U.S. Department of Labor
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REPORT TO THE WAGE AND HOUR DIVISION

DOL DID NOT DEMONSTRATE IT FOLLOWED A SOUND PROCESS IN PROMULGATING THE 2017 TIP RULE NOTICE OF PROPOSED RULEMAKING

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BRIEFLY...

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December 11, 2020

WHY OIG CONDUCTED THE REVIEW

On December 5, 2017, the Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) to rescind portions of its 2011 tip regulations under the Fair Labor Standards Act because DOL was concerned that it incorrectly construed the statute in promulgating the tip credit regulations. As such, DOL proposed to remove the regulations' limitation on employers' ability to pool tips received by employees, thereby allowing employers to allocate tips into a tip pool shared with employees who do not customarily receive tips, such as dishwashers and cooks, or simply retain the tips.

DOL issued the 2017 NPRM with primarily a qualitative analysis of the potential benefits and transfers. However, multiple news reports noted DOL conducted an economic analysis not included in the final NPRM, raising questions about the soundness of DOL's rulemaking process.

WHAT OIG DID

We conducted a review to answer the following question:

> Did DOL follow a sound process in promulgating the 2017 NPRM?

We reviewed federal and DOL rulemaking guidance and processes; interviewed DOL staff and contractors; and reviewed emails, work products, and draft versions of the NPRM.

WHAT OIG FOUND

DOL did not demonstrate it followed a sound process in promulgating the 2017 NPRM and did not fully adhere to regulatory guidance.

In the initial phase of the process, a DOL Senior Official considered regulatory action as unnecessary and believed that the courts should be the arbiters. However, DOJ's Office of the Solicitor General believed that rulemaking action was necessary. Based on this, DOL proceeded with the NPRM. Members of DOL's NPRM workgroup and senior leadership told us they felt "pressured" to take regulatory action and were told not to document the decisions they received from management

DOL analyzed various cost estimates of transferring tips from employees who typically receive tips to those who do not or to employers. DOL made several revisions, but ultimately excluded the transfer analysis from the published 2017 NPRM. DOL officials did not demonstrate what was lacking in the analyses that made them insufficient to support what they believed employers would do under the proposed rule. Further, DOL did not provide criteria in support of its rationale for familiarization costs in the published NPRM, and did not include an assessment of the effect the rule would have on families.

Additionally, DOL did not identify to the public the substantive changes it made between the draft NPRM submitted to OIRA and the 2017 NPRM published in the Federal Register.

WHAT OIG RECOMMENDED

We made five recommendations to improve DOL's rulemaking process. DOL proposed corrective actions for four of the recommendations and disagreed with one.

READ THE FULL REPORT

http://www.oig.dol.gov/public/reports/oa/2021/17-21-001-15-001.pdf

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INSPECTOR GENERAL'S REPORT

Cheryl M. Stanton
Administrator
for Wage and Hour
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

This report presents the results of our review of the process the Department of Labor (DOL) followed in issuing the December 5, 2017, Tip Regulations Under the Fair Labor Standards Act (FLSA) Notice of Proposed Rulemaking (NPRM) issued by DOL's Wage and Hour Division (WHD).

On December 5, 2017, DOL published an NPRM to rescind portions of its 2011 tip regulations issued pursuant to the FLSA in part to address litigation that included claims the 2011 tip regulations interpreted the FLSA incorrectly, and because DOL was concerned that it incorrectly construed the statute in promulgating the tip credit regulations. The 2017 NPRM proposed removal of the regulatory limitation on an employer's ability to pool tips received by employees. The proposed change would have allowed employers to allocate tips into a tip pool shared with employees who do not customarily receive tips, such as dishwashers and cooks, or simply retain the tips.

We conducted a review to answer the following question:

Did DOL follow a sound process in promulgating the 2017 NPRM?

To answer our question, we reviewed federal rulemaking guidance, and DOL's rulemaking guidance and processes (see Appendix A). We interviewed DOL staff and contractors involved in initiating, developing, and publishing the NPRM. We reached out to the Department of Justice's Office of Solicitor General (DOJ-OSG) during our review and it declined our request for interview; however, it provided comments to our draft report. In addition, we reviewed DOL emails, work products, and draft versions of the NPRM.

Based on the results of our work, we determined DOL did not demonstrate it followed a sound process in promulgating the 2017 NPRM and did not fully adhere to regulatory guidance.

Our review found DOL initially determined regulatory action was unnecessary. DOL also believed courts should arbitrate the validity of the 2011 tip regulations. However, based on DOJ-OSG's insistence that action was necessary, DOL reversed its position and proceeded with regulatory action.

We also found that although DOL officials and the Office of Management and Budget (OMB) determined the 2017 NPRM would have a significant[1] impact on the economy, DOL issued the 2017 NPRM with primarily a qualitative analysis of the potential benefits and costs of implementation. Releasing the 2017 NPRM without a quantitative analysis raised transparency concerns since DOL did not identify for the public the full economic impact of allowing employers to keep or reallocate tips earned by tipped employees, which the public could have used to make more informed comments on the proposed rulemaking.

BACKGROUND

TIP REGULATIONS

DOL issues rules and regulations to interpret and guide the implementation of the FLSA, including those provisions applying to tipped employees, tip credits,[2] and tip pooling practices. The focus of this report is the NPRM that DOL published on December 5, 2017, to revise the 2011 tip regulations that affected tipped employees, tip pooling, and tip retention practices of employers. The 2017 NPRM stated its purpose was, in part, to address litigation that included claims the 2011 tip regulations incorrectly interpreted the FLSA by prohibiting employers that pay at least the federal minimum wage from sharing tips with non-tipped employees.

[1] Significant regulatory action means any regulatory action 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 Executive Order 12866.

[2] The term "tip credit" refers to a portion of an employee's tips that an employer may take as a credit toward its minimum wage obligation equal to the difference between the required cash wage (which must be at least $2.13) and the federal minimum wage. Thus, the maximum tip credit that an employer can currently claim is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The proposed rule would have rescinded DOL's 2011 tip regulations and allowed employers that pay the full minimum wage in cash to tipped employees, and do not take a tip credit, to institute mandatory tip pooling not only among tipped employees, but also among employees who do not customarily and regularly receive tips from customers. The proposed rule would have also allowed such employers simply to retain tips. Additional history related to DOL's tip regulations is included in Exhibit 1.

