

# Department of Commerce



## *Plan for Retrospective Analysis of Existing Rules*



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**Department of Commerce**  
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## Department of Commerce Plan for Retrospective Analysis of Existing Rules



### I. Executive Summary

The Department of Commerce submits this plan (the Plan) in response to President Obama's Executive Order 13563, Improving Regulation and Regulatory Review, issued January 18, 2011. In this Executive Order, the President stated:

Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

E.O. 13563, 76 FR 3281 (Jan. 21, 2011), at Section 1(a).

The Executive Order affirmed that the goal of a regulatory system that is efficient, minimally burdensome, constantly improving, based on the best available science, and informed by the open exchange of ideas with stakeholders and the public requires retrospective review and analysis of regulations. Because it is difficult to analyze with total accuracy all of the costs and benefits of regulations before they have been implemented, it is important to conduct such analysis after regulations have been adopted, and after agencies and the public can judge how the regulations have worked in practice. In addition, the Department will also consider how regulations might be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and the measurement of actual results. For example, it may consider the use of experimental or quasi-experimental designs, including randomized controlled trials, when promoting the empirical testing of the effects of rules.

To carry out the call in E.O. 13563 for retrospective review and analysis of regulations throughout the executive branch, the Department of Commerce plan focuses on those Commerce bureaus that have the highest volume of regulatory activity and regulations deemed "significant" – the National Oceanic and Atmospheric Administration (NOAA), the United States Patent and Trademark Office (USPTO), the Bureau of Industry and Security (BIS), and the International Trade Administration (ITA). In addition, the Economic Development Administration (EDA), although not one of the primary regulatory Commerce components, took the initiative of publishing a notice seeking public input as it develops its retrospective review plan.

While the work and mission of these bureaus can vary significantly, each has created a unique plan specific to its own needs to establish a defined method and schedule for identifying certain



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significant rules that may be obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive, and to coordinate reviews required under various statutes. Each bureau's review processes are intended to identify rules that warrant repeal or modification, strengthening, complementing, or modernizing where necessary or appropriate.

The focus of this Plan is on Commerce's "significant regulatory actions," which are defined under section 3(f) of E.O. 12866 as any regulatory action that is likely to result in a rule that may:

1. 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;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Based on their specific regulations and regulatory needs, each bureau has a unique plan to identify and review its significant regulations.

### A. Highlights of the Department of Commerce's Efforts

In accordance with the goals of E.O. 13563, the Commerce Department has already made significant strides towards identifying, simplifying, and updating outdated regulations. Key areas of progress include:

- Implementation of the President's Export Reform Initiative which includes redrafting various highly technical export control regulations
- Comprehensive review of patent regulations in order to streamline the process by which individuals and companies obtain patents in the U.S.
- Plan for the withdrawal of outdated import regulations that are no longer necessary to reduce the regulatory burden on industry

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



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“retrospective analyses, including supporting data, should be released online wherever possible.” Consistent with the commitment to periodic review and to public participation, the Department of Commerce 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.

### NOAA:

For the most part, NOAA’s “significant” regulations fall under the first and fourth categories of “significant regulations” enumerated above. The National Marine Fisheries Service (NMFS) conducts the vast majority of NOAA rulemaking activities, specifically on marine fisheries and protected resources. NOAA also implements rules related to national marine sanctuaries (National Ocean Service) and licensing of civilian remote sensing satellites (National Environmental Satellite, Data, and Information Service). As noted in a March 14, 2011, Federal Register notice soliciting comment on development of NOAA’s review plan, NOAA’s discretion over the content of regulations is limited by law in some instances, as is the case with fishery management plans and regulations developed by Regional Fishery Management Councils under the Magnuson-Stevens Act. Thus, NOAA’s ability to modify, streamline, expand, or repeal regulations unilaterally to carry out the E.O. is similarly constrained. NOAA will coordinate its retrospective review with its reviews required under other statutes including, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), National Marine Sanctuaries Act, Coastal Zone Management Act, Regulatory Flexibility Act, Endangered Species Act, and National Environmental Policy Act to streamline the reviewing process.

### USPTO

Consistent with the definition for “significant regulations” and with the direction of E.O. 13563, USPTO will review all of its existing regulations that were deemed “significant” under any of the criteria above as determined by OMB. For the most part, these regulations concern USPTO’s activities examining patent and trademark applications and issuing patents and trademarks, and are found at 37 CFR Parts 1, 2, and 41.

### BIS

BIS’s review of its regulations began in August 2009, when President Obama directed a broad-based interagency review of the U.S. export control system. This review is entirely consistent with Executive Order 13563 in spirit and substance even though it originated with an earlier Executive Order. The goal of this export control review is to enhance our national security while ensuring that U.S. manufacturers and technology companies remain competitive and innovative.



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With this objective in mind, the review evaluates costs and benefits in light of present day threats and current trends in the economic and technological landscape.

The first change in regulations leading to the broader reform of our export control system was the creation of a new license exception called “Strategic Trade Authorization” (STA), published on June 16, 2011 (75 FR 35276). This license exception removes most license requirements for exports to countries that do not pose a national security concern. At the same time, the new license exception requires explicit authorization before an item shipped pursuant to STA can be reexported outside of this select group of trusted countries. Subsequently, BIS proposed a framework for controlling militarily less significant defense articles, largely generic parts and components, on the Commerce Control List, rather than the United States Munitions List. This proposed rule was published on Friday, July 15, 2011 (76 FR 41958) with a 60-day comment period.

The next step in the reform process requires the export control lists the Departments of State and Commerce administer to be updated, revised, aligned, “tiered,” and made more “positive.” Exporters consult these lists to learn whether a license is required and which agency may issue any required license. “Tiering” the lists requires that, as the lists are being revised, items are identified by which of the three “tiers” the Administration has developed. The revised control lists – which the Administration intends to eventually consolidate into a single list – will make compliance easier for exporters while freeing up resources the government can use to prevent the most dangerous items from being exported to those who would harm the United States.

The new lists will place every item into one of three tiers, and each tier will correspond to a different level of sensitivity:

1. Tier 1 will include the most sensitive items. These are items that provide a critical military or intelligence advantage to the United States and are available almost exclusively from the United States, or are items that are a weapon of mass destruction.
2. Tier 2 will include items that are sensitive, but not as sensitive as those in Tier 1. These are items that provide a substantial military or intelligence advantage to the United States and are available almost exclusively from either the United States or our partners and allies.
3. Tier 3 will include items that are less sensitive than those in Tier 2. These items will be those that provide a significant military or intelligence advantage but are available more broadly.

These new tiers will make it easier for the government to lower an item’s or technology’s control level as its underlying technology ages and becomes less sensitive. Additionally, a new



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technology can efficiently be placed into an appropriate tier commensurate with the technology's sensitivity.

Before the lists can be tiered, however, they must be clear about what they control. As part of this ongoing review, the Commerce Department is taking steps to turn the Commerce Control List to the greatest extent possible into a "positive list." "Positive lists" describe controlled items using objective criteria, such as horsepower, microns and wavelength, or other precise physical descriptions, and a "positive list" does not use open-ended, subjective, or design intent-based criteria. The Commerce Control List generally controls items based on technical specifications, and items that do not have ascertainable parameters are generally not subject to control. Certain entries, however, contain general wording or apply a "specially designed" criterion that is undefined, and BIS is reviewing the Commerce Control List to make it more positive, clear and precise.

Many key aspects of the Export Administration Regulations (EAR) – which subject certain items to licensing – will be revised by the Export Control Reform Initiative. As part of its retrospective analysis of existing rules, BIS will seek to identify and remedy any unnecessary compliance burden caused by rules that are unduly complex, outmoded, inconsistent, or overlapping. While implementation of a license exception for lower-risk transactions and the revision of the Commerce Control List have been the primary focus of the reform initiative to date, additional retrospective regulatory review will extend to the entire EAR, including other license exceptions and documentation requirements. BIS expects export control reform to significantly reduce an exporter's licensing burdens. Further retrospective review that does away with unnecessary complexity will additionally reduce exporters' compliance burdens.

One of the significant objectives of this retrospective review is BIS's desire to make it easier for businesses to participate in controlled trade. This is especially true for those small and medium-sized businesses that may have limited resources to spend on export compliance. It is critical that our export control system clearly identify what and how an item or technology is controlled, and how exporters can ensure items do not end up where they don't belong. Clarity of regulations helps ensure that our export control system works as it was intended, as a key tool in protecting our national security.

