**APPENDIX D**

## AGENCY RESPONSE TO DRAFT REPORT

**U.S. Department of Labor**

Office of the Assistant Secretary
for Administration and Management
Washington, D.C. 20210

AUG 18 2008

MEMORANDUM FOR ELLIOT LEWIS
Assistant Inspector General

FROM: EDWARD C. HUGLER
Deputy Assistant Secretary for
Operations

SUBJECT: Department of Labor Records Management Program;
Draft Audit Report No. 03-08-001-07-001

This responds to the Office of Inspector General's (OIG) August 8, 2008, Draft Audit Report concerning the Department's records management program.

By way of background, the Assistant Secretary for Administration and Management/Chief Information Officer issued a Department-wide Uniform E-Mail and Electronic Document Back-up Retention Policy on December 1, 2006. The policy established a prospective six-month schedule for retaining back-up media for deleted e-mail and electronic documents. Fashioned on the guidance and polices from the National Archives and Records Administration (NARA) and other research, the policy was to become effective July 1, 2007.

The purpose of the Uniform E-Mail and Electronic Document Back-up Retention Policy is straightforward—to stop the unnecessary expense and related problems created by storing back-up media for an extended time, in some cases indefinitely. In discussions that included the Inspector General and the Assistant Secretary for Administration and Management/Chief Information Officer, in various meetings among their respective staffs, and in the Draft Audit Report, OIG has acknowledged the valid and prudent purposes of the policy. By memorandum of August 13, 2008, the appropriateness and legal soundness of a reasonable disposal regimen for e-mail and electronic back-up media was also definitively addressed by the Solicitor of Labor. A copy of the legal opinion is attached behind **TAB 1**.

Nonetheless, OIG expressed concern about the possible risk that the policy could result in the inadvertent loss of Federal Records. To accommodate OIG's desire to conduct an audit of the Department's records management program to assess that possible risk, the Department suspended implementation its Uniform E-Mail and Electronic Document Back-up Retention Policy before it went into effect.

OIG's audit was initiated July 30, 2007, followed by a Management Letter issued September 24, 2007, recommending that the Office of the Assistant Secretary for Administration and Management (OASAM) develop and implement a standard process for annual training of all DOL employees in records management. OASAM accepted the recommendation by memorandum of November 21, 2007, and asked that OIG expedite the records management

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audit to facilitate timely re-institution of the policy. During the period June 2 through August 15, 2008, the Department launched mandatory annual computer based training for all DOL employees—"Records Management for Everyone." The training content is a product of NARA, the Federal subject-matter expert.

In addition, as acknowledged in the Draft Audit Report, the Department has undertaken substantial efforts to improve its records management program since 2004, including guidance and specific instructions on how to handle electronic records, issuing an updated Records Management Handbook, numerous training sessions for employees with the aid of NARA experts and updating agency records schedules, including electronic records.

Since 2006, the Assistant Secretary for Administration and Management has reported annually to the Agency Heads a summary of the DOL records management program accomplishments for the preceding fiscal year, including data about DOL records stored at Federal Records Centers in accordance with NARA-approved records disposition schedules.

Further substantiating the Department's robust records management program are the quantifiable results of the program: for the period FY 2001 through the second quarter of FY 2008 the Department has retired more than 140,000 cubic feet of Federal records (including paper and electronic media) to NARA's Federal Records Centers around the country—enough to fill an Olympic-size swimming pool one and one-half times.

With the forgoing as context, the Draft Audit Report includes five additional recommendations, each of which are addressed below:

- *Recommendation 1: Implement an effective evaluation process so DOL can demonstrate that its agencies are in compliance with relevant Records Management laws, regulations, and procedures.*

  The Department will standardize as a regular part of its records management program the "periodic evaluations" recommended by NARA. Specifically, NARA Regulations at 36 CFR Chapter XII, Subpart B - Records Management, Part 1220.42 Agency Internal Evaluations provide that agencies are to "…periodically evaluate its records management programs relating to records creation and record keeping requirements, maintenance and use of records, and records disposition." The basic framework for the periodic evaluations will be derived from guidance provided in the NARA self-evaluation guide for Federal agencies published by NARA in 2001, and any subsequent relevant updates.

  The Department's periodic evaluations of its records management program will be scheduled so as to cover all DOL agencies during a five-year cycle on an ongoing basis, beginning in the first quarter of FY 2009. We believe that this is a practical cycle and it comports with advice given to the Department's Records Officer by NARA's appraiser for DOL. By the first quarter of FY 2009, the Department will amend DLMS 1, Chapter 400 – Records Management Program to reflect this expanded aspect of the its records management program.