DOL issued the 2017 NPRM with primarily a qualitative analysis of the potential benefits and transfers. The 2017 NPRM explained that a quantitative analysis of potential transfer costs was "too speculative at this stage," and stated:

> The Department is unable to quantify how customers will respond to proposed regulatory changes, which in turn would affect total tipped income and employer behavior.

However, multiple news reports raised concerns that while DOL had conducted an economic analysis, it decided not to include one in the final 2017 NPRM.

In October 2019, DOL issued a new NPRM to incorporate congressional amendments to the FLSA that were part of the 2018 Consolidated Appropriations Act. The 2018 Appropriations Act prohibited employers from keeping any portion of an employee's tips, regardless of whether the employer takes a tip credit. For employers not claiming a tip credit, the proposed rule would permit establishing a mandatory tip pool that includes tipped workers and workers who do not customarily and regularly receive tips, such as dishwashers and cooks. Employers claiming a tip credit would only be able to institute mandatory tip pools limited to tipped employees.

THE RULEMAKING PROCESS IN BRIEF

Executive Order 12866, Regulatory Planning and Review, places the responsibility for regulatory action on agencies, by stating:

> [B]ecause Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive Order.

Within DOL, WHD is responsible for issuing regulations and enforcing the federal minimum wage requirements of the FLSA. This includes the related tip regulations. In addition, the Office of the Assistant Secretary for Policy (OASP), the Office of the Solicitor (SOL), and the Office of the Secretary (OSEC) play a role.

In coordination with the other DOL agencies, OASP establishes DOL internal procedures on the rulemaking process and coordinates rulemaking for DOL. SOL provides legal advice regarding how to achieve DOL's goals. OSEC provides oversight, review, and approval of DOL's regulatory actions. OMB's Office of Information and Regulatory Affairs (OIRA) may review proposed and final regulatory significant regulatory actions. Finally, the Executive Office of the President (EOP) and DOJ-OSG may engage with DOL on policy priorities and legal considerations.

EO 12866 establishes the process under which OIRA reviews agency drafts of proposed and final regulatory actions. It provides guidance to federal agencies on how to develop regulations and assure these regulations are consistent with applicable law, as well as to make the process more accessible and open to the public. EO 12866 also instructs agencies to take two key actions: 1) determine whether rulemaking is required by law or is necessary; and, 2) conduct an underlying analysis of costs and benefits anticipated from the regulatory action for regulatory actions deemed significant.

For the first action, EO 12866 states:

> [Federal agencies] should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.

As part of this determination, EO 12866 advises agencies to assess all costs and benefits of available regulatory alternatives, including that of not regulating, and to choose the approach that maximizes net benefits, unless a statute requires another regulatory approach.

For those regulatory actions that an agency or OIRA deems significant and have an anticipated impact on the economy of $100 million or more, EO 12866 calls for a second action and states:

> [Agencies shall conduct] an assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits.

An NPRM lays out an agency's proposal to address an issue and seeks public comment prior to finalization. One approach to pursuing regulatory action is to issue an Advance Notice of Proposed Rulemaking (ANPRM).[3]

According to "A Guide to the Rulemaking Process," prepared by the Office of the Federal Register, an agency has the option to initially issue an ANPRM to obtain information from the public at an early stage of a regulatory action.

RESULTS

Based on the results of our work, we determined DOL did not demonstrate it followed a sound process in promulgating the 2017 NPRM and did not fully follow regulatory guidance. Specifically, our review found:

- DOL did not support its decision to exclude a quantitative estimate of the economic impact.

- DOL did not identify to the public substantive changes between the draft and published NPRM.

Our review did not include a determination of whether the economic analysis performed by the Department was the appropriate analysis to include in the 2017 NPRM.

INITIATION OF THE 2017 NPRM

The initiation of the 2017 NPRM began with a request from DOJ-OSG to DOL Senior Official #1 to revisit DOL's 2011 tip regulations because of two pending U.S. Supreme Court cases. Although Senior Official #1 initially thought regulatory action was unnecessary, interactions with DOJ-OSG ultimately led to DOL issuing an NPRM. DOL believed regulatory action was unnecessary because it felt courts should determine the validity of the 2011 rule, among other reasons.

[3] Agencies use an ANPRM as a vehicle for obtaining public participation in the formulation of regulatory change, typically before the agency has done significant research or investigation on its own. The primary use of an ANPRM is to involve the interested public in a potential regulatory action at an early stage, before the agency has arrived at even a tentative decision on a particular regulatory change. If an agency chooses to use an ANPRM, it still must issue an NPRM before issuing a final rule on that subject

DOL REGULATORY POLICY OFFICER WAS UNAWARE OF DUTIES

The regulatory process in an agency is overseen by a Regulatory Policy Officer. At DOL, that individual is the Deputy Assistant Secretary for Policy. As the Regulatory Policy Officer, this individual should be involved in all stages of the process. Although the Deputy Assistant Secretary for Policy was involved in the development of the 2017 NPRM, he was not aware of his designation as the Regulatory Policy Officer or the responsibilities it entailed.

Section 6(a)(2) of EO 12866 states:

> Each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive Order.

Secretary's Order No. 01-2009 designates the Assistant Secretary of OASP as the Regulatory Policy Officer. DOL initially informed us it did not have a Regulatory Policy Officer to oversee each step of the rulemaking process as set forth in EO 12866. DOL later identified the politically appointed Deputy Assistant Secretary for Policy as the appointed position for the Regulatory Policy Officer's duties. We found the official was unaware of any assigned duties specific to the Regulatory Policy Officer. Additionally, the position description for the Deputy Assistant Secretary for Policy did not contain any information about the Regulatory Policy Officer's oversight role or responsibilities.

DOL INITIALLY CONCLUDED THAT REGULATORY ACTION WAS UNNECESSARY

In February 2017, an official from DOJ-OSG asked DOL Senior Official #1 to revisit DOL's 2011 tip regulation because of two pending Supreme Court cases. DOL initially concluded regulatory action was unnecessary and believed that courts should arbitrate the validity of the 2011 rule.

In response to our draft report, DOJ-OSG officials stated:

> All agreed that action by the government was necessary; the only question is what action was the most appropriate.

