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DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 10

RIN 1235-AA10

Establishing a Minimum Wage for Contractors

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes regulations to implement Executive Order 13658, Establishing a Minimum Wage for Contractors, which was signed by President Barack Obama on February 12, 2014. Executive Order 13658 states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. The Executive Order therefore seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by raising the hourly minimum wage paid by those contractors to workers performing on covered Federal contracts to: $10.10 per hour, beginning January 1, 2015; and beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor. The Executive Order directs the Secretary to issue regulations by October 1, 2014, to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act to implement the Order's requirements. This proposed rule therefore establishes standards and procedures for implementing and enforcing the minimum

wage protections of Executive Order 13658. As required by the Order and to the extent practicable, the proposed rule incorporates existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, the Service Contract Act, and the Davis-Bacon Act.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA10, by either of the following methods:

Electronic comments: Submit comments through the Federal eRulemaking Portal http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Address written submissions to Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3510, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Instructions: Please submit only one copy of your comments by only one method. All submissions must include the agency name and RIN, identified above, for this rulemaking. Please be advised that comments received will become a matter of public record and will be posted without change to http://www.regulations.gov, including any personal information provided. Comments that are mailed must be received by the date indicated for consideration in this rulemaking. For additional information on submitting comments and the rulemaking process, see the "Public Participation" heading of the SUPPLEMENTARY INFORMATION section of this document. For questions concerning the interpretation and enforcement of labor standards related to government contracts, individuals may contact the Wage and Hour Division (WHD) local district offices (see contact information below).

Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at http://www.regulations.gov.

FOR FURTHER INFORMATION: Contact Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3510, 200 Constitution Avenue, N.W., Washington, D.C. 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this proposed rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the WHD's website for a nationwide listing of WHD district and area offices at http://www.dol.gov/whd/america2.htm.

SUPPLEMENTARY INFORMATION:

I. Electronic Access and Filing Comments

Public Participation: This proposed rule is available through the Federal Register and the http://www.regulations.gov website. You may also access this document via the WHD's website at http://www.dol.gov/whd/. To comment electronically on Federal rulemakings, go to the Federal e-Rulemaking Portal at http://www.regulations.gov, which will allow you to find, review, and submit comments on Federal documents that are open for comment and published in the Federal Register. You must identify all comments submitted by including "RIN 1235-

AA10" in your submission. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period (date identified above); comments received after the comment period closes will not be considered. Submit only one copy of your comments by only one method. Please be advised that all comments received will be posted without change to http://www.regulations.gov, including any personal information provided.

II. Executive Order 13658 Requirements and Background

On February 12, 2014, President Barack Obama signed Executive Order 13658, Establishing a Minimum Wage for Contractors (the Executive Order or the Order). 79 FR 9851. The Executive Order states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. Id. The Order therefore seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by raising the hourly minimum wage paid by those contractors to workers performing on covered Federal contracts to (i) $10.10 per hour, beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor (Secretary) in accordance with the Executive Order. Id.

Section 1 of Executive Order 13658 sets forth a general position of the Federal Government that increasing the hourly minimum wage paid by Federal contractors to $10.10 will increase efficiency and cost savings for the Federal Government. 79 FR 9851. The Order states that raising the pay of low-wage workers increases their morale and productivity and the quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs. Id. The Order further states that these savings and quality improvements will lead to improved economy and efficiency in Government procurement. Id.

Section 2 of Executive Order 13658 therefore establishes a minimum wage for Federal contractors and subcontractors. 79 FR 9851. The Order provides that executive departments and agencies (agencies) shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations (collectively referred to as "contracts"), as described in section 7 of the Order, include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c),[1] in the performance of the contract or any subcontract thereunder, shall be at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary in accordance with the Executive Order. 79 FR 9851. As required by the Order, the minimum wage amount determined by the Secretary pursuant to this section shall be published by the Secretary at least 90 days before such new minimum wage is to take effect and shall be: (A) not less than the amount in effect on the date of such determination; (B) increased from such amount by the annual percentage increase, if any, in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and (C) rounded to the nearest multiple of $0.05. Id.

Section 2 of the Executive Order further explains that, in calculating the annual percentage increase in the CPI for purposes of this section, the Secretary shall compare such CPI for the most recent month, quarter, or year available (as selected by the Secretary prior to the first year for which a minimum wage determined by the Secretary is in effect pursuant to this

[1] 29 U.S.C. 214(c) authorizes employers, after receiving a certificate from the WHD, to pay subminimum wages to workers whose earning or productive capacity is impaired by a physical or mental disability for the work to be performed.

section) with the CPI for the same month in the preceding year, the same quarter in the preceding year, or the preceding year, respectively. 79 FR 9851. Pursuant to this section, nothing in the Order excuses noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order. Id.

