April 15, 2011

U.S. Department of Homeland Security
Office of the General Counsel
245 Murray Lane
Washington, DC 20528

Via email: Regulatory.Review@dhs.gov

Re: Comments on DHS Request Pursuant to Executive Order 13563 Seeking Input on Retrospective Analysis of Existing Significant Regulations

Dear Sir or Madam:


SHRM is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in Canada and India.

SHRM’s membership comprises HR professionals who are responsible for developing and administering their employer’s human resource policies and practices. As such, our members are intimately familiar with the practical aspects of implementing the regulations and guidance promulgated by DHS with regard to employment.

We thank DHS for the opportunity to provide input into its development of a regulatory review process according to Executive Order 13563, “Improving Regulation and Regulatory Review.” SHRM appreciates consideration of its comments along with those submitted by other stakeholders and members of the public.
DHS Should Seek Input on an Ongoing Basis

The Executive Order is intended to increase the effectiveness of governmental regulation, while reducing the burden imposed by compliance with overlapping and many times obsolete requirements. As President Obama emphasized in announcing its implementation,

This order requires that federal agencies ensure that regulations protect our safety, health and environment while promoting economic growth. And it orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive.


Department of Homeland Security, like all Executive Branch departments and agencies, is required under the Executive Order to submit a preliminary plan for periodic review of existing significant regulations to the Office of Information and Regulatory Affairs (OIRA) on or before May 18, 2011 (120 days from the January 18 issuance date) “under which the agency will . . . determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.” Executive Order No. 13,563, Sec. 6(b), 76 Fed. Reg. 3821, at 3822. In a Guidance Memorandum issued February 2, 2011, the Office of Management and Budget (OMB) emphasized that the aim of the plan requirement is “to create a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive.” Memorandum re Executive Order 13563, “Improving Regulation and Regulatory Review,” Office of Management and Budget (OMB) M-11-10 (Feb. 2, 2011).

DHS issued its request for public comments on March 14, 2011 providing a 30-day public comment period. Although this comment period was similar to those provided by other federal agencies, it is an inadequate period of time given the scope and importance of the regulatory review project. SHRM urges DHS to approach this review as an ongoing process and provide additional opportunities for comment that will allow stakeholders to provide more meaningful and systematic input to the Department.

Method for Prioritizing DHS's Periodic Review of Existing Regulations

Section 6 of the Executive Order requires the agencies to submit a preliminary plan under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, expanded, streamlined, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.
To further this goal, SHRM suggests that DHS identify for review those regulations that meet any of the following criteria:

1. The regulation is contrary to DHS's goal of effecting compliance with the laws it is charged with enforcing in that it discourages the regulated community from seeking compliance assistance from DHS. To identify such regulations, DHS should issue a Request for Information;

2. The regulation has proven, over time, to impose such a significant burden on the regulated community as to create a disincentive to job creation, to discourage businesses from becoming federal contractors, or to adversely affect the competitiveness of businesses in the international marketplace. To identify these regulations, DHS should issue a Request for Information to obtain data to enable DHS to quantify the costs of compliance with the regulation, as compared to the public benefit achieved as a result of complying with the regulation;

3. While the regulation may have been effective at the time of promulgation, intervening events or technologies have rendered the regulation less relevant or efficacious. To identify these regulations, DHS should issue a Request for Information to obtain information about how the need for the regulation has changed since its promulgation; or

4. The regulation or multiple regulations impose overlapping obligations that are either duplicative or inconsistent, such that the costs of compliance far exceed the public benefit achieved. To identify these regulations, DHS should issue a Request for Information to obtain data to enable DHS to quantify the costs of compliance with the regulation, as compared to the benefit achieved as a result of complying with the regulation.

Specific Regulations of Concern to SHRM

SHRM's members have a vital interest in the regulations related to employment. In the very short period of time provided for public input, SHRM cannot provide meaningful suggestions on the specific regulations that would likely meet any of the criteria listed above, and we believe that other interested members of the public likely are in the same position. For that reason, we urge DHS to obtain detailed information from the public through the Requests for Information described above. Using the information obtained, the Department can then make reasoned decisions about how best to focus its review of existing regulations.

Should DOL instead decide to conduct its review of specific regulations without requesting the information SHRM has suggested above, SHRM submits for consideration the following priorities for review:
Provide Guidance to Respond to ICE Notice of Suspect Documents

A notice of suspect documents is issued during the inspection of I-9s by ICE auditors. It informs employers that certain workers may possess questionable work authorization documents. Currently, there is no specific timeline provided to employers in which to respond to the Notice by questioning employees and terminating their employment. Some auditors refuse to provide any timeline guidance, some state three days, while others provide several weeks. Employers should be given specific guidance. We recommend 90 to 120 days. Prior regulatory guidance that provided for a 90 day grace period was rescinded in September 2008.

Establish One-Step Verification for E-Verify Employers

Completion of I-9 forms in addition to the E-Verify process is duplicative and unnecessary and the cost of retention of Forms I-9 for E-Verified employees imposes an unnecessary economic burden. Reduction of the I-9 paperwork burden would encourage voluntary employer registration for E-Verify, reduce costs, and promote efficiency.

Develop Electronic Form I-9

Providing an electronic Form I-9 with instructions, prompts, and drop-down menus would provide a more efficient and effective means of completing the basic verification process and reduce or eliminate the risk of paperwork violations.

Provide Guidance to Complete I-9 for Remote Hires

Currently employers must complete an I-9 by conducting an in person review of the original of the documents to determine if they are “genuine looking” and appear to relate to the employee. Many employers hire staff remotely and find it difficult to delegate the task of I-9 completion to a third party unrelated to the employer’s business. We recommend that ICE provide guidance for completing I-9s for remote hires that incorporates increased technological capabilities, such as internet-based conferencing, to view employees and their documents.

Allow Prosecutorial Discretion for Completing I-9’s During Acquisitions and Mergers

In most mergers and acquisitions, human resource departments are overwhelmed in their efforts to comply with applicable laws and regulations and to timely complete I-9s for hundreds or thousands of employees based on an effective acquisition date. If an acquiring or surviving entity chooses to reduce its exposure by electing to complete new I-9s for all acquired employees, the company should not be required to complete I-9s for the transitioning workforce in just three days. The company’s good faith efforts to complete the I-9s within a reasonable time from the effective date of the acquisition should be treated as acceptable. Under 8 CFR §274a.2(b)(1)(viii)(A)(7), the receiving/surviving employer is allowed to claim that the employee continues employment for I-9
purposes; but for the employer who does not trust old I-9s or applies stricter I-9 standards, that employer is provided no additional time for new I-9 completion. We request an agreement/MOU among Immigration and Customs Enforcement, Office of Special Counsel for Immigration, and US Citizenship and Immigration Services to allow an exception from the normal I-9 completion deadline for employers who choose to complete new I-9s in a merger, acquisition, or reorganization. If an employer documents its protocol for I-9 completion as part of the merger, acquisition, or reorganization process and completes new I-9s in a 30–45 day time frame, we would encourage the application of prosecutorial discretion uniformly.

Finally, SHRM supports the idea of creating a “business liaison” within USCIS. USCIS policy staff and adjudicators struggle with the fluid and dynamic shifts of business models as companies adjust to the changes in a global economy. A business liaison would function as the information conduit between USCIS and real world businesses whose evolving business models USCIS needs to learn and understand better.

Again, we appreciate your consideration of our comments. If you would like to discuss these comments, please contact Nancy Hammer at (703) 535-6030.

Yours truly,

Michael P. Aitken
Director, Government Affairs