However, Senior Official #1 stated that he was opposed to taking regulatory action. Nevertheless, after insistence from DOJ-OSG, DOL reversed its position and decided to proceed with an NPRM. DOL stated it is not unique or unusual to confer with DOJ-OSG during rulemaking when there is pending litigation on the topic of the rulemaking.

According to DOL, DOJ-OSG was involved in drafting the 2017 NPRM because it needed to respond to a petition for certiorari[4] that was pending before the Supreme Court. In response to our draft report, DOJ-OSG officials stated they were involved in reviewing and commenting on the draft 2017 NPRM. In addition, they advocated to DOL that an NPRM was necessary.

EO 12866 identifies Federal agency responsibilities in promulgating regulations. Specifically, Section 1(a) states:

> Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.

DOL Senior Official #1 initially thought regulatory action was unnecessary. However, DOL assembled a workgroup in April 2017 to begin the rulemaking process in response to the DOJ-OSG official's request. The workgroup was comprised of wage and hour compliance specialists, attorneys, economists, and policy advisors, and analysts from OASP, SOL, and WHD.

In April 2017, the workgroup initially determined that an ANPRM would be the best approach to meet time constraints for addressing the pending Supreme Court cases[5] because it would allow for stakeholder input, provide OIRA time for a thorough review, and would not require an assessment of the economic impact of the proposed rule. The workgroup memorialized this determination in internal emails. In May 2017, DOL's workgroup and leadership held a phone call with DOJ-OSG on the rule and presented DOL's reasons for determining an ANPRM was the best approach.

[4] A petition for certiorari is a request to the U.S. Supreme Court to review the decision of a lower court.
[5] In June 2018, the Supreme Court denied certiorari in the two pending cases.

DOJ-OSG DISAGREED WITH DOL'S DETERMINATION

After the phone call between DOL and DOJ-OSG, a DOJ-OSG official expressed concerns to DOL Senior Official #1 about an ANPRM and provided a point-by-point counterargument for each of the workgroup's reasons for issuing an ANPRM.

In response to our draft report, DOJ-OSG stated an economic analysis "would not be required to rescind the 2011 tip regulation on the grounds that…the 2011 regulations were themselves promulgated without such analysis because DOL had determined that they would have, 'no measurable economic effect on the public.'" However, unlike the 2017 NPRM that was deemed significant, OIRA did not deem the 2011 tip regulations significant so it was not subject to an assessment of potential costs and benefits under EO 12866.

DOL Senior Official #1 responded to the DOJ-OSG official by supporting the workgroup's assertions about the need for an estimate of the economic impact of the proposed rule and the timeliness of an ANPRM versus an NPRM. Further, in response to promulgating a rule, DOL Senior Official #1 stated:

> Changing the Department's longstanding position is likely to require an analysis for even a defensible direct rescission [and] removing the rule will almost certainly have an economic impact.

DOL Senior Official #1 also stated:

> [He was] agnostic on whether [DOL] need[ed] a rule at all here but removing this rule will most certainly have an economic effect as it will incentivize shifting to not using the tip credit and allow use of tip pools for back house staff.

DOJ-OSG informed DOL that nothing short of an NPRM would suffice. Consequently, DOL began developing the NPRM.

DOL OFFICIALS FELT PRESSURED TO ULTIMATELY ISSUE THE NPRM

According to EO 12866, when initiating a regulation each agency shall identify the problem that it intends to address, as well as assess the significance of that problem. DOL included some, but not all, of its reasons for pursuing regulatory action in the preamble to the NPRM.

Members of the workgroup and senior leadership told us they felt "pressured" to take regulatory action. DOL Senior Official #2 stated, "We pushed back pretty hard on the idea of doing this regulation; we were told we would be doing this by the Solicitor General." DOL Senior Official #1 stated, "I ultimately was overruled by a combination of folks."

Senior Official #1 emailed the workgroup stating that DOJ-OSG "was insisting on an NPRM." DOL officials told us in interviews they felt "pressured" to issue the NPRM and said they were told not to document the decisions they received from management. One member of the workgroup stated, "I was instructed not to write things down" by the Acting Administrator of WHD. This type of environment risks depriving DOL of required documentation of its decisions.

DOL EXCLUDED A QUANTITATIVE ESTIMATE OF THE ECONOMIC IMPACT

DOL performed analyses to assess the costs of transferring tips from employees directly receiving them to "back of the house" employees (e.g., cooks and dishwashers) or employers. However, DOL ultimately excluded this analysis from the 2017 NPRM. In addition, DOL did not provide criteria in support of its rationale for familiarization costs in the published NPRM. .

Finally, the 2017 NPRM also did not include an assessment on the effect the rule would have on families. DOL decided that an individual tipped employee did not meet the definition of family and their income would not increase or decrease disposable income or poverty of families and children.

DOL AND OIRA DETERMINED THE 2017 NPRM WOULD BE SIGNIFICANT AND INITIALLY ESTIMATED ITS ECONOMIC IMPACT

Federal rulemaking guidance in EO 12866 Section 1(b)(1) calls for agencies to assess the potential significance of a rule's impact, stating:

> Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

Agencies also submit the potential rule to OMB's OIRA for a significance determination. EO 12866 Section 6(a)(3)(A) states:

> Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are

> significant regulatory actions within the meaning of this Executive order.

Proposed rules deemed significant by OIRA require additional information developed as part of the agency's decision-making process. EO 12866 Section 6(a)(3)(C) states:

> For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):
>
> (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
>
> (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets [including productivity, employment, and competitiveness], health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
>
> (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

Additionally, agencies alert stakeholders of their intent to regulate by publishing a regulation identifier number, brief summary of the action, and the legal authority for the action in the Unified Federal Agenda that identifies regulations under development.

In the initial submission to the Spring 2017 Unified Federal Agenda, DOL identified the NPRM as economically significant.[6] The published NPRM stated OIRA deemed the impact of the 2017 NPRM to be significant. We found DOL initially followed EO 12866 guidance by estimating costs of transferring tipped amounts from employees directly receiving the tips to employers and back of the house employees, who do not customarily receive tips. However, none of these transfer estimates were included in the published NPRM.