Section 3 of Executive Order 13658 explains the application of the Order to tipped workers. 79 FR 9851-52. It provides that for workers covered by section 2 of the Order who are tipped employees pursuant to 29 U.S.C. 203(t), the hourly cash wage that must be paid by an employer to such employees shall be at least: (i) $4.90 an hour, beginning on January 1, 2015; (ii) for each succeeding 1-year period until the hourly cash wage under this section equals 70 percent of the wage in effect under section 2 of the Order for such period, an hourly cash wage equal to the amount determined under section 3 of the Order for the preceding year, increased by the lesser of: (A) $0.95; or (B) the amount necessary for the hourly cash wage under section 3 to equal 70 percent of the wage under section 2 of the Order; and (iii) for each subsequent year, 70 percent of the wage in effect under section 2 for such year rounded to the nearest multiple of $0.05. 79 FR 9851-52. Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their wages are equal to the minimum wage under section 2 of the Order, section 3 requires that the cash wage paid by the employer be increased such that their wages equal the minimum wage under section 2 of the Order. 79 FR 9852. Consistent with applicable law, if the wage required to be paid under the Service Contract Act (SCA), 41 U.S.C. 6701 et seq., or any other applicable law or regulation is higher than the wage required by section 2 of the Order, the employer must pay additional cash wages sufficient to meet the highest wage required to be paid. Id.

Section 4 of Executive Order 13658 provides that the Secretary shall issue regulations by October 1, 2014, to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act, to implement the requirements of the Order, including providing exclusions from the requirements set forth in the Order where appropriate. 79 FR 9852. It also requires that, to the extent permitted by law, within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council (FARC) shall issue regulations in the Federal Acquisition Regulation (FAR) to provide for inclusion of the contract clause in Federal procurement solicitations and contracts subject to the Executive Order. Id. Additionally, this section states that within 60 days of the Secretary issuing regulations pursuant to the Order, agencies must take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts for concessions and contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, entered into after January 1, 2015, consistent with the effective date of such agency action, comply with the requirements set forth in sections 2 and 3 of the Order. Id. The Order further specifies that any regulations issued pursuant to this section should, to the extent practicable and consistent with section 8 of the Order, incorporate existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq.; the SCA; and the Davis-Bacon Act (DBA), 40 U.S.C. 3141 et seq. 79 FR 9852.

Section 5 of Executive Order 13658 grants authority to the Secretary to investigate potential violations of and obtain compliance with the Order. 79 FR 9852. It also explains that Executive Order 13658 does not create any rights under the Contract Disputes Act and that disputes regarding whether a contractor has paid the wages prescribed by the Order, to the extent

permitted by law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to the Order. Id.

Section 6 of Executive Order 13658 establishes that if any provision of the Order or the application of such provision to any person or circumstance is held to be invalid, the remainder of the Order and the application shall not be affected. 79 FR 9852.

Section 7 of the Executive Order provides that nothing in the Order shall be construed to impair or otherwise affect the authority granted by law to an agency or the head thereof; or the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals. 79 FR 9852-53. It also states that the Order is to be implemented consistent with applicable law and subject to the availability of appropriations. 79 FR 9853. The Order explains that it is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Id.

Section 7 of Executive Order 13658 further establishes that the Order shall apply only to a new contract, as defined by the Secretary in the regulations issued pursuant to section 4 of the Order, if: (i) (A) it is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by Department of Labor (the Department) regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Section 7 of the Order also states that, for contracts covered by the SCA

or the DBA, the Order shall apply only to contracts at the thresholds specified in those statutes.[2] Id. Additionally, for procurement contracts where workers' wages are governed by the FLSA, the Order specifies that it shall apply only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a)[3], unless expressly made subject to the Order pursuant to regulations or actions taken under section 4 of the Order. 79 FR 9853. The Executive Order specifies that it shall not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended; or any contracts expressly excluded by the regulations issued pursuant to section 4(a) of the Order. 79 FR 9853. The Order also strongly encourages independent agencies to comply with its requirements. Id.

Section 8 of Executive Order 13658 provides that the Order is effective immediately and shall apply to covered contracts where the solicitation for such contract has been issued on or after: (i) January 1, 2015, consistent with the effective date for the action taken by the FARC pursuant to section 4(a) of the Order; or (ii) for contracts where an agency action is taken pursuant to section 4(b) of the Order, January 1, 2015, consistent with the effective date for such action. 79 FR 9853-54. It also specifies that the Order shall not apply to contracts entered into pursuant to solicitations issued on or before the effective date for the relevant action taken pursuant to section 4 of the Order. Id. Finally, Section 8 states that, for all new contracts negotiated between the date of the Order and the effective dates set forth in this section, agencies are strongly encouraged to take all steps that are reasonable and legally permissible to ensure that

[2] The prevailing wage requirements of the SCA apply to covered prime contracts in excess of $2,500. See 41 U.S.C. 6702(a)(2) (recodifying 41 U.S.C. 351(a)). The DBA applies to covered prime contracts that exceed $2,000. See 40 U.S.C. 3142(a). There is no value threshold requirement for subcontracts awarded under such prime contracts.