- *Recommendation 2: Periodically prepare a written summary on DOL's evaluation activities and report whether DOL is in compliance with NARA and DOL records management requirements.*

  The Department will prepare a written summary of the "periodic evaluations" conducted as outlined in our response to *Recommendation 1* as each evaluation is completed.

- *Recommendation 3: Require Agency Heads to implement NARA and Departmental guidance by creating program specific record keeping procedures that instruct all employees on the maintenance and disposition of transitory records and documents that have no legal retention requirements under the Federal Records Act.*

  By memorandum issued August 18, 2008, from the Assistant Secretary for Administration and Management **(TAB 2)**, the Department has addressed Agency Head's responsibilities to implement NARA and Departmental guidance by creating program-specific record keeping procedures that instruct all employees on the maintenance and disposition of transitory records and documents. Conformity with this guidance will be evaluated during the Department's periodic evaluations as outlined in our response to *Recommendation 1.*

- *Recommendation 4: Before implementing the new retention policy, ensure that the Department's evaluation of DOL's Records Management program demonstrated compliance with NARA and DOL records management regulations.*

  Mindful of the acknowledged valid and prudent purposes of the Uniform E-Mail and Electronic Document Back-up Retention Policy—to stop the unnecessary expense and related problems created by storing back-up media for an extended time—we believe that, taken together—

  - the substantial efforts undertaken by the Department to improve its records management program since 2004;
  - the absence of any NARA-identified instances of non-compliance in DOL's records management program;
  - the retirement of more than 140,000 cubic feet of Federal records (including paper and electronic media) to NARA's Federal Records Centers around the country;
  - adopting OIG's recommendations 1 through 3 above; and
  - the annual on-line mandatory computer based training for all DOL employees

  —there is now demonstrated assurance that DOL's Records Management program is in compliance with NARA and DOL records management regulations. The recent definitive legal opinion supporting the appropriateness of a reasonable disposal regimen for e-mail and electronic back-up media adds further credence to this conclusion.

  As such, we consider this recommendation resolved and ask that it be closed. Correspondingly, the Department will proceed to re-issue before the end of FY 2008 a Department-wide Uniform E-Mail and Electronic Document Back-up Retention Policy. That policy will be guided by the recent opinion from the Solicitor of Labor, and include a

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prospective six-month schedule for retaining back-up media for deleted e-mail and electronic documents.

- *Recommendation 5: Conduct a cost-benefit analysis on establishing an electronic recordkeeping and document management system, or a similar system, which provides the capabilities for storing, indexing, locating, and tracking of e-mails that are Federal records and addresses the unnecessary retention of e-mails that are transitory record or non-records.*

  The Department is aware of the potential benefits of electronic recordkeeping and document management systems. At the same time we are cognizant that such a system would be a major information technology capital investment that must be thoroughly analyzed before being pursued. With this in mind, the Department, under the auspices of the Office of the Chief Information Officer, will update its cost-benefit analysis (CBA) of electronic recordkeeping and document management systems by the second quarter of FY 2009 and provide OIG with a copy. The CBA will assess the technical maturity of electronic recordkeeping and document management systems, as well as evaluate the best architecture of such a system for DOL, including deployment that is distributed or centralized.

As always, we appreciate the opportunity for input and value the OIG's contributions to the management efficiency of DOL programs. If you have any questions, please feel free to contact me.

Attachments

cc: Patrick Pizzella, ASAM/CIO
Tom Wiesner, OASAM/Deputy CIO
Al Stewart, OASAM/BOC

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**U.S. Department of Labor**

Solicitor of Labor
Washington, D.C. 20210

August 13, 2008

MEMORANDUM FOR PATRICK PIZZELLA
Assistant Secretary for Administration
and Management

FROM: GREGORY F. JACOB
Solicitor of Labor

SUBJECT: Departmental Backup Tapes and Litigation Holds

This memorandum responds to your May 12, 2008, memorandum to me (attached as "A"), which proposed a modified implementation of the DOL backup media retention policy adopted in December 2006, but never implemented. Your memorandum concludes that:

> . . . unless you express a legal objection, OASAM will proceed with plans to reinstate the Department-wide Uniform Email and Electronic Document Backup Retention Policy effective August 1, 2008. Accordingly, system backup media from December 1, 2006, through February 1, 2008, will be appropriately disposed of at that time, and every month thereafter, thereby maintaining the most recent six (6) months of backup tape.

