest publication of the Department's submission to the Unified Agenda of Federal Regulatory and Deregulatory Actions in www.reginfo.gov. The Bureau of Consular Affairs, for example, was already in the process of reviewing Part 71 of 22 C.F.R., Consular Protection Loans. In addition, see Section V. c. below, for rules in the Bureau of Political-Military Affairs that were already under consideration for retrospective analysis. Revisions to the U.S. Munitions List were already in progress.

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

a. How does the agency plan to develop a strong, ongoing culture of retrospective analysis?

The Department's leadership, beginning with Secretary Clinton, is looking forward to the opportunities presented in the E.O. initiative. We all recognize the importance of collaboration, engagement, partnerships, and accountability. The principal focus of this plan is to build on the work currently underway and expand our engagement with all of our stakeholders. We have created a Rules and Information Collection website, linked to the Department's home page. The website provides access to available information and represents an effort to engage the public more dynamically, solicit input, and increase collaboration for an on-going retrospective analysis. The URL for the site is: <http://www.state.gov/m/a/dir/rulemaking/index.htm>.

State's mission also includes making relevant information available to the public. The Bureau of Consular Affairs provides detailed travel information about countries and documentation of U.S. citizens and foreign nationals via the Internet on www.travel.state.gov. The first quantitative assessment of online open government efforts recently found this site to be one of the highest ranking in online transparency. State.gov also scored high in this transparency project, which surveyed more than 36,000 citizens who visited 14 federal sites during the fourth quarter of 2009.

Through our website, we will encourage the public to review and provide us with their comments on the best way to conduct our analysis on an ongoing basis. We will also actively seek views from the public on specific rules or Department-imposed obligations that might be modified or repealed. Within the Department an executive committee was created with responsibility for developing a preliminary plan and for subsequent periodic reviews. All offices responsible for writing rules were requested to nominate a representative who will be an active and responsible regulatory review member. Although our regulatory procedures are dynamic and have constant triggers that promote review and amendment to our rules and other guidance, we will conduct annual reviews, with the first one commencing on the anniversary after the completion of the initial review. In addition, each proposed rule and final rule will be reviewed for meeting the requirements of the E.O.

The Department's goal is to create a systematic method for identifying those significant rules that are obsolete or simply no longer make sense. While this review will focus on the elimination of rules that are no longer warranted, the Department will also consider strengthening, complementing, or modernizing rules where necessary or appropriate including, as relevant, undertaking new rulemaking. For this purpose, the Department has developed a checklist to not only serve as a guide to rule writers, but also to serve as an official record of the systematic review of each significant rule.

b. Prioritization. What factors and processes will the agency use in setting priorities?

The Department of State is the agency with lead responsibility for formulating and carrying out the nation's foreign policy. The Department operates in Washington, D.C., and in nearly 200 countries, with over 285 locations world-wide. State's major program areas include diplomacy, border security, U.S. citizen's services, and foreign assistance. The Department's Mission Statement is to *Advance freedom for the benefit of the American people and the international community by helping to build and sustain a more democratic, secure, and prosperous world composed of well-governed states that respond to the needs of their people, reduce widespread poverty, and act responsibly within the international system.* The Department, being the diplomatic arm of the U.S. government, generates many narrative documents, treaties, and inter-governmental agreements.

The fundamental activities of diplomacy are based on human contact and the establishment of common dialogue to both further ties, as well as resolve conflict in a peaceful manner between nations. This function is not the subject of rulemaking; for this reason, the Department does not publish many rules on a year-to-year basis.

The Department's rules are reviewed on a continuing basis consistent with the principles set forth in Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. The Department will not impose a mandatory schedule for review on the organizations responsible for promulgating rules. Instead, bureaus will establish their own priorities and guidelines, giving priority to significant regulations affected by: comments from the public; other agencies' and internal feedback; changes in legislation; and, where applicable, to simplify language based on the provisions of the Plain Writing Act of 2010 (Public Law 111-274).

c. Initial list of candidate rules for review over the next two years:

Some of the rules listed here were identified during a public comment period, and/or the responsible bureau had identified them for review prior to the development of this plan.

- **Bureau of Political-Military Affairs**

This is a list of regulatory changes that the organization can immediately foresee, but should not be construed as a limitation on the bureau's ability to propose and staff additional changes based upon statutory changes, geo-political developments, new departmental requirements/priorities, or other unforeseen events.

1) Revision of 22 C.F.R. 121, International Traffic in Arms Regulations (ITAR), The United States Munitions List. Each category will be the subject of a separate rule.