OMB Circular A-4, Regulatory Analysis, guides agencies in conducting the assessments outlined in EO 12866 for significant and economically significant determinations. Included in this guidance is the need for an assessment of costs anticipated from the regulatory action of any adverse effects on the efficient functioning of the economy, private markets, together with, to the extent feasible, a quantification of those costs. Circular A-4 also promotes transparency in the completion of a regulatory analysis, stating the regulatory action should clearly set out the basic assumptions, methods, and data underlying the analysis, and discuss the uncertainties associated with the estimates.

In DOL's determination of economic significance, OASP economists, WHD contractors, and OIRA economists performed quantitative assessments for the costs of the 2017 NPRM. These assessments included estimated amounts for the potential transfer of total wages from tipped employees to back of the house employees or employers.

In DOL's assessment of potential transfers, OASP initially used two different approaches: 1) calculating the total potential transfer estimate possible; and, 2) calculating the potential transfer estimate accounting for labor market forces. DOL's assessment started by identifying the total universe subject to potential first-year transfer. DOL then applied various assumptions to refine the potential transfer estimate. The assumptions applied by DOL included market forces, potential employer behavior, and different labor industries for tipped workers.

According to DOL officials, they used an iterative process to refine the data sets and calculations, which was ultimately judged by agency leadership as not sufficiently reflective of what they believed employers would do under the proposed rule. However, DOL officials did not demonstrate what was lacking in each data set and transfer calculation that made them insufficient to support what they believed employers would do under the proposed rule.

[6] Economically significant regulatory action means any regulatory action that has an annual effect on the economy of $100 million or more or adversely affects 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.

DOL DID NOT INCLUDE AN ESTIMATE OF ECONOMIC IMPACT IN THE 2017 NPRM

Prior to the issuance of the 2017 NPRM, DOJ-OSG provided input on DOL's working drafts, and "raised questions about the validity of DOL's underlying assumptions and methodology, identified a series of real-world issues central to the estimate that the working draft either ignored or failed to quantify, and expressed concern that draft analysis was significantly flawed in light of those shortcomings."

After receiving this feedback, DOL decided to omit the transfer estimates from the proposed rule's published version. During an interview with us, DOL Senior Official #3 stated they "were pressured to take actions [that they] did not agree with."

The 2017 NPRM stated:

> The Department currently lacks data to quantify possible reallocations of tips through newly expanded tip pools to employees who did not customarily and regularly receive tips.

It further stated DOL was "unable to quantify how customers would respond to regulatory changes."

Moreover, DOL did not address the uncertainties it identified as reasons for removing the quantitative transfer analysis. Specifically, WHD did not demonstrate it followed the guidelines of Circular A-4 to present a range of plausible scenarios for those uncertainties, consider additional research prior to rulemaking, explain why the costs of developing additional information exceeded the value of that information, or consider deferring the decision to regulate pending further study. On October 8, 2019, DOL issued a new Tip Rule NPRM that withdrew the 2017 Tip Rule NPRM.

The 2019 Tip Rule NPRM stated:

> The Department was unable to determine what proportion of the total tips estimated to be potentially transferred from these workers will realistically be transferred. The Department assumes that the likely potential transfers are somewhere between a minimum of zero and a maximum of $213.4 million, and therefore used the midpoint as a better estimate of likely transfers. The Department accordingly estimates that transfers of tips from front-of-the-house workers will be around $107 million in the first year that this rule is effective.

When asked how DOL was able to include an economic transfer analysis in the 2019 NPRM, but not for the 2017 NPRM, DOL stated, "In 2017, decision-makers

did not have confidence [in] the existing data" and "it was unclear where transfers would ultimately end up" with the 2017 NPRM.

The 2019 NPRM largely focused on implementing the 2018 amendments to the FLSA and a change in the law that prohibited employers from retaining tips. This meant any transfer would occur only from front of the house to back of the house employees. According to DOL, "the work and analyses from the 2017 NPRM informed the development of the economic analysis used in the 2019 NPRM."

However, as noted above, Circular A-4 provides guidance to agencies on how to deal with uncertainties, which DOL did not follow for the 2017 NPRM. As such, DOL's rationale in the 2017 NPRM for excluding an estimate for the economic impact was undercut by DOL's ability to estimate an economic impact for its 2019 NPRM.

DOL's omission of an estimate from the 2017 NPRM prevented the public and other stakeholders from responding to the potential impact of the rule. Those responses could have informed DOL regarding the reliability of its transfer estimate or provided additional data to use for other transfer estimates calculated during the rulemaking process.

DOL DID NOT PROVIDE CRITERIA IN SUPPORT OF ITS RATIONALE FOR DETERMINING THE TIME ALLOTED FOR REGULATORY FAMILIARIZATION AND DID NOT CONSIDER THE UNCERTAINTIES OF ITS ESTIMATES

DOL's analysis in the 2017 NPRM supporting the familiarization costs was not consistent with Circular A-4 Section E (4) guidance noting that a good analysis should: 1) be transparent; 2) be reproducible; 3) clearly set out the basic assumptions, methods, and data underlying the analysis; and 4) discuss the uncertainties associated with the estimates.

WHD considered assigning no costs for regulatory familiarization using the following 3 approaches: 1) assign zero costs to familiarization because the rule will not introduce any new requirements or require employers to change what they are currently doing; 2) attempt to quantify the cost savings of recordkeeping or managerial burdens to offset any costs assigned to familiarization; and, 3) attempt to quantify the costs of WHD no longer having to enforce the 2011 tip regulations to offset any costs assigned to familiarization.

OASP and WHD told us they estimated the total regulatory familiarization costs by comparing the time they thought it would take an establishment to familiarize itself with the 2017 NPRM against similar equally complex rules on other topics.

WHD initially estimated regulatory familiarization costs at $10.6 million based on a food service manager spending one hour to become familiar with the rule, placing the average cost per establishment at $35.67, and identifying 281,928 establishments.

WHD ultimately published estimated total regulatory familiarization costs of $3.4 million based on an establishment's compensation or benefits specialist spending 15 minutes to review the rule and become familiar with its requirements. OASP officials questioned the change stating the basis for familiarization costs seemed low and advised WHD that the time needed to implement a new rule is normally higher than 1 hour. WHD retained the 15-minute time estimate, stating the Tip Rule would not take as much time for familiarization as other DOL rules that come with many compliance requirements, such as those of the Occupational Safety and Health Administration or the Employment and Training Administration.