This memorandum analyzes the legal risk presented by three possible actions: Action A – implementing reinstatement of the December 2006 policy on a prospective basis, in which backup media recycling commences six months after reinstatement of the policy; Action B – implementing reinstatement of the December 2006 policy as proposed in your memorandum, in which recycling of backup media created since December 2006 through the date six months prior to reinstatement would commence immediately; and Action C – scheduling recycling of older stores of backup media (which in the case of our option A means media more than six months old as of the date of policy implementation, and under your option B means media created prior to December 2006, which is a subject reserved by your memorandum for later consideration). Each of these possible actions is analyzed in relation to the document preservation and retention requirements arising in three major areas of the law: (1) the Federal Records Act and the National Archives and

Records Administration's (NARA) General Records Schedule; (2) Freedom of Information Act (FOIA) and Congressional oversight requests; and (3) litigation holds.

### A. DOL Efforts To Develop A Department-wide Policy

We understand that the volume and age of backup media varies widely across DOL agencies. DOL currently has a common e-mail platform across nine agencies that deliver e-mail services across the Department, but as late as 2003 had 13 different e-mail systems managed by the 9 agencies. We also understand that DOL's backup tapes or other media are non-indexed, un-archived electronic files created for emergency data recovery purposes. The backup media are daily "snapshots" of what exists in an electronic information network (or "EIN") at the moment of capture. Data created and deleted during the period between "snapshots" is not captured in backups. As a result of these characteristics, backup media are not searchable without extreme hardship and great expense, and searches will not necessarily result in retrieval of documents that once existed on the EIN. [1] Because of the widely varying backup media recycling policies across the various DOL networks, the potential burden of reviewing backup media in one network may be limited to one month, while the inventory of ECN backup media is continuous from 1999, currently comprising more than 23,000 tapes. While the ECN network is not the operative network for all DOL agencies and employees, the routine cross-network communication of e-mails and documents throughout DOL potentially implicates the ECN network backup media even as regards data searches for information initially created in or destined for other DOL networks.

Over the past several years, OASAM has engaged all DOL agencies to develop a Department-wide consensus on e-mail and electronic document media retention policy. OASAM has been guided by its conclusion that any such policy must balance the need to maintain the capability to restore the Department's IT networks and data in the event of a catastrophic system disruption or failure, against the countervailing burden on the Department imposed by the growing expense of maintaining extensive backup media, especially the ECN backup media storage effort and its attendant costs.

The Department is also currently in the midst of undertaking a regimen of records and document management training for staff to further highlight the Federal Records Act and NARA requirements. This training follows earlier training cycles, and the 2004 issuance of formal guidance to DOL staff from the Solicitor and the ASAM (attached to your memo of May 12th). It has also been undertaken in response to concerns raised by a management letter from DOL's Office of Inspector General (OIG). DOL's OIG has raised concerns regarding the overall DOL records management control program. SOL

[1] The cost of searching the entire 23,000 tape ECN backup media collection would be fiscally crippling. It takes approximately 11 hours to search one tape. That fact, multiplied by the quantity of old media and the work-hours needed to search the collection, yields a potential cost of $6,325,000 for the successful recovery of just one electronic item. Further, and as real-world proof of this hazard, the Department was recently required to expend millions to recover a few electronic documents pursuant to a Congressional request in 2006. Thus, to maintain such a large cache of useless but nonetheless searchable data is, from both a legal and business view, imprudent.

understands OIG's concerns, and suggests that the current status quo regarding the patchwork of DOL backup media retention policies should be coordinated and improved.

**B. "Backup" Media and the Duty to Preserve**

Before addressing the level of risk associated with each of the three action options posed in this memorandum, we address the basic question of the role of backup media in the data preservation context regarding the three major legal areas noted – Federal Records Act requirements, FOIA and Congressional requests, and litigation holds.

1. Federal Records:

As stated in the July 8, 2004, Solicitor of Labor memo to agency heads regarding "Legal Guidance on Retention and Disposition of Federal Records" (appended to Attachment A), backup media should not contain Federal Records that are required to be retained under the Federal Records Act (FRA) or records retention schedules. Rather, documents identified for retention are to be appropriately filed or stored in paper or electronic form.

Turning to NARA document retention requirements, NARA's guidance stipulates that "[b]ackup tapes maintained for potential system restoration in the event of a system failure or other unintentional loss of data . . . [should be] [d]elete[d]/destroy[ed] . . . when no longer needed for system restoration." *See* NARA General Records Schedule (GRS) 24(4)(a)(1-2)) (full backup tapes are eligible for destruction once the second subsequent backup tape has been verified as successful, and incremental backup tapes are eligible for destruction once superseded by a full backup). Thus the NARA General Records Schedule permits deletion or destruction of both incremental and full backup media, with incremental backups recycled once a full backup is made, and full backups once the "second subsequent backup" is made. These backup retention requirements are not tied to any specific time frame, and a 6 month retention period would be completely appropriate.