- Category I—Firearms, Close Assault Weapons and Combat Shotguns
- Category II—Guns and Armament
- Category III—Ammunition/Ordnance
- Category IV—Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
- Category V—Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents
- Category VI—Vessels of War and Special Naval Equipment.
- Category VII—Tanks and Military Vehicles
- Category VIII—Aircraft and Associated Equipment
- Category IX—Military Training Equipment and Training
- Category X—Protective Personnel Equipment and Shelters
- Category XI—Military Electronics
- Category XII—Fire Control, Range Finder, Optical and Guidance and Control Equipment
- Category XIII—Auxiliary Military Equipment
- Category XIV—Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
- Category XV—Spacecraft Systems and Associated Equipment
- Category XVI—Nuclear Weapons, Design and Testing Related Items
- Category XVII—Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
- Category XVIII—Directed Energy Weapons
- Category XIX—Gas Turbine Engines
- Category XX—Submersible Vessels, Oceanographic and Associated Equipment

2) New licensing exemption for certain replacement parts and incorporated articles (ITAR sections 123.28 and 126.19).

3) New licensing exemption for transfer of defense articles to dual national and third-country national employees (ITAR section 126.18).

- 4) New licensing exemption for the temporary export for personal use of chemical agent protective gear (ITAR section 123.17).
- 5) New electronic submission of registration payments (ITAR parts 120, 122, and 129).
- 6) Clarification of records maintenance requirement (ITAR section 122.5).
- 7) Discontinue submissions of form DSP-53 (ITAR section 123.4).
- 8) Change in requirements for the return of licenses (ITAR section 123.22).
- 9) Revision of agreements procedures (ITAR part 124).
- 10) Update information on sanctioned countries (ITAR section 126.1).
- 11) Clarify and reflect new policy for exports made by or for the U.S. Government (ITAR section 126.4).
- 12) Revise brokering regulations (ITAR part 129).
- 13) Revise definition of “defense service” (ITAR sections 120.9, 120.38, 124.1, and 124.2).
- 14) New regulations implementing the Australia and UK defense cooperation treaties (ITAR parts 120, 123, 124, 126, 127, and 129).
- 15) Establishment of a general program license, which would allow multiple exporters to collaborate with foreign partners on U.S. government programs (ITAR part 123).
- 16) Revise/establish definitions of/for “technology,” “specially designed,” and “public domain” (ITAR part 120).
- 17) Revision of Missile Technology Control Regime annex (ITAR part 121).

The overall effect of the rules listed above will be to simplify the regulatory structure for exporters of defense articles and services. Most importantly, this would be effected by clarifying what is covered by the United States Munitions List (USML). At the moment, almost all USML categories are being reviewed, with the goal of revising them into a “positive” list that describes controlled items using objective criteria, rather than broad, open-ended, subjective, or design intent-based criteria frequently found on the current USML.

Certain licensing exemptions will reduce the burden for exporters by eliminating the requirement of submitting an export license application. Other changes that will

reduce the burden to the public include the electronic payment of registration fees, and, for those licenses decremented electronically through the Automated Export System, the discontinuation of the requirement to send in expired or exhausted licenses.

- **Bureau of Resource Management**

- Repeal Part 8 of 22 C.F.R., **Federal Advisory Committee Act (FACA)** Regulation for the Department of State

Part 8 is 35 years old and out of date. Since it was initially published, the General Services Administration (GSA) published its FACA regulation in 41 C.F.R. Part 102-3. There is no reason for the Department to have a separate regulation in the C.F.R. The Department will repeal its regulation and publish a Foreign Affairs Manual provision that identifies which offices have responsibility for certain FACA functions, and any internal procedures to be used.

- **Bureau of Consular Affairs**

Certain provisions will be reviewed pursuant to a request from the American Immigration Lawyers Association (AILA). The quotes that follow reflect comments from that organization:

- Part 41 of 22 C.F.R.: Section 111(b), **Issuance of Nonimmigrant Visas in the United States**

“As of July 16, 2004, DOS ceased visa reissuance (visa revalidation) for the C, E, H, I, L, O, and P nonimmigrant visa (NIV) categories due to the requirement of biometrics capture for these categories as a result of the Enhanced Border Security and Visa Entry Reform Act (Pub. L. No. 107-173). *See* 69 Fed. Reg. 35121 (June 23, 2004). Visa revalidation greatly enhanced and facilitated international business travel and should be reinstated for the above-referenced visa categories. Biometrics for visa revalidations could be captured by USCIS Application Support Centers.”

- Part 41 of 22 C.F.R.: Section 111(d), **Automatic Extension of Validity at Ports of Entry**

“This provision permits a nonimmigrant with an unexpired I-94 Arrival/Departure Record, who is returning to the United States from a contiguous territory after an absence of not more than 30 days, to be readmitted notwithstanding the fact that the underlying nonimmigrant visa has expired, unless the individual has applied for (and presumably been denied) a nonimmigrant visa while

abroad. This provision should be amended to permit such individuals to reenter the United States for the period of admission remaining on his or her I-94 card.”