DOL stated that not all costs are appropriate to include in rule familiarization and additional costs would be part of managerial or adjustment costs, which are estimated separately. Furthermore, DOL officials stated the 15-minute time estimate was consistent with other WHD rulemakings. However, WHD did not provide documentation or underlying data to support that either the 1 hour or 15 minutes allotted for regulatory familiarization was appropriate. DOL also did not provide the criteria they applied to determine which costs are appropriate to include in rule familiarization. DOL officials stated that the estimates were also reviewed and commented on by interagency reviewers during the EO 12866 process, including the Small Business Administration's Office of Advocacy. However, DOL officials provided no documentation of these reviews.

None of the estimates were transparent or based on data regarding the rationale WHD used for time allocated for rule familiarization. DOL did not provide criteria for determining: 1) the time allotted for familiarization; and 2) the uncertainties associated with each of the estimates or other potential costs, such as the time it takes to explain the changes in tip policy to employees.

Staff from OASP, SOL, WHD, and OSEC repeatedly stated during our interviews that each rule is unique, making it difficult to compare or identify normal practices from one rule to another.

DOL DID NOT ASSESS THE EFFECT THE RULE WOULD HAVE ON FAMILIES

DOL decided an individual tipped employee did not meet the definition of family and it did not assess whether the 2017 NPRM would increase or decrease

disposable income or poverty of families and children. DOL also did not determine if the proposed benefits of the 2017 NPRM justified the potential financial impact on the family, as required by Section 654 of the Treasury and General Government Appropriations Act, 1999 (Act). Nonetheless, WHD included a certification statement in the published 2017 NPRM that the proposed rule would not adversely affect the well-being of families, while not disclosing its determination that a tipped individual does not meet the definition of family.

According to the Act, before implementing policies and regulations that may affect family well-being, each agency shall assess such actions with respect to whether the action increases or decreases disposable income or poverty of families and children and the proposed benefits of the action justify the financial impact on the family. The Act also states:

> With respect to each proposed policy or regulation that may affect family well-being, the head of each agency shall (A) submit a written certification to the Director of the Office of Management and Budget and to Congress that such policy or regulation has been assessed in accordance with this section; and (B) provide an adequate rationale for implementation of each policy or regulation that may negatively affect family well-being.

We asked WHD how it determined the language used in the "Effects on Families" section of the 2017 NPRM. DOL officials told us, "WHD has an informal policy to include boilerplate language for addressing the Act in its rules." Using the boilerplate language, the 2017 NPRM stated:

> The undersigned hereby certifies that the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

However, an OASP official told us "it would have an impact on everyone."

The Act directs executive agencies, before implementing policies and regulations that may affect family well-being, to assess such actions using seven specified criteria. The Act lays out that criteria and defines family, but DOL did not assess any of the criteria because it pre-determined an individual tipped employee did not meet the definition of family and therefore, the Act did not apply. A WHD official researching effects on families determined:

> Section 654 (b)(2) defines family as (A) a group of related people who live together as a "single household," and (B) any individual who is not a member of such household but related (by blood etc.) to the group and who receives over 50% of their support per year

from the household.

> The transfer affects individual tipped employees. The individual tipped employee's personal income will presumably decrease as a result of the tip transfer to their employer. This would negatively impact the well-being of the tipped employee. The individual tipped employee is not a group of related people living as a single household and accordingly it is reasonable to conclude that the transfer will not affect families. This is a very literal application of the Family Policy Making Assessment criteria.
>
> If we choose to broaden our analysis to assume that the tipped employee resides with a related group of people in a single household, and that they are the head of the household (main contributor to the income of the household), then it is plausible that the transfer of tipped income to the employer would decrease the household income and negatively affect the family well-being. The second meaning of family (B) may apply to tipped employees. They may not live with a group in a single household, but they are related by blood, marriage, or adoption to a member of the group and they receive more than 50% of their support from the group. By definition, this tipped employee would not be contributing financially to the family, and decrease in their income due to the transfer would not affect the family. It would likely affect the disposable income of the individual tipped employee.

Because WHD determined affected individuals did not meet the definition of family, WHD did not conduct an analysis to determine if there was an actual effect on families. Instead, DOL determined the Act was not applicable to the 2017 NPRM and did not disclose its assumption that a tipped individual does not meet the definition of family. By deeming the Act not applicable in this case and stating in the 2017 NPRM there was no effect on families without conducting an assessment, DOL was not transparent and did not provide the public with complete information to assess the potential impact of the proposed rule.

DOL DID NOT IDENTIFY THE SUBSTANTIVE CHANGES BETWEEN THE DRAFT AND PUBLISHED NPRM

DOL did not identify to the public the substantive changes it made between the draft NPRM submitted to OIRA and the 2017 NPRM published in the Federal Register. DOL told us that its practice is not to identify substantive changes for the public for any of its rulemaking. This practice does not meet its obligations under EO 12866.

These actions prevented the public from meaningfully participating in DOL's rulemaking process and responding to substantive changes that might affect workers, families, and employers. Therefore, DOL lacked transparency in not identifying these substantive changes.

Section 6(a)(3)(E) of Executive Order 12866 states:

> After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall:
>
> (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);
>
> (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and
>
> (iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

DOL transmitted several drafts to OIRA for review, which contained information that did not appear in the final 2017 NPRM. In no manner discernible to the OIG did WHD identify for the public any of the substantive changes made between the drafts it submitted to OIRA and the 2017 NPRM it published in the Federal Register. To the contrary, DOL officials stated:

> DOL does not disclose substantive changes made between what is initially provided to OIRA and what OIRA approves and is published in the Federal Register.

DOL officials also stated:

> If requested, OIRA's practice is to provide pdfs of what was initially formally submitted to OIRA for review and what was ultimately approved [and] this requirement is met through OIRA's release of the appropriate documents.

While Section 6(b)(4)(D) of EO 12866 sets out OIRA's responsibility to make available to the public all documents exchanged between OIRA and the agency during OIRA's review, this responsibility designated to OIRA is in addition to the agency's own responsibility as set forth in Section 6(a)(3)(E)(ii).

OIG'S RECOMMENDATIONS

The OIG recommends that the Administrator for the Wage and Hour Division, in conjunction with the Assistant Secretary for Policy:

1. Develop policies and procedures to document its rationale and supporting evidence for key decisions in the development of economic regulatory analysis.