[3] 41 U.S.C. 1902(a) defines the micro-purchase threshold as $3,000.

individuals working pursuant to those contracts are paid an hourly wage of at least $10.10 (as set forth under sections 2 and 3 of the Order) as of the effective dates set forth in this section. 79 FR 9854.

III. Discussion of Proposed Rule

A. Legal Authority

The President issued Executive Order 13658 pursuant to his authority under "the Constitution and the laws of the United States," expressly including the Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101 et seq. 79 FR 9851. The Procurement Act authorizes the President to "prescribe policies and directives that [the President] considers necessary to carry out" the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. 40 U.S.C. 101, 121(a). Executive Order 13658 delegates to the Secretary the authority to issue regulations to "implement the requirements of this order." 79 FR 9852. The Secretary has delegated his authority to promulgate these regulations to the Administrator of the WHD. Secretary's Order 05-2010 (Sept. 2, 2010), 75 FR 55352 (published Sept. 10, 2010).

B. Stakeholder Engagement

As part of the development of this proposed rule, the Department has engaged stakeholders likely subject to the Executive Order to solicit their views on what the Executive Order will mean for their operations and workers. During four of the Department's Government Contract Prevailing Wage Seminars held by the WHD in Manchester, NH; Phoenix, AZ; Chicago, IL; and San Diego, CA; this year, the WHD conducted listening sessions in each location to hear the views, ideas, and concerns of interested parties (including contractors,

contracting agencies, and unions) regarding the provisions of the Executive Order. The Department also hosted listening sessions in Washington, D.C. during which interested stakeholders, such as contractor associations; worker advocates, including advocates for people with disabilities; contracting agencies; and small businesses provided their views to Departmental leadership. One such listening session was co-hosted by the Small Business Administration's Office of Advocacy. The Department found these listening sessions helpful and considered relevant information raised during those sessions in developing the proposed regulations set forth herein.

C. Overview of the Proposed Rule

The Department's notice of proposed rulemaking (NPRM), which would amend Title 29 of the Code of Federal Regulations (CFR) by adding part 10, establishes standards and procedures for implementing and enforcing Executive Order 13658. Proposed subpart A of part 10 relates to general matters, including the purpose and scope of the rule, as well as the definitions, coverage, and exclusions that the rule provides pursuant to the Order. It also sets forth the general minimum wage requirement for contractors established by the Executive Order, an antiretaliation provision, and a prohibition against waiver of rights. Proposed subpart B establishes the requirements that contracting agencies and the Department must follow to comply with the minimum wage provisions of the Executive Order. Proposed subpart C establishes the requirements that contractors must follow to comply with the minimum wage provisions of the Executive Order. Proposed subparts D and E specify standards and procedures related to complaint intake, investigations, remedies, and administrative enforcement proceedings. Proposed appendix A contains a contract clause to implement Executive Order 13658. 79 FR 9851.

The following section-by-section discussion of this proposed rule presents the contents of each section. The Department invites comments on any issues addressed by the proposals in this rulemaking.

Subpart A – General

Proposed subpart A of part 10 pertains to general matters, including the purpose and scope of the rule, as well as the definitions, coverage, and exclusions that the rule provides pursuant to the Order. Proposed § 10.1(a) explains that the purpose of the proposed rule is to implement Executive Order 13658 and reiterates statements from the Order that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. There is evidence that boosting low wages can reduce turnover and absenteeism in the workplace, while also improving morale and incentives for workers, thereby leading to higher productivity overall. As stated in proposed § 10.1(a), it is for these reasons that the Executive Order concludes that cost savings and quality improvements in the work performed by parties who contract with the Federal Government will lead to improved economy and efficiency in Government procurement. The Department believes that, by increasing the quality and efficiency of services provided to the Federal Government, the Executive Order will improve the value that taxpayers receive from the Federal Government's investment.

Proposed § 10.1(b) explains the general Federal Government requirement established in Executive Order 13658 that new contracts with the Federal Government include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, requiring, as a condition of payment, that the contractor and any subcontractors pay workers performing on the contract or any subcontract thereunder at least: (i) $10.10 per hour beginning January 1,

2015; and (ii) an amount determined by the Secretary pursuant to the Order, beginning January 1, 2016, and annually thereafter. Proposed § 10.1(b) also clarifies that nothing in Executive Order 13658 or part 10 is to be construed to excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order.