To this end, BIS is working to make compliance easier by using new outreach efforts and implementing new tools to ensure export controls work for everyone. Recently, BIS developed a consolidated end-user screening list that makes compliance easier and more cost effective for exporters of all sizes. In the past, exporters and reexporters needed to screen their customers against ten different U.S. Government lists to ensure an export didn't violate the law. If online lists weren't updated in a timely manner, an item might inadvertently be sent to a banned party. Additionally, the burden of compliance may have discouraged some exporters from even checking the lists at all, thereby increasing the chance that controlled items would be sent to



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parties of concern, including terrorist-supporting individuals. This new consolidated electronic screening list comprises almost 24,000 entities, and ensures exporters have easy access to an up-to-date list of sanctioned entities. This consolidated list is cost efficient, easy to use, and will allow exporters to guard against participating in illicit transactions. This list is available for download from BIS's export control reform website at [http://www.bis.doc.gov/export\\_control\\_reform.htm](http://www.bis.doc.gov/export_control_reform.htm)

BIS also proactively reaches out to exporters to educate them about our regulations. The educational programs provide guidance and transparency about compliance to new and experienced exporters alike. By raising awareness, this outreach boosts national security while simultaneously facilitating legitimate trade. In FY2011, BIS will participate in 23 co-sponsored seminars, numerous speaking engagements and industry trade shows, and BIS will provide training seminars for U.S. Government employees. Moreover, each year BIS counselors assist exporters by responding to over 50,000 inquiries from the public. And BIS provides educational materials on the BIS website's online training room. Many of these programs help small and medium-sized companies who are entering export markets for the first time.

Additionally, early in 2011, BIS changed its regulations to allow exporters to submit licensing applications more easily and to check the status of license applications online. This reform eliminated the timely and labor intensive manual processing of over 6,500 annual individual and corporate requests for identification numbers to access the licensing system.

Also in 2011, BIS will partner with other U.S. agencies such as the Department of State's Bureau of Consular Affairs and the Department of Homeland Security to explain to the public some of the more complex aspects of the export control-related regulations. Such topics include the relationship between revised visa certification requirements and "deemed exports", which are releases of controlled technology to foreign nationals in the United States. BIS has conducted approximately a dozen such seminars to date and plans to conduct at least another ten events targeted to reach stakeholders that are new to exporting.

### ITA

ITA will focus its review on the regulatory work of the Import Administration (IA), which administers and enforces several distinct sets of regulations that pertain to the import of merchandise produced in other countries. For example, in addition to Antidumping and Countervailing Duty regulations, IA also oversees the enforcement of regulations that pertain to foreign trade zones and the importation of certain textiles. In addition to determining its significant regulations based on the four criteria listed above, ITA considers the several other factors in determining whether a regulation should be modified, streamlined, expanded or repealed, including:



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- (1) The continued need for the regulation;
- (2) The types of complaints or comments received concerning the regulation from the public;
- (3) The complexity of the regulation;
- (4) The extent to which the regulation overlaps, duplicates or conflicts with other Federal regulations; and
- (5) The length of time since the regulation has been evaluated, or the extent to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

### II. Scope of the Plan

As described above, Commerce's Plan is focused on those bureaus with the greatest regulatory activity. Thus, the Plan encompasses NOAA, USPTO, BIS and ITA, while it does not incorporate other Commerce components, such as the Census Bureau, that conduct little or no regulatory activity.

Types of documents covered under this Plan include:

- Existing regulations
- Significant guidance documents
- Existing information collections
- Unfinished proposed rules

### III. Public Access and Participation

Each Commerce bureau is in the process of incorporating feedback from the public to determine where the bureau should focus its efforts. Some bureaus have already sought out public opinion through notices in the Federal Register specifically related to E.O. 13563, while others have received public input through significant regulatory reform efforts already underway. These efforts include:

#### A. NOAA

NOAA published a Notice in the Federal Register on March 14, 2011 (76 Fed. Reg. 13549).



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<http://edocket.access.gpo.gov/2011/pdf/2011-5681.pdf>.

**B. USPTO**

USPTO published a Notice in the Federal Register on March 22, 2011 (76 Fed. Reg. 15891).

<http://edocket.access.gpo.gov/2011/pdf/2011-6660.pdf>

As described in that notice, USPTO solicited comments both through the regulations.gov website and its own website. USPTO is maintaining a page on its website (at <http://www.uspto.gov/ip/rules/lookback.jsp>) where the public can submit comments and where USPTO is collecting and publishing the comments it has received. USPTO will accept and review comments sent directly to it even after the end of the comment period set forth in its Federal Register notice, and will continue to do so, on an ongoing basis, as part of its implementation plan. Those comments will provide USPTO with input from the intellectual property community and the public in general about both the processes for developing and implementing its plan and suggestions for particular regulations that should be reviewed under the USPTO plan.

**C. BIS**

BIS published a Notice of Inquiry requesting comments on clarifying and streamlining all its regulations in the Federal Register on August 5, 2011 (76 FR 47527). To maximize opportunities for public feedback, the Notice has a 180-day comment period. BIS is already receiving significant public feedback on its efforts to implement the President's export reform initiative, both through notices for comment on proposed rules and through various town-hall style meetings held with stakeholders. BIS continues to conduct various seminars, training opportunities, and outreach activities across the country. Schedules and registration for these events are available on the BIS website. Furthermore, the Bureau has employed other technologies to engage and inform the public, including video conferencing and tele-presence at exporter symposia. During a recent comment period for an Advance Notice of Proposed Rulemaking relating to export control reform (75 FR 76664), BIS officials held weekly teleconferences with the public to answer questions (see [http://www.bis.doc.gov/export\\_control\\_reform.htm](http://www.bis.doc.gov/export_control_reform.htm) for information on the teleconferences and <http://efoia.bis.doc.gov> for public comments). BIS plans to hold additional teleconferences to discuss its proposed rule regarding transfer of certain items from the U.S. Munitions List to the Commerce Control List.

**D. NOTE:**

Although not one of the primary regulatory components of the Commerce Department, the Economic Development Administration (EDA) is currently in the process of comprehensively



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reviewing and updating its regulations. Economic development practice is constantly changing and EDA's regulations should be nimble enough to face today's challenges and anticipate the future, while protecting the Federal interest and meeting all Federal requirements. EDA seeks to update the agency's regulations to remove any barriers to advancing the agency's economic development mission and anticipates revising or removing regulations that are outmoded or redundant.

Via a Federal Register notice published February 1, 2011, EDA took the initiative to seek public comment on the agency's regulations as a whole. EDA's notice (76 FR 5501, February 1, 2011) seeking public comment can be found on the Federal Register's website at <http://www.gpo.gov/fdsys/pkg/FR-2011-02-01/pdf/2011-1937.pdf>

EDA subsequently extended the comment deadline to April 11, 2011 (76 FR 12616).

Currently, EDA is analyzing the 170 public comments received during the comment period and approximately 55 internal staff suggestions received and revising the regulations (in the form of a notice of proposed rulemaking (NPRM)) to address the comments. EDA anticipates publishing the NPRM sometime in the next three months with a 60-day comment period.

After comments on the NPRM are received, EDA expects to address such comments and issue a Final Rule. EDA's Offices of External Affairs and Chief Counsel are working closely in this process to maximize public engagement.

EDA anticipates that this drafting process will result in updated regulations that reflect 21<sup>st</sup> Century economic development practice and help foster innovative projects that will create and retain jobs throughout the Nation.

### E. Summary of Comments Received

#### NOAA

NOAA received 33 comments in response to the agency's notice. Many of these comments provided specific recommendations with respect to the development of NOAA's retrospective review plan, including, but not limited to:

- the review process should be focused on the underlying intent of the Executive Order and should not be construed to require the Regional Fishery Management Councils established under the Magnuson-Stevens Act or the agency to revisit basic policy or allocation decisions
- the agency should appoint a review team of personnel separate from the authors of the initial rule



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- retrospective review should be transparent and actively seek public participation
- retrospective analysis should include a thorough and balanced review of a rule's impacts, such as costs and benefits, distributional consequences, and other empirical effects
- the agency should adopt clear and publicly available guidelines for selecting rules to review
- the criteria for prioritizing regulations for review should include: (1) number of affected entities; (2) costs, benefits and the cost/benefit ratio; (3) level of risk the regulation addresses; (4) availability of new data or information; (5) existence of duplicative regulations; (6) significant changes in technology, cost, or best practices; and (7) impact of other/newer statutes or regulations
- NOAA should better integrate the National Environmental Policy Act and Magnuson-Stevens Act processes
- enforcement should be considered a key component in reviewing NOAA regulations

NOAA's National Marine Fisheries Service (NMFS) and the Regional Fishery Management Councils established under the Magnuson-Stevens Act have ongoing engagement with constituents and other members of the public on fishery management actions. NMFS and the Councils receive continual feedback on concerns regarding regulations, guidance documents, information collections, and other agency activities. Since publication of the notice, NMFS has used outreach and communication opportunities, as they have arisen, to alert members of the public to the notice and to encourage people to provide feedback.