- Part 41 of 22 C.F.R.: Section 81, **Fiancé(e) or Spouse of a U.S. Citizen and Derivative Children**

“DOS announced that effective February 1, 2010, it would no longer allow a K-3 applicant to choose whether to proceed with K-3 processing at an NIV consulate or the I-130/immigrant visa (IV) processing at an IV consulate where the National Visa Center (NVC) has received approval notices for both the K-3 and the I-130 petitions. Given the difference in processing times for K-3 NIVs versus IVs at certain consular posts, and the resulting delay in family reunification caused by this recent change, this regulation should be amended to permit the applicant to choose between proceeding with the K-3 or IV application under these circumstances.”

- Part 41 of 22 C.F.R.: Section 103(b)(3), **Filing an Electronic NIV Application—Electronic Signature**

“On April 29, 2008, DOS amended the regulations relating to NIV applications to offer an electronic application procedure on Form DS-160. *See* 73 Fed. Reg. 23067. The supplementary information to the final rule states that while a third party may assist the applicant in preparing the DS-160, the applicant must electronically sign the application him- or herself. This requires the applicant to physically click the “submit” button and does not permit an authorized attorney or representative to do so on the applicant’s behalf. This is extremely burdensome for applicants who may not have a computer, access to a computer, or cannot sufficiently complete the electronic form. This provision should be amended to permit a third party to sign the electronic DS-160 with the express consent of the applicant.”

- Part 41 of 22 C.F.R.: Section 105(a), **NIV Supporting Documents, and §41.121(b): Refusal Procedure**

“22 CFR §41.105(a) states that “[a]ll documents and other evidence presented by the alien, including briefs submitted by attorneys and other representatives, shall be considered by the consular officer.” Though 22 CFR §41.121(b) requires a consular officer to “inform the alien of the ground(s) of ineligibility” when a visa is refused, the information provided in the denial letter is often of a very general nature. The regulations should be amended to require consular officers to provide a detailed statement of ineligibility to demonstrate that all submitted documents were reviewed and considered in accordance with §41.105(a).”

- Part 42 of 22 C.F.R.: Section 65, **IV Supporting Documents**
 “Immigrant visa applicants are required to submit originals of essential documents such as birth certificates, marriage certificates, and police certificates to the NVC. The physical case file, including the original documents, is forwarded to the consulate, but documents can get lost in the file transfer process. This practice should be amended to permit IV applicants to submit good, clear copies of original documents to the NVC and to permit the applicant to bring original documents to the interview for inspection by the consular officer.”
- Part 42 of 22 C.F.R.: Section 21(b), **Immigrant Visas for Surviving Beneficiaries/Spouses of Deceased U.S. Citizens**
 “USCIS regulations promulgated in 2006, 8 CFR §204.2(i)(1)(iv), allow for the automatic conversion of an I-130 petition to an I-360 petition upon the petitioner’s death in the case of a spouse (widow) of a U.S. citizen. Section 568(c) of the FY2010 Appropriations Act, Pub. L. No. 111-83, included provisions permitting widows married less than two years to similarly self-petition, as well as provisions for benefits for other surviving relatives. Under INA §204(l), such individuals are eligible for survivor benefits if they can show a U.S. residence at the time of the petitioner’s death, even where they have proceeded abroad for the sole purpose of consular processing. However, it appears that DOS has yet to issue guidance or regulations on the treatment of surviving beneficiaries, and may in fact be treating widow petitions as automatically revoked under 8 CFR §205.1(a)(3), in cases where the petitioner dies before the beneficiary has immigrated to the United States. We ask that regulations and/or guidance be implemented in this regard.”
- A proposal for the right to counsel at U.S. Embassies and consulates.

d. **Structure and Staffing. High-level agency official responsible for retrospective review.**

Name/Position Title: Patrick F. Kennedy, Under Secretary for Management

Email address: RegulatoryReview@state.gov

e. **How does the agency plan to ensure that agency’s retrospective team and process maintains sufficient independence from the offices responsible for writing and implementing regulations?**

The Department recognizes the importance of independence from the offices responsible for writing and implementing regulations. The Under Secretary for

Management is the lead Department of State official for overall operational implementation of the Executive Order. The retrospective team and process answers to that official, not to the rule writers. With respect to prospective rules, proposed drafts of such rules must be cleared by the Office of the Legal Adviser, the Bureau of Resource Management, and other offices relevant to the regulation's subject matter, which are typically independent of the rule writers. For example, rules affecting consular affairs require clearance by the Assistant Secretary for Consular Affairs and several Deputy Assistant Secretaries all of whom are career field officers, while various additional circumstances may require clearance by the Office of the Inspector General (OIG) and the Office of Management and Budget (OMB). These required clearance steps ensure objective channels of review for rule drafts.