Proposed § 10.1(c) outlines the scope of this proposed rule and provides that neither Executive Order 13658 nor this part creates any rights under the Contract Disputes Act or any private right of action. The Department does not interpret the Executive Order as limiting existing rights under the Contract Disputes Act. This provision also restates the Executive Order's directive that disputes regarding whether a contractor has paid the minimum wages prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Order. The provision clarifies, however, that nothing in the Order is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. Finally, this paragraph clarifies that neither the Order nor this proposed rule would preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

Proposed § 10.2 defines terms for purposes of this rule implementing Executive Order 13658. Section 4(c) of the Executive Order instructs that any regulations issued pursuant to the Order should "incorporate existing definitions" under the FLSA, the SCA, and the DBA "to the extent practicable and consistent with section 8 of this order." 79 FR 9852. Most of the definitions provided in this proposed rule are therefore based on either the Executive Order itself or the definitions of relevant terms set forth in the statutory text or implementing regulations of the FLSA, SCA, or DBA. Several proposed definitions adopt or rely upon definitions published

by the FARC in section 2.101 of the FAR. 48 CFR 2.101. The Department also proposes to adopt, where applicable, definitions set forth in the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. 29 CFR 9.2. The Department notes that, while the proposed definitions discussed herein govern the implementation and enforcement of Executive Order 13658, nothing in the proposed rule is intended to alter the meaning of or to be interpreted inconsistently with the definitions set forth in the FAR for purposes of that regulation.

The Department proposes to define the term agency head to mean the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency or any persons authorized to act on behalf of the agency head. This proposed definition is based on the definition of the term set forth in section 2.101 of the FAR. See 48 CFR 2.101.

The Department proposes to define concessions contract (or contract for concessions) to mean a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. This proposed definition does not contain a limitation regarding the beneficiary of the services, and such contracts may be of direct or indirect benefit to the Federal Government, its property, its civilian or military personnel, or the general public. See 29 CFR 4.133. The proposed definition includes but is not limited to all concession contracts excluded by Departmental regulations under the SCA at 29 CFR 4.133(b).

The Department proposes to define contract and contract-like instrument collectively for purposes of the Executive Order as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is

not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The proposed definition of the term contract broadly includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The proposed definition of the term contract shall be interpreted broadly to include, but not be limited to, any contract that may be consistent with the definition provided in the FAR or applicable Federal statutes. This definition shall include, but shall not be limited to, any contract that may be covered under any Federal procurement statute. The Department specifically proposes to note in this definition that contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. The proposed definition also explains that, in addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The proposed definition also specifies that, for purposes of the minimum wage requirements of the Executive Order, the term contract includes contracts covered by the SCA, contracts covered by the DBA, and concessions contracts not otherwise subject to the SCA, as provided in section 7(d) of the Executive Order. See 79 FR 9853. The proposed definition of contract discussed herein is derived from the definition of the term contract set forth in Black's Law Dictionary (9th ed. 2009) and § 2.101 of the FAR (48 CFR 2.101), as well as the descriptions of the term contract that appear in the SCA's regulations at 29

CFR 4.110-.111, 4.130. The Department also incorporates the exclusions from coverage specified in section 7(f) of the Executive Order and provides that the term contract does not include grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended; or any contracts or contract-like instruments expressly excluded by § 10.4.

The Department notes that the mere fact that a legal instrument constitutes a contract under this definition does not mean that such contract is subject to the Executive Order. In order for a contract to be covered by the Executive Order and this proposed rule, the contract must qualify as one of the specifically enumerated types of contracts set forth in section 7(d) of the Order and proposed § 10.3. For example, although a cooperative agreement is considered a contract pursuant to the Department's proposed definition, a cooperative agreement will not be covered by the Executive Order and this part unless it is subject to the DBA or SCA, is a concessions contract, or is entered into "in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public." 79 FR 9853. In other words, this part does not apply to cooperative agreements that do not involve providing services for Federal employees, their dependents, or the general public.

The Department proposes to substantially adopt the definition for contracting officer in section 2.101 of the FAR, which means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. See 48 CFR 2.101.

The Department defines contractor to mean any individual or other legal entity that (1) directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably

may be expected to submit offers for or be awarded, a Government contract or a subcontract under a Government contract; or (2) conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor. The term contractor refers to both a prime contractor and all of its first or lower-tier subcontractors on a contract with the Federal Government. This proposed definition incorporates relevant aspects of the definitions of the term contractor in section 9.403 of the FAR, see 48 CFR 9.403; the SCA's regulations at 29 CFR 4.1a(f); and the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts at 29 CFR 9.2. This definition includes lessors and lessees, as well as employers of workers performing on covered Federal contracts whose wages are computed pursuant to special certificates issued under 29 U.S.C. 214(c). The Department notes that the term employer is used interchangeably with the terms contractor and subcontractor in this part. The proposed rule also explains that the U.S. Government, its agencies, and its instrumentalities are not considered contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of Executive Order 13658.

The Department proposes to define the term Davis-Bacon Act to mean the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 et seq., and its implementing regulations.