From this it is clear that: a) backup media are not a DOL system for maintaining "records" as defined by relevant Federal statutory and NARA requirements; and b) statutory and NARA requirements do not contemplate the use of backup media to archive records. There is no "legal" requirement that backup media be maintained as a Federal record repository. Therefore, in view of the on-going DOL records management training, and the long-standing applicability of NARA's record schedule, SOL concludes that the risk of destruction of Federal records in DOL does not warrant the maintenance of backup media beyond the prospective six months being recommended.

2. FOIA and Congressional Oversight:

FOIA and Congressional oversight requests raise only very limited concerns regarding back up media. In both instances, a reasonable search must be conducted for existing responsive documents once a request is received. There is no "anticipatory" requirement

for preservation of documents in case a FOIA or Congressional request is later filed. The significant costs associated with searching undifferentiated backup media will generally make a search of such media for responsive FOIA documents unreasonable. A similar analysis could be applied regarding Congressional requests, although individual Congressmembers who want information from the Department and who do not themselves bear any of the costs for searching for it may disagree with respect to particular cases in which they are interested. The risk that an existing FOIA request or Congressional inquiry will be in some way "violated" by instituting a regular schedule of backup media recycling is remote, however, and does not support the open-ended maintenance of backup media.[2]

3. Litigation Holds

There is no duty to preserve backup media just because the media includes data that could at some point theoretically be subject to a litigation hold. Litigation holds require the preservation and retention of any material that fits within the parameters of a particular hold, regardless of whether that material comprises a "Federal Record" and regardless of whether it would be releasable under a FOIA request. Once a litigation hold is in existence, the duty to preserve in response to a litigation hold extends to retrievable "electronically stored information" (or ESI). In addition to "litigation holds" that may be caused by an order of a court or other tribunal, there is a well-established duty on parties to potential litigation (including government agencies) to preserve relevant evidence that may be subject to discovery. The duty attaches not just once suit is filed, but whenever a party knows or should know that evidence may be relevant to *reasonably anticipated* litigation (*see generally* "Electronic Discovery and the Preservation Obligation," Department of Justice, July 2007, attached as "B"). For civil enforcement personnel in an agency such as DOL, arguably, the duty to preserve in reasonable expectation of litigation may arise as early as the start of an inspection, audit or investigation, e.g., by OSHA, MSHA or EBSA.

DOL agencies currently back up e-mail and electronic files for disaster recovery and contingency planning. However, some DOL documentation regarding the rationale for maintaining backup media also references using it to recover specific material inadvertently destroyed. Reference to authoritative discussions of backup media suggests that this is not an appropriate rationale for preserving backup media, since the retrieval of specific data from the imbedded mass of undifferentiated material in backup media is enormously complex, time-consuming and expensive.[3] Best practices in the records management field discourage the use of backup media as a source for recovering specific materials. As discussed in relation to the Federal Records Act, NARA guidance only calls for maintaining backup media until "no longer needed for system restoration." As

[2] Until an existing subpoena from the House Committee on Education and Labor regarding OLMS records is resolved, relevant backup media for the period covered by the subpoena (January 2001 through April 2002) must be retained.

[3] *See* footnote 1 above.

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your May 12th memo states, "[t]he Department's backup media (tapes/disks) are not intended, nor are they sanctioned by NARA to be a recordkeeping system."

Further, according to the Sedona Conference—the legal community's premier "think tank" on ESI and e-discovery issues:

> Effective e-mail management practices should provide advanced search and retrieval functions to track down e-mail in a timely and cost effective manner to support legal discovery and other requests. Back-up media are intended to restore saved data in the event of a failure or disaster while archives protect data so that it can be accessed when needed. Back-ups lack any sort of indexing. Because back-ups capture a snapshot of data, e-mails and electronic files generated between back-ups will be lost. . . . The use of back-up media to comply with litigation discoveries, holds, and requests, does not demonstrate effective e-mail management practices because they do not provide advanced search and retrieval functions to track down e-mail in a timely and cost effective manner.

*See* The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery, *and see* The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy.

Should DOL be found by a court to have "spoliated" or otherwise destroyed data subject to a pending litigation hold, the Department, responsible officials and/or the attorneys directly involved in the destruction can be subject to sanctions. *See generally* Haydock, Herr and Stempel, *Fundamentals of Pretrial Litigation* at §§ 10.4.4 *et seq.* (6th Ed. Thomson West 2007). However, Rule 37(f) of the Federal Rules of Civil Procedure (known as the "safe harbor" rule) stipulates that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system." The "Safe Harbor Policy pursuant to Fed. R. Civ. P. 37(f)" issued by the Executive Office of the United States Attorneys (June 15, 2007, attached as "C") states in part:

> EOUSA's Office of the Chief Information Officer . . . coordinates the operation of all EOUSA/USAO electronic information systems, including automated practices for maintaining and deleting ESI, such as e-mails and temporary documents, and reusing (rewriting) disaster recovery backup tapes after specified time periods. These routine practices were based on business need, cost and similar factors.