2. Develop policies and procedures to document its rationale and supporting evidence when DOL determines the prescribed regulatory guidance does not apply.

3. Enforce policies and procedures that require employees to maintain records that document government business. Employees should not be discouraged from maintaining such records.

4. Develop policies and procedures to ensure that after a regulatory action has been published in the Federal Register, or otherwise issued to the public, DOL identifies for the public in a complete, clear, and simple manner the substantive changes between the draft submitted to OIRA for review and the action subsequently announced.

5. Update the position description of the DOL Regulatory Policy Officer and ensure that the Regulatory Policy Officer assumes regulatory oversight responsibilities for this position.

SUMMARY OF WHD's RESPONSE

The Administrator of WHD agreed to take corrective actions for four of the five OIG recommendations to improve the rulemaking process. The Administrator disagreed with the OIG recommendation to develop policies and procedures to ensure that after a regulatory action has been published in the Federal Register, or otherwise issued to the public, DOL identifies for the public in a complete, clear, and simple manner the substantive changes between the draft submitted to OIRA and the action subsequently announced.

The OIG disagrees with the Administrator that DOL's EO 12866 responsibilities are met by OIRA's release of documents. EO 12866 clearly establishes the agency's responsibility to identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced. In addition, DOL officials provided no documentation to the OIG that would allow DOL to forgo its EO 12866 responsibilities.

WHD's written response to our draft report is included in its entirety in Appendix B.

DOJ-OSG also provided the OIG with comments on our report and we have incorporated its input in the report as appropriate.

We appreciate the cooperation and courtesies WHD, SOL, OASP, OSEC, and DOJ-OSG extended us during this review. OIG personnel who made major contributions to this report are listed in Appendix C.

Elliot P. Lewis
Assistant Inspector General for Audit

EXHIBIT 1: SUMMARY OF TIP REGULATIONS HISTORY [7]

The FLSA's tip credit provision was enacted in 1966. WHD promulgated regulations implementing the FLSA's tip credit provision in 1967. The 1967 regulations acknowledged that employers and employees could agree that tips received would belong to the employer, which might then use the tips to satisfy the entirety of its minimum wage obligations. When FLSA section 3(m) was amended in 1974, Congress added the requirement that an employer taking a tip credit must permit its tipped employees to retain all of their tips, except for those tips distributed through a mandatory tip pool that includes only employees who customarily and regularly receive tips.

In 2008, DOL published a Notice of Proposed Rulemaking that proposed, among other things, to amend WHD's tip credit regulations to reflect the 1974 amendments to the FLSA.

Before it had finalized that rulemaking, DOL participated as amicus curiae[8] in support of a tipped employee challenging her employer's tip pooling arrangement in *Cumbie v. Woody Woo*, a case before the Ninth Circuit. The district court in this case had concluded that section 3(m)'s restrictions on tip pooling apply only when an employer takes a tip credit against its minimum wage obligations. DOL argued before the Ninth Circuit that the district court's interpretation would permit an employer to use tips received by its employees to a greater extent than that permitted in section 3(m), since it would permit an employer to use tips to meet its entire minimum wage of non-tipped employees.

On February 23, 2010, the Ninth Circuit issued an opinion in *Cumbie v. Woody Woo,* which held in the context of an employer that did not use tips to pay its employees the minimum wage, that section 3(m)'s tip retention requirements apply only to employers that avail themselves of the tip credit provision.

DOL finalized its revisions to the tip regulations in 2011. Those regulations, among other things, barred all employers from sharing tips with employees who do not customarily and regularly receive tips—regardless of whether the employers take a tip credit.

[7] Excerpts from Section II, Tip Regulations Under the Fair Labor Standards Act – Notice of Proposed Rulemaking, published in the Federal Register on December 5, 2017, RIN 1235–AA21 and Section I, Tip Regulations Under the Fair Labor Standards Act – Notice of Proposed Rulemaking, published in the Federal Register on October 8, 2019, RIN 1235–AA21.

[8] Legal term derived from Latin (for "friend of the court") that refers to a person or group who is not a party to an action, but has a strong interest in the matter, may petition the court for permission to submit a brief in the action with the intent of influencing the court's decision.

On July 12, 2012, the Oregon Restaurant and Lodging Association (ORLA), along with the National Restaurant Association, Washington Restaurant Association, Alaska Cabaret, Hotel, Restaurant & Retailers Association, and others (the *ORLA* Plaintiffs), challenged DOL's authority to promulgate the 2011 Final Rule as it applies to employers that do not take a tip credit and that pay a direct cash wage of at least the federal minimum wage.

On June 7, 2013, the district court granted the plaintiffs' motion for summary judgment, ruling that the 2011 tip regulations were invalid. On August 21, 2013, DOL appealed the district court's decision to the Ninth Circuit. The Ninth Circuit consolidated the case with *Cesarz v. Wynn Las Vegas*—a private FLSA action in which the plaintiffs-employees, relying on DOL's 2011 regulations, alleged that the employer violated the FLSA when it required its tipped employees to share their tips with non-tipped employees.

On February 23, 2016, the Ninth Circuit, reversing the district court, upheld the validity of the 2011 tip regulations in *ORLA v. Perez.*

On April 6, 2016, the *ORLA* Plaintiffs filed a petition for panel rehearing and rehearing en banc[9]. The *ORLA* Plaintiffs argued that the Ninth Circuit's decision in *ORLA* cannot be reconciled with *Woody Woo* and reiterated their contention that the 2011 tip pooling regulation is an impermissible interpretation of the FLSA. On September 6, 2016, the *ORLA* panel denied the plaintiffs' request for panel rehearing, and a majority of the non-recused active judges voted to decline en banc review.

The National Restaurant Association (and other plaintiffs in the OLRA litigation) filed a petition for certiorari with the Supreme Court, asking for review of the Ninth Circuit's decision in *ORLA.* The *Wynn* Defendants filed their own petition for certiorari with the Supreme Court on August 1, 2016.[10]

Additionally, the Tenth Circuit ruled in *Marlow v. The New Food Guy*, a private FLSA case in which the United States participated as amicus curiae, that the Department's 2011 tip regulations are invalid to the extent that they bar an employer from using or sharing tips with employees who do not customarily and regularly receive tips when the employer pays a direct cash wage of at least the federal minimum wage and does not claim a section 3(m) tip credit. The Tenth Circuit affirmed the district court's dismissal of the plaintiff's claim, holding that the text of the FLSA limits an employer's use of tips only when the employer takes a tip credit, ''leaving [DOL] without authority to regulate to the contrary.''