### USPTO

USPTO received eleven comments from the public in response to its first Federal Register notice seeking comments on its plan. Those comments provided a number of suggestions for USPTO as it prepared its portion of the preliminary plan, including these suggestions:

- That patent infringement and validity analysis would be made easier if patent claims were allowed to be comprised of multiple sentences written in plain English;
- That USPTO gather feedback on its plan directly from patent lawyers and patent firms, including through public meetings with the patent bar, roundtables, written surveys, and directly requesting comment from members of the intellectual property community;



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- That USPTO improve access to information and comments on USPTO’s website and generally explore IT solutions to provide USPTO the benefit of feedback from a broad sampling of practitioners, including improving the site index and considering development of a mobile form of the website for mobile devices;
- That USPTO appoint an individual tasked with ensuring USPTO compliance with regulatory principles and administrative rules and procedures;
- That USPTO establish a system whereby its customers could seek to contest USPTO actions and enforce USPTO compliance with regulatory principles;
- That USPTO foster public participation in its regulatory process through making information public early and in such a fashion as to encourage dialogue among interested parties;
- That for its retrospective review, USPTO focus on areas that have been the subject of complaints by applicants and counsel;
- That alternative regulatory reform opportunities should be ranked in terms of marginal net social benefit, and that USPTO should not rank alternatives merely in accordance with its own potential cost savings;
- That USPTO designate by default every proposed regulation as economically significant within the meaning of E.O. 12866, and rescind that designation only on a showing that the proposed regulation is not economically significant;
- That USPTO establish a social media portal or online discussion forum to foster discussion, development of ideas, and the sharing of information relevant to the regulatory process, and utilize and interface with other forms of social media to disseminate information to a broad audience;;
- That USPTO use the Paperwork Reduction Act to inform regulatory decision-making and to help expedite the analytic process and the regulatory development timeline;
- That USPTO consult its own personnel about inefficiencies or problems in regulations that could be corrected;
- That USPTO establish an open period for the public to provide comment on any USPTO rule or guidance document, and provide 60 to 90 day comment periods on notices in the Federal Register;



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- That USPTO seek public input early in the regulatory process, including input from practitioners as it is undertaking the drafting of new regulations, prior to publication of notices in the Federal Register;
- That USPTO separate its promulgated guidelines (such as its Manual of Patent Examining Procedure) into internal guidelines for examiners and external rules for patent applicants in order to make such documents more efficient and more streamlined for their intended audiences;
- That USPTO seek to reduce the burden on patent and trademark applicants by eliminating requirements for them to provide information to USPTO that is already available elsewhere;
- That USPTO give high priority to pendency issues in considering regulatory reform, and apply its resources in revising or developing new rules to those that will contribute most to a decrease in pendency, for example, reviewing rules concerning after-final practice and reexamination;
- That USPTO seek to improve the extent and quality of its transparency and openness in a variety of ways, including in how it addresses public comments and in its other processes and with its data concerning applications;
- That USPTO's Public Advisory Committees include representatives of all stakeholders and that they always include practitioners who actively prosecute applications before USPTO; and
- That USPTO conduct review of regulations in areas where there are a disproportionate number of applicant or USPTO procedural mistakes, which may be an indicator the regulations need improvement.

USPTO considered all the comments it received as it developed its preliminary plan. USPTO will continue to review and consider the public comments it receives as USPTO proceeds both with finalizing and with implementing its plan, as it undertakes review of its significant regulations.

### ITA

As required by the Administrative Procedure Act provisions of 5 U.S.C. 553, ITA provides the public the opportunity to submit written comments for consideration by the bureau in the course of its regulatory rulemaking and review process. As required by Public Law No. 107-347, ITA provides for submission of comments by electronic means and makes available online the comments and other materials included in the rulemaking docket under 5 U.S.C. 553 (c). ITA's



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rulemaking process provides for a 60 day comment period as established by E.O. 12866. As part of the rulemaking and review process, ITA may hold public hearings if it is determined that to do so would benefit the process or if otherwise required by statute or bureau or agency policy. Industry Trade Advisory Committees (ITACs) also provide a mechanism by which industry sector representation can provide input to the bureau.

Of the five sets of regulations which ITA has preliminarily determined it will review pursuant to this Plan, a review of each will commence depending upon established criteria and deadlines described below. Once a review for each regulation has commenced, ITA will publish a notice in the Federal Register inviting comment on the regulatory provisions which the public believes ITA should consider modifying, amending, or repealing. Written public comments will be made available online, and ITA intends to consider and address those comments upon the completion of each review.

### EDA

EDA received approximately 170 comments from 70 commenter's, ranging from policy considerations on drafting a definition of "Regional Innovation Clusters" to ways in which EDA's property regulations can better provide flexibility for worthy projects while protecting the Federal interest in grant-improved property. Most comments EDA received centered on the agency's economic development planning and revolving loan fund (RLF) programs. In addition, EDA undertook a formal process to solicit regulatory comments from EDA staff, and received many innovative ideas through that effort. EDA is currently in the process of analyzing the comments and incorporating them into a proposed set of revised regulations.

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

### A. Summary of each bureaus' pre-existing efforts

Each bureau has, to some degree, already undertaken efforts to review its rules, consistent with the goals of E.O. 13563. These efforts include:

### NOAA

The vast majority of NOAA's significant regulations involve marine fishery and protected resources issues. These regulations are subject to change frequently as a result of new information and also pursuant to statutory requirements.

NOAA is currently undertaking the following actions to review its rulemaking, in many cases to streamline and reduce requirements:



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- Under § 610 of the Regulatory Flexibility Act, NOAA, conducts ongoing reviews of rules that were identified as having a significant economic impact on a substantial number of small entities. “Significant” under this Act is defined differently than under Executive Order 12866. Most recently, NOAA’s National Marine Fisheries Service (NMFS) completed a review of 36 rules from 2001-02. *See* 75 FR 69633 (Nov. 15, 2010). No regulatory changes were made as a result of this review. As a general matter, because the majority of entities that NMFS regulates are considered “small entities” for purposes of the Act, an important aspect of the fishery management process is considering potential impacts to such entities. NMFS has specific guidelines on addressing such impacts: Guidelines for Economic Analysis of Fishery Management, Office of Sustainable Fisheries, National Marine Fisheries Service (2007), *available at* <http://www.nmfs.noaa.gov/sfa/RFA%20Guidelines.PDF>.
- In 2007, new requirements for annual catch limits and preventing overfishing went into effect in the Magnuson-Stevens Act. 16 U.S.C. § 1853(a)(15). As a result, NMFS and the Regional Fishery Management Councils have engaged in a comprehensive review of existing fishery management plans and amendments. Through this review, the Councils have undertaken substantial revisions to the existing fishery management plans, addressing inefficiencies in past processes as well as new statutory requirements. The annual catch limit requirement is effective in 2010 for fisheries experiencing overfishing and 2011 for other fisheries. In addition, in August 2010, NMFS conducted an “enforcement summit,” a national, professionally-facilitated conference with stakeholders at which issues concerning fishery management regulations were a major topic.
- Under the Magnuson-Stevens Act, NMFS is required to review at routine intervals that may not exceed two years any fishery management plans, plan amendments, or regulations for fisheries that are experiencing overfishing or in need of rebuilding. *Id.* § U.S.C. 1854(e)(7). For many fisheries, revisions to plans and regulations occur with even greater frequency, as National Standard 2 of the Magnuson-Stevens Act requires that conservation and management measures be based on the best scientific information available. *Id.* § 1851(a)(2).
- The Magnuson-Stevens Act also requires that all Limited Access Privilege Programs provide provisions for the regular monitoring and review by the Regional Fishery Management Councils and the Secretary of the operations of the program, and any necessary modification of the program to meet those goals, with a formal and detailed review 5 years after the implementation of the program and at least every seven years thereafter. *Id.* § 1853a(c)(1)(G).



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- NMFS is required by the Marine Mammal Protection Act, 16 U.S.C. § 1387(c), to publish a list of commercial fisheries based on whether they have frequent, occasional, or a remote likelihood or no known incidental mortality and serious injury of marine mammals. The Act further requires NOAA to annually reexamine the classification of commercial fisheries and other determinations on this list of fisheries and publish any necessary changes in the Federal Register. Each year, NOAA publishes an annual rule describing changes to the list of fisheries based on the best available current scientific information, including the reclassification of fisheries and additions or deletions of marine mammal stocks to the list of stocks killed or injured incidental to certain commercial fishing operations.
- Under the Endangered Species Act (ESA), NMFS publishes an annual determination of commercial and recreational, federal and state, fisheries that are required to carry observers. Fisheries remain on an annual determination for 5 years; at the end of 5 years a fishery listed is no longer requested to carry observers pursuant to the ESA unless NOAA re-proposes that fishery. Each year NOAA evaluates whether to include additional fisheries on the annual determination.
- NMFS and the Fish and Wildlife Service jointly administer regulations for implementing the ESA listing process, including designation of critical habitat, and the interagency consultation process. The agencies are considering the following changes to the joint ESA regulations that are expected to improve efficiency and effectiveness in the implementation of the statute:
  - Minimize requirements for written descriptions of critical habitat boundaries in favor of map- and internet-based descriptions. Map- and internet-based descriptions are clearer and more accessible methods of showing critical habitat boundaries. Additionally, reducing written boundary description requirements will save taxpayer money.
  - Clarify, expedite, and improve procedures for the development and approval of conservation agreements with landowners including habitat conservation plans.
  - Expand opportunities for the states to engage more often and more effectively in the implementation of the ESA's various provisions, especially those pertaining to the listing of species.
  - With input from the regulated, conservation, and other stakeholder communities, review and revise the entire process for designating critical habitat to design a more efficient, defensible, and consistent process.