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And, the Department of Justice Guide "Electronic Discovery and the Preservation Obligation" (July 2007, attached as "B") states:

> Attorneys have a professional responsibility to work with their clients so that their clients know the existence and extent of these duties [to preserve documents subject to a preservation requirement], take the necessary steps to identify and preserve potentially relevant material, and maintain it in a proper format. *See* ABA Model Rules of Prof'l Conduct R. 3.4 (2002). ESI, for example, should be preserved in its originally-created or "native" format, and should include any related metadata to ensure the integrity of the information. *See Hagenbach v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. 04-3109, 2006 WL 665005, at *3 (N.D. Ill. Mar. 8, 2006) (unreported). *But see Wyeth v. Impax Labs., Inc.*, No. 06-22, 2006 WL 3091331, at *1-2 (D. Del. Oct. 6, 2006) (finding that production of documents in their native format was unnecessary where the parties did not initially agree to production in that format and there was no particular need for metadata).

Consistent with the opinion in the seminal *Zubulake* decision (*Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 [S.D.N.Y. 2003]), courts have repeatedly reaffirmed the presumption that ESI contained on backup tapes is inaccessible for purposes of searching for specific material: "Backup tapes must be restored using a process similar to that previously described [...] That makes such data inaccessible." This is true for several reasons. Data is recorded onto tapes in a linear fashion, sometimes in multiple forward and reverse passes. Generally, tapes must be restored cover-to-cover at slow speeds before the data can be examined. Restorations often result in the production of multiple copies of the same documents. In addition, tapes handle data in blocks, which requires a great deal of memory and processor resources in the restoration process. As the court in *U.S. v. Amerigroup*, 2005 WL 3111972 (N.D. Ill.) noted in discussing the difficulties of retrieving data from backup tapes, "...[t]o be sure, one can imagine the use of three dedicated servers to perform each of the six weeks of restoration work concurrently, but the end result is still eighteen weeks of man-power and eighteen weeks of use of the necessary equipment. That burden, which is undeniably substantial, exists independently of the monetary costs entailed." In other words, generating data from tapes to determine the existence of any responsive ESI is a costly, resource-intensive undertaking.

As recent decisions have confirmed, efforts to require document/information production via the discovery of backup tape ESI is subject to a balancing analysis, which requires an examination of the following seven factors: (1) the specificity of the request; (2) the likelihood of availability of ESI from more accessible sources; (3) the failure to produce once-available ESI; (4) the likelihood of finding responsive ESI; (5) the importance of the information; (6) the nature of the issues at stake in the litigation; and (7) the resources

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of the parties. To overcome the cost of restoring all data to determine if a tape contains responsive ESI, courts have employed creative workarounds. These include sampling methodologies, as in *Zubulake*, and phased restorations, as in *AAB Joint Venture* (*AAB Joint Venture v. U.S.*, 2007 WL 646157 [Fed. Cl.]). Both amount to a hit-or-miss endeavor and neither obviates the cost of restoration when samples uncover relevant ESI.

In line with the above authorities, the Department's backup media regimen should be revised so that it no longer suggests that backup media should be maintained for the purpose of permitting future retrieval of particular data otherwise lost or destroyed.[4] Likewise, maintenance of backup media, including the massive volume of ECN backup tapes currently being indefinitely maintained, is not required for the purpose of responding to litigation holds but could, to the extent the Department continues to retain it, expose the Department for years to come to significant fiscal risks that this mass of undifferentiated backup media may be required in some circumstances to be searched for newly sought information.[5]

4. Additional Minimization of Risk

Because backup media are manifestly not normally suitable for responding to litigation holds or other retention requirements, it would be wise to couple any policy regarding the recycling of backup media that is implemented by the Department with other measures to minimize the risk of loss of data that either is or can reasonably be expected to be included in a litigation hold or other retention requirement. SOL proposes a number of actions that will further minimize the risk. First, the Department should continue its current effort to train all staff regarding effective document and record management. This effort enhances the consciousness of all employees regarding the need to properly file and maintain electronic and other information.

Second, the Department should put in place a more formal and systemic litigation hold notice and review procedure. Such a procedure will better enable staff to avoid the potential destruction of data that is subject to an actual or imminent litigation hold.

Any residual risk that data responsive to a litigation hold has been inappropriately destroyed is further minimized by the actual history of litigation holds in this Department. SOL has no knowledge of any instances in which documents subject to a litigation hold (whether from a court, administrative or other tribunal, or based on reasonable anticipation of relevance to pending or anticipated litigation) were destroyed despite the

[4] Of course, such a policy would not prohibit the resort to backup media for any form of search, should such prove necessary.