[9] Legal term derived from French (for "on the bench.") that refers to when all judges of a particular court hear a case.

[10] As noted in the report, these two petitions for certiorari were denied in June 2018.

On December 5, 2017, DOL published an NPRM proposing to rescind the portions of its 2011 tip regulations that imposed restrictions on employers that pay a direct cash wage of at least the full federal minimum wage and do not take a tip credit against their minimum wage obligations.

During a hearing on March 6, 2018, the Subcommittee on Labor, Health and Human Services, and Education of the U.S. House of Representatives Committee on Appropriations, Secretary of Labor R. Alexander Acosta was asked about the proposed rulemaking. The Secretary explained that the Tenth Circuit had made clear in *Marlow,* in reasoning he found persuasive, that the Department lacked statutory authority for its 2011 regulations. The Secretary thus concluded that Congress has not authorized the Department to fully regulate in this space. The Secretary, however, explained that Congress had the authority to implement a solution, and he suggested that Congress enact legislation providing that establishments, whether or not they take a tip credit, may not keep any portion of employees' tips.

On March 23, 2018, Congress amended the FLSA through the Consolidated Appropriations Act of 2018 (CAA) to further address employers' practices with respect to their employees' tips. The CAA added a new section to the FLSA, 3(m)(2)(B). This section expressly prohibits employers—regardless of whether they take a tip credit under section 3(m)—from keeping tips received by their employees, including distributing them to managers or supervisors. The CAA amendments to the statutory text of the FLSA directly impacted the subject of the 2017 NPRM. For that reason, DOL withdrew the 2017 NPRM upon issuance of a new Tip Rule NPRM on October 8, 2019, to address the 2018 CAA amendments.

APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA

SCOPE

Our work focused on the initiation, development, and publication of the Tip Regulations Under the Fair Labor Standards Act – Notice of Proposed Rulemaking, published in the Federal Register on December 5, 2017, RIN 1235–AA21. It was not our objective to render an opinion on the economic analysis performed by DOL. Our work was conducted through and included information available as of November 23, 2020.

METHODOLOGY

We conducted this review in accordance with *Quality Standards for Inspection and Evaluation* issued by the Council of Inspectors General on Integrity and Efficiency. The term "inspection" includes evaluations, inquiries, and similar types of reviews that do not constitute an audit or a criminal investigation. Those standards require that we possess adequate professional competency, adequately plan our work, and obtain sufficient, competent and relevant evidence to sustain the findings and conclusions. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our review objective.

To accomplish our objective, we obtained an understanding of WHD's rulemaking process and the role of other DOL component agencies in the initiation, development, and publication of the Tip Rule NPRM. We reviewed federal and DOL rulemaking guidance, interviewed DOL staff and contractors, and analyzed rulemaking documentation that included draft NPRMs and emails.

We also contacted the Office of Management and Budget's Office of Information and Regulatory Affairs, and the Department of Justice's Office of the Solicitor General to discuss their involvement in the development and approval of the Tip Rule NPRM. Both parties declined our interview requests. However, the Department of Justice's Office of the Solicitor General provided comments to the report.

INTERNAL CONTROLS

In planning and performing our review, we considered WHD's internal controls relevant to our review objective by obtaining an understanding of those controls, and assessing control risks for achieving our objective. The objective of our review was not to provide assurance of the internal controls; therefore, we did not express an opinion on WHD's internal controls. Our consideration of internal

controls for administering the initiation, development, and publication of the Tip Rule NPRM would not necessarily disclose all matters that may be significant deficiencies. Because of the inherent limitations on internal controls, or misstatements, noncompliance may occur and not be detected.

CRITERIA

- Executive Order 12866, Regulatory Planning and Review, 1993
- Executive Order 13563, Improving Regulation and Regulatory Review, 2011
- Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, 2017
- Federal Register Act, Title 44 – Public Printing and Documents, Section 1505 Documents to be Published in the Federal Register
- 44 U.S.C. § 3101 – Records management by agency heads; general duties
- GAO's *Standards for Internal Controls of the Federal Government ,* 2014
- Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Department of Labor, 2002
- Information Quality Act, Public Law 106–554, Section 515, 2000
- Office of the Assistant Secretary for Policy, Standard Operating Procedures for The Department of Labor's Regulatory Development Process
- OMB Circular A-4, Regulatory Analysis, 2003
- OMB Circular A-123, Management's Responsibility for Enterprise Risk Management and Internal Control – Revised, 2004
- OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information, 2001
- Regulatory Flexibility Act, Title 5 – Government Organization and Employees, Chapter 6 – The Analysis of Regulatory Functions, 1980
- Secretary's Order – 01-2009 - Delegation of Authorities and Assignment of Responsibilities to the Assistant Secretary for Policy, 2009
- Treasury and General Government Appropriations Act, 1999
- WHD Rulemaking Process Policies and Procedures Guide, 2014

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor Wage and Hour Division
Washington, D.C. 20210

December 4, 2020

MEMORANDUM FOR: Elliot P. Lewis
Assistant Inspector General

FROM: Cheryl M. Stanton
Administrator, Wage and Hour Division

SUBJECT: Response to the Office of Inspector General's Report: DOL Did Not Demonstrate It Followed A Sound Process In Promulgating The 2017 Tip Rule NPRM

Report No. 17-20-002-15-001

The Wage and Hour Division (WHD) appreciates the opportunity to respond to the Office of the Inspector General's (OIG) Draft Report titled *DOL Did Not Demonstrate it Followed A Sound Process In Promulgating The 2017 Tip Rule NPRM.*

The Draft Report provides five recommendations that WHD in conjunction with the Office of the Assistant Secretary for Policy (OASP) should undertake. We respond to each recommendation below:

Recommendation 1: Develop policies and procedures to document its rationale and supporting evidence for key decisions in the development of economic regulatory analysis.

