

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 *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

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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.