In the NPRM, the Department defines executive departments and agencies that are subject to Executive Order 13658 by adopting the definition of executive agency provided in section 2.101 of the FAR. 48 CFR 2.101. The Department therefore interprets the Executive Order to apply to executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31

U.S.C. 9101. The Department does not interpret this definition as including the District of Columbia or any Territory or possession of the United States.

The Department defines the term Executive Order minimum wage as a wage that is at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of Executive Order 13658. This definition is based on the language set forth in section 2 of the Executive Order. 79 FR 9851-52.

The Department proposes to define Fair Labor Standards Act as the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq., and its implementing regulations.

The term Federal Government is defined in the NPRM as an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. This proposed definition is based on the definition of Federal Government set forth in 29 CFR 9.2, but eliminates the term "procurement" from that definition because Executive Order 13658 applies to both procurement and non-procurement contracts covered by section 7(d) of the Order. Consistent with the SCA, the term Federal Government includes nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies. See 29 CFR 4.107(a). For purposes of the Executive Order and this part, the Department's proposed definition does not include the District of Columbia or any Territory or possession of the United States.

The Department proposes to define the term independent agencies, for the purposes of Executive Order 13658, as any independent regulatory agency within the meaning of 44 U.S.C. 3502(5). Section 7(g) of the Executive Order states that "[i]ndependent agencies are strongly encouraged to comply with the requirements of this order." The Department interprets this

provision to mean that independent agencies are not required to comply with this Executive Order. This proposed definition is therefore based on other Executive Orders that similarly exempt independent regulatory agencies within the meaning of 44 U.S.C. 3502(5) from the definition of agency or include language requesting that they comply. See, e.g., Executive Order 13636, 78 FR 11739 (Feb. 12, 2013) (defining agency as any executive department, military department, Government corporation, Government-controlled operation, or other establishment in the executive branch of the Government but excluding independent regulatory agencies as defined in 44 U.S.C. 3502(5)); Executive Order 13610, 77 FR 28469 (May 10, 2012) (same); Executive Order 12861, 58 FR 48255 (September 11, 1993) ("Sec. 4 Independent Agencies. All independent regulatory commissions and agencies are requested to comply with the provisions of this order."); Executive Order 12837, 58 FR 8205 (Feb. 10, 1993) ("Sec. 4. All independent regulatory commissions and agencies are requested to comply with the provisions of this order.").

The Department proposes to define the term new contract as a contract that results from a solicitation issued on or after January 1, 2015 or a contract that is awarded outside the solicitation process on or after January 1, 2015. The proposed definition would note that this term includes both new contracts and replacements for expiring contracts provided that the contract results from a solicitation issued on or after January 1, 2015 or is awarded outside the solicitation process on or after January 1, 2015. This language is based on section 8 of the Executive Order, 79 FR 9853, and is consistent with the convention set forth in section 1.108(d) of the FAR, 48 CFR 1.108(d).

Proposed § 10.2 defines the term option by adopting the definition set forth in section 2.101 of the FAR, which provides that the term option means a unilateral right in a contract by

which, for a specified time, the Federal Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. See 48 CFR 2.101.

The Department proposes to define the term procurement contract for construction to mean a contract for the construction, alteration, or repair (including painting and decorating) of public buildings or public works and which requires or involves the employment of mechanics or laborers, and any subcontract of any tier thereunder. The proposed definition includes any contract subject to the provisions of the DBA, as amended, and its implementing regulations. This proposed definition is derived from language found at 40 U.S.C. 3142(a) and 29 CFR 5.2(h).

The Department proposes to define the term procurement contract for services to mean a contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder. This proposed definition includes any contract subject to the provisions of the SCA, as amended, and its implementing regulations. This proposed definition is derived from language set forth in 41 U.S.C. 6702(a), 29 CFR 4.1a(e), and 29 CFR 9.2.

The Department proposes to define the term Service Contract Act to mean the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 et seq., and its implementing regulations. See 29 CFR 4.1a(a).

In this NPRM, the term solicitation is defined to mean any request to submit offers or quotations to the Federal Government. This definition is based on the language found at 29 CFR 9.2. The Department broadly interprets the term solicitation to apply to both traditional and

nontraditional methods of solicitation, including informal requests by the Federal Government to submit offers or quotations.

The Department adopts in this proposed rule the definition of tipped employee in section 3(t) of the FLSA, that is, any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips. See 29 U.S.C. 203(t). For purposes of the Executive Order, a worker performing on a contract covered by the Executive Order who meets this definition is a tipped employee.

In proposed § 10.2, the Department defines the term United States by adopting the definition set forth in 29 CFR 9.2, which provides that the term means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities. The proposed definition also incorporates the definition of the term that appears in the FAR at 48 CFR 2.101, which explains that when the term is used in a geographic sense, the United States means the 50 States and the District of Columbia. The Department's proposed rule does not adopt any of the exceptions to the definition of this term that are set forth in the FAR.