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- Clarify the definition of the phrase “destruction or adverse modification” of critical habitat, which is used to determine what actions can and cannot be conducted in critical habitat.
- Clarify the scope and content of the incidental take statement, particularly with regard to programmatic actions or other actions where direct measurement is difficult. An incidental take statement specifies the impact of an incidental taking of an endangered or threatened species and provides reasonable and prudent measures that are necessary to minimize those impacts. Greater flexibility in the quantification of anticipated incidental taking could reduce the burden of developing and implementing biological opinions without any loss of conservation benefits.
- NOAA, FWS and the Environmental Protection Agency (EPA) formed an interagency workgroup of senior policy leaders to craft a multi-faceted strategy to address the challenge of the conservation of endangered species and the administration of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). One major element of this effort is to address core scientific issues underlying the effective integration of FIFRA and ESA responsibilities.
- NOAA’s Office of National Marine Sanctuaries (ONMS) is required by the National Marine Sanctuaries Act, 16 U.S.C. § 1434(e), periodically to review sanctuary management plans to ensure that sanctuary management continues to best conserve, protect, and enhance the nationally significant living and cultural resources at each site. Such reviews provide sanctuary management with ongoing opportunities to review existing regulations, amend existing regulations (as deemed necessary) and generally outline future regulatory goals in the management plans. Management plan reviews have a strong community engagement component, which includes public scoping, public involvement of the sanctuary advisory council, and public review of the draft management plan once it is released. Relevant federal, state, local, and tribal governments, as well as interested parties, are strongly encouraged to participate at various stages of the management plan review. In addition, comments and other materials are available throughout the management plan review on relevant websites (the individual sanctuary website, as well as regulations.gov when rulemaking is involved). Because the process involves so much participation from multiple parties, ONMS has rarely been able to conduct these extensive reviews at the statutorily allotted 5 year intervals. ONMS has recommended a more realistic time-frame.
- ONMS is also preparing a regulatory review and update of the regulations, to remove inconsistencies and redundancies. ONMS has periodically performed similar reviews, however, this review would not only make technical revisions, but would



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also reorganize large sections of the regulations to streamline them into a more coherent form and make them internally consistent.

- NOAA’s Office of Ocean and Coastal Resource Management (OCRM), periodically reviews and approves State coastal management programs (CMPs) pursuant to federal requirements contained in the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1455(e). The CZMA establishes a partnership between the State and Federal government for management of the coast. State CMPs are developed and implemented with enforceable policies to meet national objectives. The Federal government provides funds to implement these State CMPs and requires Federal agencies to act consistently with federally approved State CMPs. Because state law is not static and is often subject to change, the State CMPs are likewise subject to change. OCRM is conducting an ongoing review of its program change regulations, 15 CFR Part 923, Subpart H, and its associated guidance to clarify any ambiguities and to provide a more administratively efficient submission and review process. *See* 73 FR 29093 (May 20, 2008).
- NOAA’s Office of Commercial Remote Sensing Regulatory Affairs (CRSRA) periodically reviews and updates, as appropriate, regulations at 15 CFR Part 960 (Licensing of Private Land Remote-Sensing Space Systems) implementing the licensing and compliance provisions contained in the Land Remote Sensing Policy Act, 15 U.S.C. § 60121 et seq., to ensure that they facilitate the growth and international competitiveness of the U.S. commercial remote sensing industry while preserving U.S. national security and international obligations.

In addition to these specific rules that NOAA is already reviewing, NOAA has also taken the following specific actions to reduce burdens on regulated entities:

- NMFS is currently working with the Regional Fishery Management Councils and the NOAA Office of the Chief Information Officer to explore how to improve web-based delivery of information on fishery management regulations. As a jumping off point for this project, NOAA’s Chief Information Officer has developed Content Management templates that are currently being tested.
- NMFS has a Fisheries Information Systems national work group that is developing a National Permit System, under which fishermen would have a “one-stop shop” for federal fisheries permits.
- In the last 3 years, NMFS has undertaken at least 11 rulemakings, which resulted in simplification of overly complex regulations, or reductions in regulatory burdens. For example, NMFS rulemakings improved consistency between federal and state



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recordkeeping and reporting requirements, facilitated web-based transfers of fishing quotas by eliminating the requirement for notarized signatures, eliminated a requirement that fishing co-operatives submit annual reports, and implemented emergency provisions to increase catch limits based on new scientific information. See attached list of revised regulations.

- In 2003, NOAA and the Fish and Wildlife Service promulgated joint regulations to provide an alternative interagency consultation process for the U.S. Forest Service, the Bureau of Land Management, the National Park Service, the Bureau of Indian Affairs and the U.S. Fish and Wildlife Service to provide a streamlined consultation procedure for projects implemented pursuant to the National Fire Plan. That process allowed the agencies to move forward with projects they determined were not likely to adversely affect listed species without receiving concurrence from NMFS or FWS. As part of the streamlined procedure, NMFS and FWS regularly review the projects implemented through this process.

### USPTO

USPTO periodically reviews and revises its significant regulations over time, in response to changing legal and factual issues, its own analysis of its regulations, and public comment, and in order to improve the regulations and to produce better results for the public and USPTO. For example, USPTO has revised its regulations setting the various fees associated with patent filings five times over the last 10 years, to make sure these fees accurately reflect the services the agency provides and the cost of such services, and to make sure the fees accommodate differing needs of small businesses compared to large entities. As described in more detail below, USPTO anticipates undertaking extensive review and revision of its regulations in connection with the Leahy-Smith America Invents Act, which recently passed the Senate and the House, and which, if enacted, would represent the most significant revision of patent law in decades.

In 1997, USPTO enacted a major overhaul of the patent regulations set forth in Title 37 of the Code of Federal Regulations, in order to streamline and simplify the process for submitting patent applications and for issuing patents. 62 FR 53131 (Oct. 10, 1997). The purpose of these revisions was to reduce the regulatory burden on the public by simplifying the requirements of the rules, rearranging portions of the rules for better context, and eliminating unnecessary rules or portions of rules. The changes involved: (1) simplification of procedures for filing continuation and divisional applications, establishing lack of deceptive intent in reissues, petition practice, and in the filing of papers correcting improperly requested small entity status; (2) elimination of unnecessary requirements in some rules; (3) removal of rules and portions thereof that represented instructions as to the internal management of the Office more appropriate for inclusion in the Manual of Patent Examining Procedure; (4) rearrangement of portions of rules to



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improve their context; and (5) clarification of rules to aid in understanding of the requirements that they set forth.

Currently, the majority of compliance requirements for patent applicants are set forth at Title 35 of the United States Code. USPTO publishes guidelines that serve to aid applicants in their compliance with these statutory requirements, and solicits comments from the public on those guidelines. 75 FR 53643 (Sep. 1, 2010); 76 FR 71672 (Feb. 9, 2011). In addition, USPTO has worked in conjunction with the Administration and has provided technical assistance to members of Congress and their staff concerning the Leahy-Smith America Invents Act that recently passed the Senate and the House. USPTO believes this patent reform legislation, if enacted, will result in significant improvements to the patent system, better results both for the public and USPTO, and will promote economic growth and job creation. Among other features, the Act, if enacted, will provide new discounts on fees for smaller entities that qualify under a newly created “micro-entity” status. USPTO anticipates that this should further reduce barriers and aid small businesses and individuals in seeking patents.

USPTO has also undertaken two recent efforts to allow applicants greater control over the timing of patent examinations, and to allow USPTO to deploy its resources to better meet the needs of innovators. The American patent system is a significant driver of technological progress, economic growth and job creation, and USPTO’s efforts to improve its regulations to best serve the needs of innovators are designed to contribute to this growth. In 2009, USPTO initiated a Green Technology Pilot Program under which an applicant may have a patent application advanced out of turn (accorded special status) if the application pertains to green technologies (*e.g.*, applications pertaining to environmental quality, energy conservation, development of renewable energy resources, or greenhouse gas emission reduction). 74 FR 64666 (Dec. 8, 2009). USPTO implemented this program to allow inventors more control of the timing of their green technology applications, in order to realize significant savings in pendency, to help green innovations reach market more quickly, and to aid in the development of business and jobs in those important technology areas. In 2010, USPTO announced an initiative to allow applicants to choose one of three “tracks” for examination – an expedited track, a track consistent with current examination procedure, or a delayed track. 75 FR 31763 (Jun. 4, 2010); 76 FR 18399 (Apr. 4, 2011). The goal of this initiative was to allow applicants flexibility in choosing the examination schedule that they need and to reduce overall pendency of patent applications by increasing resources applied to the expedited track. Prioritized examination is also addressed in pending patent reform legislation.