[5] In the unlikely event that a litigation hold or other retention requirement applies to data known currently to exist only on backup media, both SOL and the involved agency should immediately determine whether to put in place a temporary cessation of scheduled recycling of relevant backup media while a determination is made whether searching backup media is required by the court or other authority.

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existence of that litigation hold.[6] Nor has DOL been required to search backup media with any frequency. SOL is aware of just one instance in which DOL was required by a court or tribunal (including through the operation of discovery rules) to restore and review backup media to potentially recover documents – in 2001 to recover the email of a former agency head. Additionally, as noted in footnote 1, DOL has also searched backup media in response to a 2006 Congressional request, recovering just five relevant documents at a cost over $2 million.

### C. Application of the Risk Analysis

Having concluded that backup media are not appropriate resources for retention of specifically identified data, and briefly discussed the inappropriateness of using backup media as a source for responding to FOIA requests, Congressional inquiries or restoration of records, we now directly analyze the relative legal risk presented by three possible actions: Action A – implementing reinstatement of the December 2006 policy on a prospective basis, in which backup media recycling commences six months after reinstatement of the policy; Action B – implementing reinstatement of the December 2006 policy as proposed in your memorandum, in which recycling would commence immediately of backup media created since December 2006 through the date six months prior to reinstatement; and Action C – scheduling recycling of older stores of backup media (which in the case of our option A means media more than six months old as of the date of policy implementation, and under your option B means media created prior to December 2006, which is a subject reserved by your memorandum for later consideration).

#### 1. Action A

Recycling of backup media after six months applied prospectively means that – assuming policy implementation in August 2008 – the first month of backup media to be recycled is that created in the month of August 2008 and that month's backup media will be recycled six months after the end of August 2008, which means on or after March 1, 2009. Then September 2008 backup media will be recycled on or after April 1, 2009, October 2008 backup media will be recycled on or after May 1, 2009, and so on.

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[6] DOL has been inappropriately accused in a few cases of having "spoliated" documents. However, in no such case of which SOL is aware was there a litigation hold in place. Therefore, such claims are without merit. SOL and its clients are aware of instances in which documents were properly destroyed in accordance with rules on record retention prior to the creation of a litigation hold . In these instances, there is some possibility that versions of the properly destroyed documents may nonetheless exist in some manner in backup media created for disaster recovery purposes, although SOL is not aware of any instance in which it is actually known that properly destroyed documents can be found in backup media.

[8] We reiterate, as discussed in Section A of this memorandum, that the backup media do not contain all data created on an EIN, but only that portion captured as part of a daily "snapshot," and that recovery of any data from backup media is costly.

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This method of prospective implementation of the backup media recycling policy will ensure that: (a) as a retention fail-safe, backup media are available for a period of six months after its creation;[8] and (b) the actual recycling of backup media will be initiated with the recycling of backup media from August 2008, which is after the completion of the Department's current records management training program. This six-month prospective recycling policy is also in line with the general NARA standard that, for purposes of disaster and system failure recovery, backup media need only be retained for a reasonable period of time.

2. Action B

Your memorandum of May 12th suggests the immediate recycling of all backup media from December 1, 2006 through six months prior to the date of implementation of the backup media recycling policy (whether the backup media is from the ECN or other networks), and the recycling each month thereafter of the backup media created six months prior. Recycling of the media from December 1, 2006 through the date six months prior to the policy's implementation (which was February 1, 2008 in the scenario identified in your May 12th memo) at this time poses an increased risk that data responsive to a litigation hold or other retention requirement may be lost.

Generally, two factors affect the risk associated with recycling particular backup media: the age of the media and the records management guidance in place when the media was created. First, the risk that a litigation hold or other retention requirement will implicate data on backup media is greatest during the period immediately following the data's creation. In the judgment and experience of the Solicitor's Office, the likelihood that an obligation will arise with respect to a particular document drops significantly by the time two years have passed since its creation. Thus, the older backup media is, the less likely it is to contain information that could become subject to a litigation hold of which we are not yet aware. Second, and on the other hand, the older the backup media is, the less records management guidance and training employees had at the time the information on the backup media was created (as discussed in Section A of this memo), and thus the more likely it is that the backup media will contain information that the Department improperly failed to retain. Also relevant here is that DOL does not yet have a formal litigation hold procedure addressing backup media (see Section B(4)). With respect to older backup media, however, destruction of documents and records that may have been improper at the time will have been cured by time's passage, since many federal records are supposed to be destroyed on a regular basis in accordance with record retention schedules. On balance, the older backup media is, the less likely it is that recycling it will prove problematic.