The Department proposes to define wage determination as including any determination of minimum hourly wage rates or fringe benefits made by the Secretary pursuant to the provisions of the SCA or the DBA. This term includes the original determination and any subsequent determinations modifying, superseding, correcting, or otherwise changing the provisions of the original determination. The proposed definition is derived from 29 CFR 4.1a(h) and 29 CFR 5.2(q).

The Department proposes to define worker as any person engaged in the performance of a contract covered by the Executive Order, and whose wages under such contract are governed by the FLSA, the SCA, or the DBA, regardless of the contractual relationship alleged to exist between the individual and the employer. The proposed definition also incorporates the Executive Order's provision that the term worker includes any individual performing on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c). 79 FR 9851, 9853. The definition of worker includes any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. See 29 CFR 4.6(p) (SCA); 29 CFR 5.2(n) (DBA). Consistent with the FLSA, SCA, and DBA and their implementing regulations, this proposed definition of worker excludes from coverage any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. See 29 U.S.C. 213(a)(1) (FLSA); 41 U.S.C. 6701(3)(C) (SCA); 29 CFR 5.2(m) (DBA). The Department also emphasizes the well-established principle under those statutes that worker coverage does not depend upon the existence or form of any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons. See, e.g., 29 U.S.C. 203(d), (e)(1), (g) (FLSA); 41 U.S.C. 6701(3)(B), 29 CFR 4.155 (SCA); 29 CFR 5.5(a)(1)(i) (DBA). As reflected in the proposed definition, the Executive Order is intended to apply to a wide range of employment relationships. Neither an individual's subjective belief about his or her employment status nor the existence of a contractual relationship is determinative of whether a worker is covered by the Executive Order.

Finally, the Department proposes to adopt the definitions for the terms Administrator, Administrative Review Board, Office of Administrative Law Judges, and Wage and Hour Division set forth in 29 CFR 9.2.

Proposed §§ 10.3 and 10.4 address and implement the coverage and exclusionary provisions of Executive Order 13658. Proposed § 10.3 explains the scope of the Executive Order and its coverage of executive agencies, new contracts, types of contractual arrangements and workers. Proposed § 10.4 implements the exclusions expressly set forth in section 7(f) of the Executive Order and would provide other limited exclusions to coverage as authorized by section 4(a) of the Order. 79 FR 9852-53.

Executive Order 13658 provides that agencies must, to the extent permitted by law, ensure that new contracts, as described in section 7 of the Order, include a clause specifying, as a condition of payment, that the minimum wage to be paid to workers in the performance of the contract shall be at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) an amount determined by the Secretary, beginning January 1, 2016, and annually thereafter. 79 FR 9851. Section 7(d) of the Executive Order establishes that this minimum wage requirement only applies to a new contract if: (i) (A) it is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Section 7(e) of the Order states that, for contracts covered by the SCA or the DBA, the Order applies only to contracts at the thresholds specified in those statutes. Id. It also

specifies that, for procurement contracts where workers' wages are governed by the FLSA, the Order applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the Order pursuant to regulations or actions taken under section 4 of the Order. 79 FR 9853. The Executive Order states that it does not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended; or any contracts expressly excluded by the regulations issued pursuant to section 4(a) of the Order. 79 FR 9853.

Proposed § 10.3(a) would implement these coverage provisions by stating that Executive Order 13658 and this part apply to any contract with the Federal Government, unless excluded by § 10.4, that results from a solicitation issued on or after January 1, 2015 or that is awarded outside the solicitation process on or after January 1, 2015, provided that: (1) (i) it is a procurement contract for construction covered by the DBA; (ii) it is a contract for services covered by the SCA; (iii) it is a contract for concessions, including any concessions contract excluded by Departmental regulations at 29 CFR 4.133(b); or (iv) it is a contract in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (2) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Proposed § 10.3(b) incorporates the monetary value thresholds referred to in section 7(e) of the Executive Order. 79 FR 9853. Finally, proposed § 10.3(c) states that the Executive Order and this part only apply to contracts with the Federal Government requiring performance in whole or in part within the United States. Several issues relating to the coverage provisions of the Executive Order and proposed § 10.3 are discussed below.

Coverage of executive agencies and departments

Executive Order 13658 applies to all "[e]xecutive departments and agencies." 79 FR 9851. As explained above, the Department would define executive departments and agencies by adopting the definition of executive agency provided in section 2.101 of the Federal Acquisition Regulation (FAR). 48 CFR 2.101. The proposed rule therefore interprets the Executive Order as applying to executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31 U.S.C. 9101. Pursuant to this definition, contracts awarded by the District of Columbia or any Territory or possession of the United States would not be covered by the Order.