USPTO recognizes that the intellectual property community and the public in general have useful information and opinions on how USPTO regulations can promote innovation and competition in the best and most efficient ways. USPTO has a long tradition of soliciting and considering input from the intellectual property community and the public in general on regulatory issues. In 2005, pursuant to its 21st Century Strategic Plan, USPTO sought public



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comment on a number of issues to help guide the scope and content of a study of changes that would be needed to implement a Patent Cooperation Treaty style “Unity of Invention” standard in the United States. 70 FR 32761 (Jun. 6, 2005). USPTO is currently working with the Public Patent Advisory Committee and stakeholders to consider changes that would improve the regulations concerning restriction practice and improve the quality and consistency of restriction requirements. 75 FR 33584 (Jun. 14, 2010). USPTO continues this tradition of outreach to the public with its review efforts in connection with EO 13563.

USPTO anticipates that its regulatory review under this plan should result in reduced burdens on applicants, where regulations can be simplified and clarified to make it easier for applicants to understand and comply with the regulations, and reduced costs for applicants where processes can be simplified. USPTO also anticipates that its regulatory review should result in improved and more cost-efficient operations at USPTO, with solicitation of input from employees on how regulations can be revised in order to improve and make easier their work that contributes to USPTO fulfilling its mission to promote innovation.

### BIS

Since August 2009, when the President directed a broad-based interagency review of the U.S. export control system, BIS has been heavily focused on a type of retrospective regulatory review of its export regulations. The President directed the interagency review with the goal of strengthening national security and the competitiveness of key U.S. manufacturing and technology sectors by focusing on current threats and adapting to the changing economic and technological landscape. The review determined that the current export control system is overly complicated, contains too many redundancies, and, in trying to protect too much, diminishes our ability to focus our efforts on the most critical national security priorities. As a result, the Administration has begun the Export Control Reform Initiative, which will fundamentally reform the U.S. export control system.

The Export Control Reform Initiative is designed to enhance U.S. national security and strengthen the United States’ ability to counter threats such as the proliferation of weapons of mass destruction. The Administration determined that fundamental reform is needed in each of the export control system’s four component areas with transformation to a single control list, a single licensing agency, a single information technology system, and a single primary enforcement coordination agency.

The Administration is implementing the reform in three phases. The first two phases involve short-term and medium-term adjustments to the current export control system, with a focus on establishing harmonized control lists and processes among the Departments of Commerce, State, and the Treasury to the extent practicable in order to build toward the third phase of the single control list, licensing agency, information technology system, and enforcement coordination



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agency. Under this approach, new criteria for determining what items need to be controlled and a common set of policies for determining when an export license is required will be implemented. The control list criteria will be based on transparent rules, which will reduce the uncertainty faced by our allies, U.S. industry, and its foreign partners, and will allow the government to erect higher walls around the most sensitive items in order to enhance national security.

A core part of Phase II of the plan to bring about the national security objectives described above is to transfer jurisdiction over less significant defense articles, principally generic parts and components, that are controlled by the regulations administered by the State Department to the more flexible regulations administered by the Commerce Department. This plan will significantly reduce the licensing and other collateral burdens on exporters and the government while at the same time harmonizing the system to allow for the eventual creation of a single list of controlled items administered by a single licensing agency.

### B. Specific rules already under consideration for retrospective analysis at the bureaus

Pursuant to E.O. 13563 and the initiatives referenced above, the bureaus are undertaking the following specific regulatory reviews:

#### NOAA

- See attached 75 FR 69633 (listing 36 rules under review per the Regulatory Flexibility Act)
- See attached list of fishery management plans recently amended, or in the process of being amended.
- The following national marine sanctuaries are currently in ongoing management plan review, or are in the process of undergoing management plan review:
  1. Flower Garden Banks
  2. Olympic Coast
  3. Monitor
  4. Fagatele Bay
  5. Hawaiian Islands Humpback Whale



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### BIS

On September 8, 2010, BIS published a notice requesting comments on the effects of foreign policy-based export controls (75 FR 54540).

On December 9, 2010, BIS issued a proposed rule (75 FR 76653) describing the proposed new License Exception Strategic Trade Authorization (STA) that is an initial step in the Export Control Reform Initiative. License Exception STA, published in final form on June 16, 2011 (76 FR 35276), authorized, with conditions, the export, reexport and transfer (in-country) of specified items to destinations that pose relatively low risk of unauthorized uses. To safeguard against reexports to destinations that are not authorized under License Exception STA, it imposed notification and consignee statement requirements on these transactions. BIS received a substantial number of public comments on this rule and the final rule made changes based on those comments.

Also on December 9, BIS issued an Advance Notice of Proposed Rulemaking (75 FR 76664) soliciting public comments on how the descriptions of items on the Commerce Control List (CCL) could be clarified and made more “positive” in the sense of using objective parameters rather than subjective criteria to determine the items’ classification, which in turn determines license requirements. This notice also sought public comments on “tiering” items in a manner consistent with the control criteria the Administration has developed as part of the reform effort: the degree to which an item provides the United States with a critical, substantial, or significant military or intelligence advantage; and the availability of that item outside certain groups of countries (see <http://efoia.bis.doc.gov> for public comments).

On July 15, 2011, BIS issued a proposed rule (76 FR 41958) that will create a framework for controlling militarily less significant defense articles, largely generic parts and components, on the CCL rather than the United States Munitions List.

On October 6, 2010, BIS issued a notice of inquiry regarding small and medium enterprises’ understanding of and compliance with the EAR (75 FR 61706). BIS invited comment on the principal challenges faced by small and medium-sized enterprises in their compliance efforts; the value to them of current BIS outreach efforts; and additional ways to help improve or expand their awareness of, ability to understand and capacity to comply with the EAR. BIS continues to explore ways to facilitate legitimate trade by small and medium-sized enterprises.

The regulations regarding reporting of offsets agreements were revised December 23, 2009 (74 FR 68136). A proposed rule revising the Defense Priorities and Allocations System Regulations, published June 7, 2010 (75 FR 32122), is still pending publication of a final rule. The proposed rule would reorganize and clarify existing standards and procedures by which BIS may require that certain contracts or orders that promote the national defense be given priority over other



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contracts or orders. The rule would also set new standards and procedures by which BIS may allocate materials, services, and facilities to promote the national defense.

### V. Elements of Preliminary Plan

The General Counsel of the Department of Commerce, Cameron Kerry, will be responsible for overseeing execution of the retrospective analysis laid out in this Plan. To ensure that those crafting the retrospective analysis and process are sufficiently independent from the offices responsible for writing and implementing regulations, each bureau plans to task those offices in their purview that do not write and implement regulations to review the plans and proposals for retrospective review on a periodic basis. Bureaus may also ask various outside boards or committees that play an advisory role to review their plans and priorities. For example, BIS's Export Administration Regulations protect national security and advance foreign policy objectives while minimizing interference with legitimate trade. BIS draft rules are reviewed by Technical Advisory Committees, which are statutorily authorized committees that include substantial representation from members of the public affected by BIS' regulations. These committees operate independently from BIS. The draft rules are also reviewed by the Departments of Defense and State. Thus, each draft rule is reviewed in its pre-decisional state by the three primary stakeholders in the process.

#### A. NOAA

Many of NOAA's statutory mandates emphasize the need to base decisions on best scientific information available and require periodic review of regulatory actions. In addition, many of NOAA's activities require analyses under the National Environmental Policy Act. The Council on Environmental Quality has indicated that environmental impact statements that are more than 5 years old should be carefully reexamined to determine if supplementary analyses are required per 40 C.F.R. § 1502.9 of the CEQ regulations. See <http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm> (explaining need for supplements to old EIS at question # 32 of "NEPA's Forty Most Asked Questions").

NOAA's National Marine Fisheries Service (NMFS) intends to reinforce the existing culture of retrospective analysis through increased outreach to the Regional Fishery Management Councils that develop fishery management plans pursuant to the Magnuson-Stevens Act. The Councils' fishery management planning process entails significant public participation and opportunities for soliciting thoughts on needed modifications to or repeal of regulatory actions. NMFS has begun, and will continue, to coordinate with the councils, emphasizing the need for scrutiny of proposed and existing regulations consistent with Executive Order 13563, the Magnuson-Stevens Act, and other relevant laws, and the need to make fisheries management regulations simpler and easier to follow. NMFS intends to encourage such scrutiny of regulatory actions through its



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meetings with the Council Coordination Committee and during meetings of the councils and their subcommittees.