While the risk regarding this intermediate group of backup media (December 1, 2006 through the date six months prior to the recycling policy's implementation) is low, and the actual requirement that backup media be utilized in response to a litigation hold or other retention requirement is a relatively remote possibility, the residual risk could be further minimized by delaying the recycling of this backup media. One option for a delayed implementation might be for this 14 or so months of backup media to be recycled

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on a month by month basis beginning on December 1, 2008, so that the recycling will be completed by February 1, 2010. This suggestion will provide additional time during which any potential requirement to search this media, however remote, will become more remote.

3. Action C

While your memorandum of May 12, 2008 does not address a proposed solution to the ECN backlog of backup media, SOL has concluded that the ECN "permanent" backup regimen should be addressed in any implementation of a Department-wide backup media recycling policy. Otherwise, the Department will remain in a "schizophrenic" program mode, with a reasonable recycling policy in operation, but also a decade of extant ECN backup media totaling more than 23,000 tapes, beginning from 1999, at an annual cost of $1.1 million.

SOL has learned that the Department of Justice has a similar situation. While our understanding from Justice is that the current backup media policy for most of its divisions requires recycling after periods varying from three months to two years, the Criminal Division has all backup media from its EIN going back to 2000. Like this Department, Justice is in the process of establishing a single uniform backup media retention policy of six months while recognizing that the independence and unique work of some divisions might require deviation from that standard. We have been informed by responsible officials in Justice that they are working to ensure that the "indefinite" retention policy in their Criminal Division will be ended, and that a program for recycling of the backup media implemented as soon as possible

SOL's approach to this issue seems to be in line with that being pursued at Justice, and incorporates the risk analysis for all backup media preservation discussed above. The chance that any litigation hold or other preservation mandate applies solely to data preserved in the oldest ECN backup media is very remote. Litigation or other retention needs and any corresponding holds regarding material created ten years ago would normally have been initiated by now. Consequently, SOL considers that the phased recycling of the oldest ECN tapes – perhaps at the rate of several months' worth of backup tapes during each "real" month that passes or other periodic basis – presents a minimal risk of loss of any data that exists only on backup media. [9]

**D. Recommended Continued Enhancement of DOL's Data Retention Capabilities**

While considering implementation of DOL's backup media recycling policy, we do wish to point out that – as in any evolving technology context – there are further improvements in our ability to locate and retrieve all forms of ESI that DOL should continue to advance. The most effective "backup" system for locating ESI in response to a litigation hold,

[9] *See* Footnote 2, *supra*, regarding the need to preserve January 2001 to April 2002 backup media until a pending subpoena is resolved.

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FOIA request, or Congressional inquiry is through the development and implementation of an electronic archive.

In a draft Memorandum to all Agency Heads (attached as "D"), the Archivist of the United States describes the benefits of an archived e-mail backup system. The memorandum states:

> . . . e-mail archiving applications may provide the following benefits. Each product has different features and different strengths, so this list is not exhaustive:
>
> - Provides more efficient storage of e-mail because it is moved from a distributed network of servers, desktop applications, and other places and is then managed in one place;
> - The application's repository can be electronically searched for content that may be germane to a subpoena, Freedom of Information Act request, e-discovery request, or similar purpose;
> - Assists in back-up and disaster recovery.[10]

For the past few years, DOL has been in the process of developing an electronic Document Management/Records Management (DM/RM) system, which will work across DOL IT system boundaries to store, index, locate and keep track of both record and non-record information that is valuable to DOL. Such a system – which can archive material for the period it is maintained – is certainly an appropriate "next step" in DOL's records/non-records management system. The DM/RM initiative, however, is in temporary stasis due to the current budget confines and has no known date of deployment or project recommencement.

The fact that the Department does not have an effective e-mail and electronic files management system does not, however, require the Department to back up its ECN or any other network indefinitely. There is no legal requirement that any particular e-mails or documents be retained by the Department at all in the absence of an existing document request or retention requirement (whether as part of a litigation hold, Congressional inquiry, pending FOIA request, or records schedule requirement).

If DOL staff continues to follow "print and file" procedures for federal records, there will not be a need to search backup media for FRA purposes. Confidence that the Department

[10] "Archiving" is defined in the Archivist's draft Memorandum as "copying or transfer of files for storage. In general, these applications collect in a central repository the e-mail (possibly including attachments, calendars, task lists, etc.) of some or all agency users." We assume, for the purposes of this memorandum, that the DM/RM solution meets this definition.

has exercised "due diligence" in this regard will be substantially enhanced by the FRA training currently taking place.