The Executive Order strongly encourages, but does not compel, "[i]ndependent agencies" to comply with its requirements. 79 FR 9853. The Department interprets this provision, in light of the Executive Order's broad goal of adequately compensating workers on contracts with the Federal Government, as a narrow exemption from coverage. See 79 FR 9851. As discussed above, the proposed rule interprets independent agencies to mean any independent regulatory agency within the meaning of 44 U.S.C. 3502(5). This interpretation is consistent with provisions in other Executive Orders. See, e.g., Executive Order 13636, 78 FR 11739 (Feb. 12, 2013); Executive Order 12861, 58 FR 48255 (Sept. 11, 1993). Thus, under the proposed rule, the Executive Order covers executive departments and agencies but does not cover any independent regulatory agency within the meaning of 44 U.S.C. 3502(5).

Coverage of new contracts with the Federal Government

Proposed § 10.3(a) provides that the requirements of the Executive Order generally apply to "contracts with the Federal Government." As discussed above, the NPRM sets forth a broadly inclusive definition of the term contract that would cover all contracts and contract-like

instruments and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, intergovernmental service agreements, provider agreements, service agreements, licenses, permits, awards and notices of awards, job orders or task letters issued under basic ordering agreements, letter contracts, purchase orders, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. Unless otherwise noted, the use of the term contract throughout the Executive Order and this part therefore includes contract-like instruments and subcontracts.

As reflected in proposed § 10.3(a), the minimum wage requirements of Executive Order 13658 apply only to "new contracts" with the Federal Government within the meaning of section 8 of the Order. 79 FR 9853-54. Section 8 of the Executive Order states that the Order shall apply to covered contracts where the solicitation for such contract has been issued on or after: (i) January 1, 2015, consistent with the effective date for the action taken by the FARC pursuant to section 4(a) of the Order; or (ii) for contracts where an agency action is taken pursuant to section 4(b) of the Order, January 1, 2015, consistent with the effective date for such action. 79 FR 9853-54. Proposed § 10.3(a) of this rule therefore states that this part applies to contracts with the Federal Government, unless excluded by § 10.4, that result from solicitations issued on or after January 1, 2015 or to contracts that are awarded outside the solicitation process on or after January 1, 2015. The Executive Order and this part thus apply to both new contracts and replacements for expiring contracts provided that such a contract results from a solicitation issued on or after January 1, 2015 or is awarded outside the solicitation process on or after January 1, 2015. The Department proposes that the Executive Order and this part do not apply to subcontracts unless the prime contract under which the subcontract is awarded results from a

solicitation issued on or after January 1, 2015 or is awarded outside the solicitation process on or after January 1, 2015. Pursuant to the proposed rule, the requirements of the Executive Order and this part would not apply to contracts entered into pursuant to solicitations issued prior to January 1, 2015, the automatic renewal of such contracts, or the exercise of options under such contracts.

As discussed above in the context of the Department's proposed definitions in § 10.2, the term option means a unilateral right in a contract by which, for a specified time, the Federal Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. See 48 CFR 2.101. The Department notes that only truly automatic renewals of contracts or exercises of options devoid of any bilateral negotiations fall outside the scope of the Executive Order. As discussed above and consistent with the FAR, the Department's proposed definition of the term contract specifically includes bilateral contract modifications. Any renewals or extensions of contracts resulting from bilateral negotiations involving contractual modifications other than administrative changes would therefore qualify as "new contracts" subject to the Executive Order if they are awarded on or after January 1, 2015, even if such negotiations occur during option periods. For example, pursuant to this proposed interpretation, renewals of GSA Schedule Contracts that occur after January 1, 2015, and subsequent task or delivery orders under such contracts, will be covered by the Executive Order and this part to the extent that such renewals reflect bilateral negotiations resulting in contractual modifications other than administrative changes. By way of another example, if on January 1, 2015, a contracting agency and contractor renew or modify an existing contract for construction after engaging in negotiations regarding the type, size, cost, or location for the construction work under the contract, the Department would view such a contractual renewal as a "new contract"

subject to the Executive Order. However, when a contracting agency exercises its unilateral right to extend the term of an existing service contract and simply makes pricing adjustments based on increased labor costs that result from its obligation to include a current SCA wage determination pursuant to 29 CFR 4.4 but no bilateral negotiations occur (other than any necessary to determine and effectuate those pricing adjustments), the Department would not view the exercise of that option as a "new contract" covered by the Executive Order.

Coverage of types of contractual arrangements

Proposed § 10.3(a)(1) sets forth the specific types of contractual arrangements with the Federal Government that are covered by the Executive Order. As explained below, Executive Order 13658 and this part are intended to apply to a wide range of contracts with the Federal Government for services or construction. Proposed § 10.3(a)(1) implements the Executive Order by generally extending coverage to procurement contracts for construction covered by the DBA; service contracts covered by the SCA; concessions contracts, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. Each of these categories of contractual agreements is discussed in greater detail below.