As part of the agency's Catch Share Policy, NOAA has provided further guidance to the Councils regarding periodic review of all limited access privilege programs pursuant to 16 U.S.C. § 1853a(c)(1)(G). Specifically, the agency directs that Councils should periodically review all catch share and non-catch share programs to ensure that management goals are specified, measurable, tracked, and used to gauge whether a program is meeting its goals and objectives. The policy reinforces NOAA's commitment to working with Councils, stakeholders, the Department of Commerce, the Office of Management and Budget, and Congress in improving and monitoring useful and relevant performance metrics for all U.S. fishery management policies, not just catch share programs.

NOAA's Office of Commercial Remote Sensing Regulatory Affairs (CRSRA) will continue its present practice of periodically reviewing (approximately, every 3-5 years) its implementing regulations to ensure that they facilitate the growth and international competitiveness of the U.S. commercial remote sensing industry while preserving U.S. national security and international obligations. In particular, NOAA CRSRA will stay abreast of technological developments and business practices that are relevant to the industry and will reevaluate its implementing regulations to ensure they take into account such developments. In addition, NOAA CRSRA will request the expert advice on such matters from the Advisory Committee on Commercial Remote Sensing (ACCRES), when appropriate.

NOAA's Office of National Marine Sanctuaries (ONMS) will continue its practice of periodically reviewing implementing regulations pursuant to the National Marine Sanctuaries Act. The development and implementation of sanctuary management plans entail public participation and opportunities for soliciting comments on regulatory actions. ONMS will continue its practice of periodically reviewing sanctuary management plans and associated regulation pursuant to the National Marine Sanctuaries Act, and will continue to work with sanctuary advisory councils in developing plans and regulations.

NOAA will prioritize its regulatory review planning process based on several factors. NOAA will consider whether any significant regulations are required to be reviewed pursuant to statutory requirements (e.g., Regulatory Flexibility Act § 610). NOAA will also consider whether prioritization should be given to review of specific regulations because of critical needs of or impacts to managed resources and the regulated community; major changes in the state of industry; and foreign policy and national security considerations. NOAA line offices will provide input into priorities under the NOAA plan. In addition, for fishery matters, the National Marine Fisheries Service will solicit input from Regional Fishery Management Councils on regulations that they are responsible for developing.



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NOAA will incorporate the ongoing review efforts addressed above into the E.O. 13563 retrospective review process. Accordingly, candidate rules for review over the next two years include, but are not limited to:

- a. Rules subject to review under § 610 of the Regulatory Flexibility Act, which includes all rules for which a Final Regulatory Flexibility Analysis was prepared and were issued during 2003, 2004, 2005, and 2006.
- b. Issues that NOAA and the Department of the Interior identify under their co-administered Endangered Species Act regulations.

NOAA will strengthen internal review expertise in various ways. For example, NMFS will provide instruction on regulatory reform/review as part of its annual, new Regional Fishery Management Council Member Training. *See* 16 U.S.C. § 1852(k). NMFS will also include instruction on regulatory reform/review as part of training modules for agency staff. In addition, NMFS has already begun, and will continue, to encourage and work with the regional fishery management councils' enforcement and compliance committees to look at the issues of regulatory complexity and burdens. Additionally, NESDIS is comprised of a small group of staff with relevant expertise, which receive continuing education on regulatory matters

NOAA will decide what actions may be warranted in light of the analysis, based on consideration of the goals of E.O. 13563; NOAA's statutory mandates; other applicable law; and the mission, purpose, and policy goals of the agency. For fishery regulations, NMFS will work with the Regional Fishery Management Councils with regard to addressing analyses that pertain to council-developed regulatory actions.

NOAA will coordinate with other federal agencies that have jurisdiction or similar interests:

- NOAA already coordinates with other federal agencies as part of the implementation of the National Ocean Policy. NOAA will continue to coordinate with other federal agencies with overlapping interests/issues, developing, revising or updating existing memoranda of agreement as needed to help strengthen coordination processes.
- An area of focus for NOAA is coordination with the Department of the Interior and the Department of Energy on energy development activities.

NOAA also already coordinates heavily with other federal agencies with expertise, interests, and/or regulatory roles with regard to matters addressed in NOAA or joint agency rulemakings. Such agencies may include Customs and Border Protection, Department of State, Department of Interior, U.S. Coast Guard, EPA, and the Office of the U.S. Trade Representative.



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### B. USPTO

USPTO has designated specific personnel to be responsible for implementing its retrospective review plan. These designated personnel will be independent from the personnel and offices within USPTO that are generally responsible for drafting and implementing regulations in order to ensure the independence of this retrospective review process. USPTO anticipates that its implementation of the USPTO retrospective review plan and designation of personnel with responsibility for that plan will foster an internal culture of retrospective analysis.

These designated personnel will direct the actual review of USPTO rules, as well as ensure the continual updating of the USPTO review plan. These personnel will also be responsible for reviewing public comments, which USPTO is soliciting on an ongoing basis through the portion of its webpage specifically devoted to its retrospective review plan. On that webpage, USPTO will publish public comments as they are received and make available to the public both the results of USPTO's retrospective review under the plan and underlying data used in conducting that review. Just as it plans to maintain an internal culture of retrospective analysis, USPTO anticipates that its efforts to provide information to, and solicit comments from, the public on a real-time basis will help to foster a culture of retrospective analysis among the intellectual property community, the general public, and other stakeholders who have an interest in USPTO's regulatory process.

USPTO will consider a variety of factors in determining how to prioritize for review its existing significant regulations. Those factors include, but are not limited to:

- The impact of the specific regulation (including its financial impact on the economy and the number of people who are impacted by the regulation, both financially and in other ways);
- The potential increase in benefits and/or potential decrease in costs that could be realized from revising the regulation;
- Input from stakeholders on regulations to be reviewed (*e.g.*, from public comments to be solicited on a continuous basis as well as periodic town hall meetings and/or roundtable discussions with the intellectual property community and other stakeholders); and
- The length of time since the regulation was last reviewed (*i.e.*, when other factors are equal, prioritizing review of a regulation that has gone the longest since it was last reviewed).

In preparing an initial list of existing significant regulations that are candidates for retrospective review, USPTO reviewed all of its rules that have been amended or added as part of rulemaking



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final actions that OMB determined to be “significant” within the meaning of E.O. 12866. Out of these significant rules, USPTO selected a set of candidates for review based on the factors described above for prioritizing review. The following list constitutes the set selected for retrospective review plan over the next two years. This list of rules is organized by the priority for review that USPTO plans at this time, but that priority may be revised based on the results of its review, public comments, appropriate allocation of USPTO resources, or other factors.

1. 37 CFR § 1.52 (“Language, paper, writing, margins, compact disc specifications”)
2. 37 CFR § 1.78 (“Claiming benefit of earlier filing date and cross-references to other applications”)
3. 37 CFR § 1.121 (“Manner of making amendments in applications”)
4. 37 CFR § 1.53 (“Application number, filing date, and completion of application”)
5. 37 CFR § 1.704 (“Reduction of period of adjustment of patent term”)
6. 37 CFR § 1.75 (“Claim(s)”)
7. 37 CFR § 1.114 (“Request for continued examination”)
8. 37 CFR § 1.321 (“Statutory disclaimers, including terminal disclaimers”)
9. 37 CFR § 1.16 (“National application filing, search, and examination”)
10. 37 CFR § 1.17 (“Patent application and reexamination processing fees”)

These ten candidate rules were selected because they have significant impact on the day-to-day operations of USPTO and the high volume of patent applications it processes. Even minor revisions that improve or simplify these rules could result in immediate, significant, and widespread benefits for patent applicants in their daily interactions with USPTO. Given the high volume of patent applications USPTO processes, improvements that result even in small reductions in cost for a single applicant could result in large aggregate reductions in cost. Where improvement of regulations leads to fewer instances of filings being incorrect from confusion about the rules, or questions from the public where rules are unclear, there could be significant benefits for the internal operations of USPTO as well. The two rules at the top of the above list were selected in part because they could impact every patent application USPTO processes, and even small improvements could reap large benefits for USPTO customers. USPTO often gets feedback from the public on these rules, and the review process encourages USPTO to respond to such feedback and improve the rules. Another consideration that drove the selection and ordering of this candidate list was the fact that USPTO’s business is increasingly electronic –



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now over 90% of patent filings. Many of the regulations related to patent filings, however, were conceived or drafted at a time when most, if not all, filings were made on paper. The review process under this plan, starting with these candidate rules, is an opportunity for USPTO to work from the ground up reconciling its existing significant regulations with the electronic world that drives innovation and the economy.