**E. Conclusion**

SOL has concluded that neither litigation holds, record retention requirements, FOIA requests, nor Congressional oversight give rise to a general "legal" requirement that DOL maintain backup media for an indeterminate period of time. In developing a policy solution, the relatively minimal risk that substantial amounts of data responsive to a current litigation hold, FOIA request or Congressional inquiry might be destroyed and only available in backup media must be balanced against the substantial and ever-growing costs associated with the extensive and – at least in the case of the ECN – "permanent" maintenance of an ever-increasing number of backup tapes, and the enormous expense associated with potential future searches for information within thousands of backup tapes.

A conservative, low risk solution could include the following features:

- Maintenance of existing backup media for a "reasonable" period, during which any required disaster recovery can be accomplished. We agree with the December 2006 policy announcement that the general standard for the retention of all DOL EIN backup media be six months from the month of creation.
- Formulation of a more formal DOL litigation hold procedure that addresses considerations of backup media.
- Gradual recycling of the mass of ECN backup tapes, as well as the backup media from any other DOL EIN that is greater than six months old, beginning with the oldest tapes first, based upon the self-evident fact that the older the material and more unsupported the recovery methodology, the more remote is the possibility that a current litigation hold would require a search that far back in time and technology.

We will be happy to discuss this memorandum with you and your staff.

cc: Carol De Deo
Ron Whiting
Bill Thompson
Tim Hauser
Ed Hugler
Rose Audette
Don Knickerbocker

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U.S. Department of Labor

Office of the Assistant Secretary
for Administration and Management
Washington, D.C. 20210

AUG 18 2008

MEMORANDUM FOR AGENCY HEADS

FROM: PATRICK PIZZELLA
Assistant Secretary for Administration and Management,
Chief Information Officer

SUBJECT: DOL Records Management Program
Recordkeeping Requirements—Transitory Records

Since 2004, DOL has undertaken considerable efforts to improve its records management program, including working with agency records management staff to review and update agency records schedules and expand the overall level of knowledge and professionalism of DOL agency records management staff. Examples include providing agencies and employees with guidance and specific instructions on how to handle and manage electronic records, including e-mail; issuing an updated Records Management Handbook; conducting numerous senior management training sessions with the aid of National Archives and Records Administration (NARA) experts; conducting records and e-mail management workshops; and implementing mandatory records management training for all DOL employees.

Substantiating the Department's robust records management activities —attributable to the skill and dedication of your staff—are the quantifiable results of the program: the Department retired more than 140,000 cubic feet of Federal records (including paper and electronic media) to NARA's Federal Records Centers during the period FY 2001 through the second quarter of FY 2008. For perspective, consider that the volume of the records retired by DOL for this period would fill an Olympic-size swimming pool one and one-half times.

As part of our work to build up the Department's records management program, we have also become more aware of the value and prudence of disposing of what are characterized by NARA as *transitory records*. These are records which have very limited legal retention requirements under the Federal Records Act.

According to guidance from NARA, *transitory records* are records of short-term (180 days or less) interest, including in electronic form (e.g., e-mail messages), which have minimal or no documentary or evidential value. Examples of transitory e-mail and other records include:

- Routine requests for information or publications and copies of replies which require no administrative action, no policy decision, and no special compilation or research for reply;
- Originating office copies of letters of transmittal that do not add any information to that contained in the transmitted material, and receiving office copy if filed separately from transmitted material;

- Notices including memoranda and other records that do not serve as the basis of official actions, such as notices of holidays or charity and welfare fund appeals, bond campaigns, and similar records;
- Records documenting routine activities containing no substantive information, such as routine notifications of meetings, scheduling of work-related trips and visits, and other scheduling related activities; and
- Suspense and tickler files or "to-do" and task lists that serve as a reminder that an action is required on a given date or that a reply to action is expected, and if not received, should be traced on a given date.

NARA guidance calls for the destruction of transitory records immediately, or when no longer needed for reference, or in accordance with a predetermined schedule or business rule.

Building on our progress, I ask that you take the steps necessary to establish program-specific record keeping procedures that instruct employees on the maintenance and disposition of transitory records and documents in your agency, and that these procedures are effectively communicated to your employees. To assist with this task, we will work with your staff to provide training and guidance to help them establish record keeping procedures for transitory records and documents appropriate to your agency programs. These procedures should be made a component part of your agency records management system and will be evaluated during the Department's periodic reviews of DOL agency records management practices. Your Agency Records Manager may contact Karen Nunley, DOL's Records Officer, at (202) 693-7289 or nunley.karen.h@dol.gov, for assistance.

I know I can count on each of you to support our ongoing Departmental effort to ensure that we continue to carry out our records management responsibilities effectively.

Thank you for your cooperation.

cc: Agency Administrative Officers
Agency Records Managers
OASAM Regional Administrators