Response: WHD follows standard operating procedures (SOPs) developed by OASP for agencies' use as a guide to development of economic regulatory analyses for rulemaking. OASP, in consultation and partnership with regulatory economists across the Department of Labor (Department or DOL), developed DOL guidelines and SOPs for practitioners for conducting a regulatory impact analysis (RIA) and regulatory flexibility analysis (RFA) in early 2017. The SOPs provide guidelines to DOL regulatory economists to successfully and timely complete RIAs and RFAs, and build internal consistency within the Department. The DOL SOPs are regularly updated, most recently in 2020.

The DOL guidelines are posted on the OASP regulatory SharePoint site to which all DOL internal users have access and where OASP has Q&As for DOL economists and program analysts to post their questions and get timely responses from the OASP regulatory analysis team.

Specifically, the Draft Report finds DOL did not fully follow regulatory procedures as outlined in Executive Order (EO) 12866 and managed by the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). The Draft Report found WHD did not support its decision to issue the NPRM without a quantitative estimate of the economic impact of

the rule. We do not agree with OIG's conclusion that DOL's 2017 qualitative economic analysis did not comply with OMB Circular A-4, which instructs agencies how to account for uncertainties in quantitative economic analyses. DOL and other agencies make the decisions to publish rules that contain a qualitative rather than quantitative analysis when they are not confident in the quality of the data, in compliance with OMB/OIRA policies and guidance. In this case, DOL lacked data to adequately quantify the possible transfers and, notably, OIRA approved the NPRM with the use of a qualitative analysis. The Executive Office of the President through OMB/OIRA has exclusive jurisdiction under EO 12866 to determine compliance with its EO. Here, OMB/OIRA determined that DOL complied with the EO and other requirements.

However, to address this recommendation, OASP, in consultation with WHD and other affected agencies, will review and strengthen the SOPs, as necessary, to ensure more robust rationales for key decisions with regard to RIA and RFA are appropriately documented and transparent.

Recommendation 2: Develop policies and procedures to document its rationale and supporting evidence when DOL determines the proscribed regulatory guidance does not apply.

Response: With regard to the 2017 Tips NPRM, WHD believes that DOL's 2017 regulatory familiarization economic analysis was consistent with OMB Circular A-4 requirements that a good analysis be transparent, reproducible, clearly set out basic assumptions, methods, and data used in the analysis, and discuss uncertainties associated with the estimates. Rule familiarization costs are the costs of reading the rule and becoming familiar with its requirements. We note rule familiarization costs are not generic but rather are estimated based on the rule itself, including the complexity of the rule and how much or little the proposed change differs from current practice. OASP has provided technical support and information to assist the agencies in developing these estimates. These estimates are also reviewed and commented on by interagency reviewers during the EO 12866 process, including the OIRA and the SBA Office of Advocacy.

In constructing the regulatory familiarization economic analysis, the Department evaluated the steps employers would need to take to understand the rule. In this case, the only change proposed in the rulemaking was how tipped employees could be required to share tips. Employers only needed to read the rule to understand the obligations contained in the proposal.

With respect to the Effect on Families provision, DOL had no further obligation to analyze the effect of the proposed rule under that provision and/or to provide an analysis of that provision in the NPRM, as DOL's obligation to do so only involves rulemakings when the Effect on Families provision applies. We believe this approach is consistent with OMB guidance issued on January 26, 1999 (M-99-10), which provides that Effect on Family assessments are required only "[f]or those regulations for which a family assessment is appropriate[.]" We further note that the statement in the NPRM that the "proposed rule would not adversely affect the well-being of families" was also approved through OMB/OIRA review.

With regard to the specific recommendation concerning certain regulatory guidance requirements that may not apply to specific rulemakings, WHD, in consultation with OASP and following

requirements as set out by OIRA, will review its existing policies and procedures and make any appropriate needed adjustments to strengthen its rationale and supporting evidence for these estimates.

Recommendation 3: Enforce policies and procedures that require employees to maintain records that document government business. Employees should not be discouraged from maintaining such records.

Response: WHD agrees that employees should not be discouraged from following required practices in maintaining government records. WHD requires that official records made as part of the formal rulemaking process are maintained for a period ranging from one year to permanent retention, depending on the nature of the record. Records of internal development of agency rules in preparation for *Federal Register* publication as a proposed rule should be deleted or destroyed after 6 years.

WHD will ensure that staff involved in managing the rulemaking process are aware of and adhere to these requirements with regard to official government records.

Recommendation 4: Develop policies and procedures to ensure that after a regulatory action has been published in the Federal Register or otherwise issued to the public, DOL will make available and identify for the public in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced.

Response: As the Department previously explained to OIG, this EO 12866 requirement is met through OIRA's release, if requested, of the version of the regulatory document that is submitted to OIRA through official systems for review and the version of the regulatory document that is transmitted to OIRA for final approval (before the document is transmitted to the Federal Register for formatting and publication).

Agencies do not have an additional obligation under EO 12866 to release regulatory documents. We further note that pre-decisional drafts are deliberative and, therefore, are excluded by Exemption # 5 from release to the public under the Freedom of Information Act (FOIA).

Recommendation 5: Update the position description of the DOL Regulatory Policy Officer and ensure that the Regulatory Policy Office assumes regulatory oversight responsibilities for this position.

Response: The Secretary's Order establishing the Office of the Assistant Secretary for Policy explains that the OASP Deputy Assistant Secretary serves as the DOL Regulatory Policy Officer.

Additionally, the current DOL Regulatory Policy Officer is aware of the regulatory oversight responsibilities for this position under EO 12866. However, the Department will review this issue and recommend to the Office of Executive Resources that it update the position description for the Assistant Secretary for Policy (and Principal Deputy Assistant Secretary in the absence of

a Senate-confirmed Assistant Secretary) to reflect that the individual serving in this position is the DOL Regulatory Policy Officer.

Thank you again for the opportunity to comment on this report.

APPENDIX C: ACKNOWLEDGEMENTS

Key contributors to this report were:

Jennifer Anderson, Criminal Investigator
Carolyn Cayode-Gorman, Assistant Counsel to the Inspector General
Jennifer Dunbar, Program Analyst
Rachael Hess, Auditor
Tracy Katz, Audit Director
Daniel Rhodes, Auditor
Jaimie Richardson, Audit Manager

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