The USPTO plan will be implemented and maintained by its Office of the General Counsel, which is distinct from the patent and trademark business units that originate most of USPTO's significant regulations. Specifically, the USPTO plan will be implemented at the direction of its Deputy General Counsel and its Solicitor, who will assign attorneys in their respective offices to implement and maintain the USPTO plan. The Deputy General Counsel is responsible for the Office of General Law, whose attorneys work on rulemaking matters. The Solicitor's Office staff work on matters of substantive patent and trademark law. Together, these counsel have knowledge both of administrative and substantive law that will be useful in the retrospective review of Office regulations.

In order to strengthen its internal review expertise, USPTO will pursue additional training for its personnel in its Office of the General Counsel who will be involved in implementing the USPTO plan, including additional training concerning rulemaking as well as substantive areas of law related to USPTO's significant regulations, such as patent and trademark law.

As noted above, USPTO intends to focus on a retrospective analysis of those rules over the next two years or more (depending on the length of time needed to conduct the analysis). In determining this priority, USPTO will consider both its own analysis of each rule as well as comments from the public about how those rules should be prioritized.

Beyond that first two years, USPTO will continue to undertake retrospective analysis of its significant regulations based on the prioritizing of factors described above. Among the various factors USPTO will consider in determining which regulations to analyze, weight will be given to the length of time since a regulation was last reviewed and/or the length of time since a regulation was enacted (for significant regulations that have not yet been reviewed). In this way, USPTO intends to allow for flexibility in its review process, so that factors other than length of time since last review can be considered for prioritization, while also seeking to ensure that no significant regulation goes too long without retrospective analysis.

USPTO will use the results of the retrospective analysis of its significant regulations to determine whether those regulations warrant modification, expansion, streamlining, or repeal, and how that can be accomplished as necessary or appropriate. While implementation of the USPTO plan will be driven by USPTO's Office of General Counsel personnel responsible for rulemaking, the ultimate determination of how to revise significant regulations based on this analysis will be made in consultation with the relevant business units at USPTO responsible for



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drafting the significant regulation in question. Where appropriate, other business unit heads and the USPTO Management Council may also be involved. Revision of significant regulations as a result of the retrospective analysis under the USPTO plan will be conducted in much the same way that USPTO currently prepares regulations – with consultation between other USPTO business units, counsel, and USPTO officials so that all necessary entities within USPTO are able to have input in the drafting process.

USPTO recognizes that in the same way that consistent and ongoing review of significant regulations is necessary, the USPTO plan for conducting such review must itself be periodically analyzed to determine whether it should be revised or improved in anyway. To that end, USPTO intends to conduct periodic review of the USPTO plan itself, including considering both internal analysis of the plan and any public comments submitted on the implementation of the plan, in order to determine whether the plan should be revised. Such comments will be solicited through USPTO’s website concerning its plan, and any changes to its plan will be set forth in notices published in the Federal Register as well as on USPTO’s website.

Where coordination will aid USPTO in conducting its review under its plan, USPTO will coordinate with other Federal agencies that have jurisdictions or similar interests that relate to USPTO’s significant regulations. For example, where review of a particular significant regulation raises questions about how the regulation has impacted small businesses, USPTO will seek input from the Small Business Administration concerning such impact. USPTO will also coordinate with the Department of Commerce in implementing USPTO’s plan. Finally, by soliciting public comment on a continuous basis as it implements its plan, USPTO will always be open to receiving comments from any other Federal agencies regarding its plan.

### C. BIS

The Export Control Reform Initiative will be BIS’s priority in light of the President’s strong commitment to this initiative. Benefits generated by specific rules in process include:

- New License Exception “Strategic Trade Authorization.” This exception removes license requirements for low-risk transactions while implementing safeguards to ensure items are not reexported without authorization to higher-risk destinations. An exception removes the inherent uncertainty, burden, and processing time associated with the need to obtain a license. Private industry and government will be freed up to allocate resources more efficiently.
- Making the Commerce Control List more objective. A more objective control list based entirely on objective, physical criteria helps exporters more easily determine their items’ classification, which in turn helps determines if a license is required. Clearer standards will reduce uncertainty, increase predictability, and better facilitate lawful trade.



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- “Tiering.” Dividing export control lists into tiers according to the sensitivity of the items will allow effective and flexible targeting of export controls.
- More flexible, tailored controls for less significant defense articles. The Administration estimates that as many as 30,000 of the licenses for basic defense articles handled in 2010 by the State Department under the less flexible International Traffic in Arms Regulations will be transferred to the Commerce Department to be administered under the authority of the more flexible, tailored Export Administration Regulations. Assuming the resources can be found for BIS to process such applications and related work, substantial national security benefits will result from the transfer. The United States export control system will become more interoperable with our close allies and the defense industrial base will be strengthened because of the reduction in unnecessary barriers to trade.

Implementation of a license exception for lower-risk transactions and proposing transfer of militarily less significant defense articles from the U.S. Munitions List to the Commerce Control List are initial steps in the reform process. Next steps will involve harmonizing control lists and key definitions among export control agencies, an interagency effort that requires unusually close cooperation and high-level commitment. Within BIS, both the Under Secretary and the Assistant Secretary for Export Administration are directly involved in this effort, drawing on years of experience as export control practitioners. This high-level commitment ensures that the Administration’s vision for reform is consistent across agencies and implemented effectively. Ultimately, export control reform will reduce the collective burden and uncertainty faced by U.S. industry and its foreign partners, and will allow the government to focus its resources on erecting higher walls around the most sensitive items in order to enhance national security. BIS anticipates that the Export Control Reform Initiative will be implemented in a number of rules, primarily rules revising the Commerce Control List, making conforming changes to the EAR, and incorporating in its controls less significant defense articles formerly handled by the State Department. Public comments received in response to BIS’s various notices of inquiry, proposed rules, and outreach events noted in *Section IV.B.* will serve as additional factors BIS will use in setting priorities.

### D. ITA

ITA’s plan is specific to various categories of regulations and, for each category, ITA has provided the approximate time at which those rules will be reviewed either pursuant to statute or as part of ITA’s retrospective review. ITA’s plan is specific to various categories of regulations, and for each category, as described below, ITA has provided the approximate time at which those rules will be reviewed either pursuant to statute or as part of ITA’s retrospective review.

At the end of the list are two categories of regulations that ITA has determined are obsolete and will be removed. This reduction of regulations benefits industry as a whole as industry



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participants will now have fewer regulations to review and analyze for applicability to their activities. At the end of the list are two categories of regulations that ITA has determined are obsolete and will be removed.

1. Regulations of the Foreign-Trade Zones Board; 15 CFR 400.1 – 400.64. Foreign Trade Zones (FTZs) are restricted-access sites in or near U.S. Customs and Border Protection ports of entry. The Foreign-Trade Zones Act of June 18, 1934, as amended (FTZ Act) (Pub. L. 73-397) (codified as 19 USC §81a – 81u), created the Foreign-Trade Zones Board (the Board), with the Secretary of Commerce as the chairman and executive officer of the Board. The FTZ program allows companies to benefit from delayed or reduced duty payments on the importation of foreign merchandise within their designated area. Use of the FTZ program enables companies to reduce production, transaction, and logistics related costs. To administer FTZs, the FTZ Act directed the Board to issue regulations. On behalf of the Board, Commerce last adopted revised FTZ regulations in 1991. Foreign-Trade Zones in the United States (Final Rule), 56 FR 50790 (Oct. 8, 1991). In 2010, the Board proposed an update and revision of the current regulations. Foreign-Trade Zones in the United States (Proposed Rule; Request for Comments), 75 FR 82340 (Dec. 30, 2010). The proposed regulations would, among other changes, simplify and streamline the application process for parties seeking to conduct certain activity, such as production, within a FTZ, and directly reduce the paperwork and time burden associated with zone management. The Board, through ITA, collected comments on the proposed regulations, and anticipates that final regulations will be issued within the next two years. Those final regulations will respond to and incorporate comments received on the proposed rule. Because new regulations are forthcoming, ITA intends to implement a periodic review of the new regulations ten years following their adoption.
2. Antidumping and Countervailing Duties; 19 CFR 351.101 – 527, 701-702. Title VII of the Tariff Act of 1930, as amended (Pub. L. 71-361) (codified as 19 USC 1671, *et. seq.*), authorizes the Commerce Department to administer and enforce the antidumping and countervailing duty laws. In addition, the Uruguay Round Agreements Act of 1994 (URAA) (Pub. L. 103-465) implements into U.S. law relevant parts of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Subsidies and Countervailing Measures, including Section 129 of the URAA (codified at 19 USC §3538). Pursuant to both the Tariff Act of 1930 and the URAA, the Department of Commerce issued comprehensive antidumping and countervailing duty regulations most recently in 1997 and 1998. Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27295 (May 19, 1997) (with an effective date of June 18, 1997) and