It is possible, but very unlikely, that third parties will perform the analyses.

- f. **Describe agency actions, if any, to strengthen internal review expertise. This could include training staff, regrouping staff, hiring new staff, or other methods.**

A working group was created to enforce the Department's efforts for making the most up-to-date information available online for the public and Department staff, for discussing information about the requirements of the E.O. and for planning the initial and on-going annual reviews. Looking forward, the Department's bureaus will participate in the rule writing process by contributing staff to the retrospective team. This approach will provide a rich retrospective review exchange with the public and will ensure that all aspects of the Department's broad expertise are reflected in the E.O.'s retrospective analysis of existing rules efforts.

- g. **How will the agency plan for retrospective analysis over the next two years, and beyond?**

This plan has been developed collaboratively under the direction of the Under Secretary of Management. The team is composed of bureau representatives currently active in the rule writing and rule review process. Because the Department regulatory procedures are dynamic in nature, there are triggers that promote our on-going review and amendment to our rules and other guidance.

The Regulatory Flexibility Act of 1980 and Executive Order 12866 require that agencies publish semiannually a regulatory flexibility agenda describing the subject area of any recent, pending or expected rule that is likely to have a significant economic impact on a substantial number of small entities (5 U.S.C. § 602). The Department uses the Unified Agenda of Regulatory and Deregulatory Actions (the Agenda) as another way to review existing regulations. The Department's portion of the Agenda describes the regulatory actions that State has recently completed or expects to promulgate in the next year.

As rules are reviewed, Department regulatory offices determine which agencies will be involved based on existing practices for inter-agency review of proposed or revised rules.

h. How will the agency decide what to do with analysis?

As described in section V. b. of this plan, rulemaking in the Department of State is a decentralized function. Department organizations maintain their own schedule for reviewing regulations. The triggers that promote review and amendment of rules may generate from a variety of sources. For example, the Bureau of Administration maintains ongoing, regular reviews of the Department of State Acquisition Regulation (DOSAR) codified in Chapter 6 of 48 C.F.R. Updates to the DOSAR are published at regular intervals in the *Federal Register*, as necessary, and are subject to public comment. Typically, DOSAR changes are generated by requirements from the Federal Acquisition Regulation (FAR). Another example is the Bureau of Consular Affairs (CA), which receives ongoing feedback on its regulations, public notices and information collection from sources such as the American Immigration Lawyers Association (AILA), adoption service providers, adoption accrediting entities, other public and private lawyers, the public at large, the Department of Homeland Security, other government agencies, the court system through litigation, consular officials in the field, and other stakeholders. Certain CA regulations, such as the adoption regulations (Parts 96, 97, 98 and 99 of 22 C.F.R.) and Western Hemisphere Travel Initiative Regulations (22 C.F.R. 53) included not only the required public comment periods, but extensive public hearings and briefings. When the Bureau receives feedback, it reviews the guidance and determines whether or not changes are necessary. Furthermore, CA conducts annual reviews of pertinent Foreign Affairs Manual regulations which can result in revisions to the Code of Federal Regulations.

i. What are the agency's plans for revising rules? How will agencies periodically revisit rules (e.g., through sunset provisions, during regular intervals)?

The Department will review each rule and determine whether or not it should be revised.

j. Describe how the agency will coordinate with other federal agencies that have jurisdiction or similar interests:

As administrators of the International Traffic in Arms Regulations (ITAR) and rules dealing with passport/visa issues, the Department already coordinates with other Federal agencies when it promulgates rules, and will do the same if the retrospective analysis reveals existing rules that must be changed.

k. Will the plan be peer reviewed?

This plan was developed by a team led by the Department's Under Secretary for Management, composed of employees throughout the Department. The public will be given an opportunity to comment on the plan, but it will not be peer-reviewed in the scientific sense.

The Department is reviewing the President's memo from March 2009 on scientific integrity to determine how it will be applicable to the Department's processes. This review will not be completed by the time the EO 13563 preliminary plan is due.

VI. Components of Retrospective Cost-Benefit Analysis

During the initial review process, the Department will assess the potential costs and benefits of its regulatory actions according to OMB Circular A-4, Regulatory Analysis, and best practices. In addition, the Department generally implements and reviews rules based on statutory requirements, recouping the cost of service, and increase in net benefits.

A working group, consisting of Department individuals with expertise in rule writing, will ensure an effective retrospective analysis by taking into consideration the effectiveness of the regulatory scheme and its costs and benefits on the regulated parties. In general, due to the nature of the Department's regulatory actions, the incorporation of experimental design does not apply.

VII. Publishing the Agency's Plan Online

The Department will publish this plan on its Open Government website: <http://www.state.gov/m/a/dir/rulemaking/index.htm> and <http://www.state.gov/open/>.