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- Countervailing Duties; Final Rule, 63 FR 65347 (Nov. 25, 1998) (with an effective date of December 28, 1998). Certain individual provisions have been subsequently amended, (see e.g., Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations (Interim Final Rule), 73 FR 74930 (Dec. 10, 2008)), and it is anticipated that there may be modifications to a significant number of these regulations (and possibly even the statute itself) upon completion of the WTO Doha Round. See the WTO website for updates on the status of Doha Round negotiations at [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm). Because ITA believes it is likely these regulations will be significantly modified as a result of the completion of the Doha Round, ITA intends to implement a periodic review of these regulations ten years following the issuance of final regulations incorporating the results of completed Doha Round negotiations.
3. Subsidy Determinations Regarding Cheese Subject to an In-Quota Rate of Duty; 19 CFR 351.601 – 604. These regulations were issued pursuant to section 702(a) of the Trade Agreements Act of 1979, as amended by the URAA (to bring former regulations into consistency with the WTO Agreement on Agriculture) (Pub. L. 96-39) (codified in the Harmonized Tariff Schedule of the United States, per 19 USC §3004). Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27295 (May 19, 1997) (with an effective date of June 18, 1997). They pertain to subsidy determinations regarding cheese subject to an in-quota rate of duty. Since these regulations are significant, they will be incorporated into ITA’s plan for regulatory review.
  4. Procedures for Importation of Supplies for Use in Emergency Relief Work; 19 CFR 358.101 – 104. These regulations pertain to the importation of building and relief supplies free of antidumping or countervailing duties in the event of a natural disaster or other emergency. They were issued in 2006, with an effective date of November 29, 2006, pursuant to section 318(a) of the Tariff Act of 1930, as amended (Pub. L. 71-361) (codified as 19 USC §1318(a)). Procedures for Importation of Supplies for Use in Emergency Relief Work, 71 FR 63230 (Oct. 30, 2006). Since these regulations were finalized relatively recently, ITA will conduct its periodic review of these regulations beginning in November 2016, which is ten years from when they became effective.
  5. Steel Import Monitoring and Analysis System; 19 CFR 360.101 – 108. All imports of basic steel mill products are subject to automatic import licensing requirements, as directed by these regulations. These regulations were issued in 2005, with an effective date of March 11, 2005, pursuant to Section 203 of the Trade Act of 1974 (Pub. L. 93-618) (codified in 19 USC §2253 -- Action by President After



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- Determination of Import Injury). Steel Import Monitoring and Analysis System, 70 FR 12133 (March 11, 2005). On March 18, 2009, the Steel Import Monitoring and Analysis System was reviewed and extended until March 21, 2013. Steel Import Monitoring and Analysis System: Final Rule, 74 FR 11474 (March 18, 2009). In coordination with its pre-existing plans for review, ITA will review these regulations in 2013.
6. Imports of Cotton Woven Fabric; 15 CFR 336.1 – 336.5. The Tax Relief and Health Care Act of 2006, at Division C, Title IV, Section 406(b)(1) (Pub. L. 109-432) (codified in the Harmonized Tariff Schedule of the United States, per 19 USC §3004), sets forth tariff rate quotas for imports of cotton woven fabric. These regulations provide for the administration of allocations of those quotas by IA. The interim regulations were issued in 2007, and then adopted without change with an effective date of July 10, 2008. Imports of Certain Cotton Shirting Fabric: Implementation of Tariff Rate Quota Established Under the Tax Relief and Health Care Act of 2006 (Interim Final Rule), 72 FR 40235 (July 24, 2007); Imports of Certain Cotton Shirting Fabric: Implementation of Tariff Rate Quota Established Under the Tax Relief and Health Care Act of 2006 (Final Rule), 73 FR 39585 (July 10, 2008). The tariff rate quota on cotton woven fabric expired on December 31, 2009. Accordingly, these regulations are no longer applicable. Based upon a review of annual import data, Commerce does not believe these regulations have an annual effect of \$100 million in trade, and therefore are not significant. However, because these regulations are no longer valid, ITA intends to withdraw these regulations.
  7. Short Supply Procedures (for Steel Imports); 19 CFR 357.101 – 111. These regulations were issued pursuant to Section 4(b) of the Steel Trade Liberalization Program Implementation Act (Pub. L. No. 101-221). Short Supply Procedures (Interim – Final Rules), 55 FR 1348 (Jan. 12, 1990). They pertain to voluntary restraints on certain steel imports from October 1, 1989 through March 31, 1992. These regulations are no longer applicable. ITA therefore plans to withdraw these regulations.

## VI. Components of Retrospective Cost-Benefit Analysis

### A. NOAA

NOAA currently integrates cost-benefit analysis into the development of regulations in order to comply with E.O. 12866, the Regulatory Flexibility Act, the Magnuson-Stevens Fishery Conservation and Management Act, the National Marine Sanctuaries Act, the National Environmental Policy Act, the Endangered Species Act, and other applicable laws. NOAA's



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cost-benefit analyses involve rigorous economic analysis. *See, e.g.*, Guidelines for Economic Analysis of Fishery Management, Office of Sustainable Fisheries, National Marine Fisheries Service (2007), available at <http://www.nmfs.noaa.gov/sfa/RFA%20Guidelines.PDF>. Because NOAA's significant regulations already incorporate such analyses, retrospective cost-benefit analysis, rather than beginning anew, will instead involve a revisiting of the prior analyses. NOAA will review the previous analyses as part of the review of the relevant regulations to determine whether the assumptions underlying those analyses were sound and whether any revision is necessary.

### B. USPTO

An important element of USPTO's retrospective analysis of its existing significant regulations will be a cost-benefit analysis of such regulations. This analysis will allow USPTO to determine where changes to a given significant regulation would result in changes in benefits or costs (whether quantitative or qualitative) for those impacted by the regulation. USPTO will consider financial costs and benefits (for example, ways that revision of a given significant regulation could decrease monetary costs for impacted parties), but also non-financial costs and benefits (such as decreasing information collection burdens). USPTO will prioritize its review and revision of regulations in part based on those where revision would accomplish the greatest increase in benefits and decrease in costs. A variety of metrics will be used to evaluate costs and benefits, including the monetary impact of a regulation on affected parties, the timeframe for actions by USPTO, the burden on affected parties for submitting information to USPTO in connection with a given regulation, and other metrics that relate to both costs and benefits.

USPTO collects and maintains significant amounts of data in connection with certain patent and trademark services. To the extent appropriate, USPTO will consider this data in conducting its analysis of a given significant regulation's impacts, costs, benefits and other factors. In addition, USPTO will make use of any data concerning the impact of its rules and regulations, such as data compiled in connection with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, which will help USPTO analyze whether the information collection burden associated with a given regulation can be improved through revision of the regulation. Finally, USPTO may consider any relevant data the public provides through public comment, where such data will be helpful in conducting the retrospective analysis under the USPTO plan. USPTO's website concerning its plan will allow for public comment, including comment on any relevant scientific and technical findings that relate to USPTO's significant regulations.

### C. BIS

Most commonly, BIS measures the cost of its regulations using burden hours associated with information collections. Benefits consist of protecting national security and advancing foreign policy interests. Since these benefits are difficult to quantify, BIS describes them qualitatively.



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Going forward, BIS' Office of Technology Evaluation has entered into partnership with the Census Bureau to access data entered into the Automated Export System to better measure the effectiveness of the EAR. The EAR controls items for national security, foreign policy (including non-proliferation), and short supply reasons. Commodities, software, and technology subject to the EAR may require a license based on a number of factors, including how the item is classified with reference to the Commerce Control List, where the item is destined, and its end-use or end-user.

### D. ITA

For the various categories of regulations that ITA administers/enforces, ITA will use a variety of metrics to evaluate costs and benefits, including the timeframe for actions by IA, the burden on affected parties for submitting information to IA in connection with a given regulation, the burden a given regulation may require of the agency itself, and other metrics that relate to both costs and benefits. However, several of IA's regulations directly implement statutory provisions that provide for little discretion on behalf of the bureau. Therefore, to a large extent, the regulations enforced by IA implement specific statutory requirements, as interpreted by Federal Court decisions, and are not subject to a standard cost/benefit analysis. Thus, the ability to complete a cost/benefit analysis, as well as the value of metrics in such cases, may vary from regulation to regulation.

## VII. Publishing the Department of Commerce's Plan Online

As part of Commerce's efforts to foster a strong, ongoing culture of retrospective analysis, Commerce will maintain a specific page (or pages) on its website devoted to its Plan. Through this website, Commerce will publish its both its preliminary and the final Plan online either directly on its Open Government website or with a link from its Open Government website. Each of the bureaus represented in this Plan may take additional steps to publish its component of the plan on its website or its Open Government website and seek public input and feedback.