Procurement contracts for construction: Section 7(d)(i)(A) of the Executive Order extends coverage to "procurement contract[s] for . . . construction." 79 FR 9853. The proposed rule at § 10.3(a)(1)(i) would interpret this provision of the Order as referring to any contract covered by the DBA, as amended, and its implementing regulations. The Department notes that this provision reflects that the Executive Order and this part apply to contracts subject to the

DBA itself, but do not apply to contracts subject only to the Davis-Bacon Related Acts, including those set forth at 29 CFR 5.1(a)(2)-(60).

The DBA applies, in relevant part, to contracts to which the Federal Government is a party, for the construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Federal Government and which require or involve the employment of mechanics or laborers. 40 U.S.C. 3142(a). The DBA's regulatory definition of construction is expansive and includes all types of work done on a particular building or work by laborers and mechanics employed by a construction contractor or construction subcontractor. See 29 CFR 5.2(j). For purposes of the DBA and thereby the Executive Order, a contract is "for construction" if "more than an incidental amount of construction-type activity" is involved in its performance. See, e.g., In the Matter of Crown Point, Indiana Outpatient Clinic, WAB Case No. 86-33, 1987 WL 247049, at *2 (June 26, 1987) (citing In re: Military Housing, Fort Drum, New York, WAB Case No. 85-16, 1985 WL 167239 (Aug. 23, 1985)), aff'd sub nom., Building and Construction Trades Dep't, AFL-CIO v. Turnage, 705 F. Supp. 5 (D.D.C. 1988); 18 Op. O.L.C. 109, 1994 WL 810699 (May 23, 1994), at *5. The term "contract for construction" is not limited to contracts entered into with a construction contractor; rather, a contract for construction "would seem to require only that there be a contract, and that one of the things required by that contract be construction of a public work." Id. at *3-4. The term "public building or public work" includes any building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the general public interest. See 29 CFR 5.2(k).

Proposed § 10.3(b) implements section 7(e) of Executive Order 13658, 79 FR 9853, which provides that the Order applies only to DBA-covered prime contracts that exceed the

$2,000 value threshold specified in the DBA. See 40 U.S.C. 3142(a). Consistent with the DBA, there is no value threshold requirement for subcontracts awarded under such prime contracts.

Contracts for services: Proposed § 10.3(a)(1)(ii) provides that coverage of the Executive Order and this part encompasses "contract[s] for services covered by the Service Contract Act." This proposed provision implements sections 7(d)(i)(A) and (B) of the Executive Order, which state that the Order applies respectively to a "procurement contract for services" and a "contract or contract-like instrument for services covered by the Service Contract Act." 79 FR 9853. The Department interprets a "procurement contract for services," as set forth in section 7(d)(i)(A) of the Executive Order, to mean a procurement contract that is subject to the SCA, as amended, and its implementing regulations. The proposed rule would view a "contract for services covered by the Service Contract Act" under section 7(d)(i)(B) of the Order as including both procurement and non-procurement contracts for services that are covered by the SCA. The Department has therefore incorporated sections 7(d)(i)(A) and (B) of the Executive Order in proposed § 10.3(a)(1)(ii) by expressly stating that the requirements of the Order apply to service contracts covered by the SCA.

The SCA generally applies to every contract entered into by the United States that "has as its principal purpose the furnishing of services in the United States through the use of service employees." 41 U.S.C. 6702(a)(3). The SCA is intended to cover a wide variety of service contracts with the Federal Government, so long as the principal purpose of the contract is to provide services using service employees. See, e.g., 29 CFR 4.130(a). As reflected in the SCA's regulations, where the principal purpose of the contract with the Federal Government is to provide services through the use of service employees, the contract is covered by the SCA, regardless of the direct beneficiary of the services or the source of the funds from which the

contractor is paid for the service, and irrespective of whether the contractor performs the work in its own establishment, on a Government installation, or elsewhere. See 29 CFR 4.133(a). Coverage of the SCA, however, does not extend to contracts for services to be performed exclusively by persons who are not service employees, i.e., persons who qualify as bona fide executive, administrative, or professional employees as defined in the FLSA's regulations at 29 CFR part 541. Similarly, a contract for professional services performed essentially by bona fide professional employees, with the use of service employees being only a minor factor in contract performance, is not covered by the SCA and thus would not be covered by the Executive Order or this part. See 41 U.S.C. 6702(a)(3); 29 CFR 4.113(a), 4.156; WHD Field Operations Handbook (FOH) ¶¶ 14b05, 14c07.

Although the SCA covers all non-exempted contracts with the Federal Government that have the "principal purpose" of furnishing services in the United States through the use of service employees regardless of the value of the contract, the prevailing wage requirements of the SCA only apply to covered contracts in excess of $2,500. 41 U.S.C. 6702(a)(2) (recodifying 41 U.S.C. 351(a)). Proposed § 10.3(b) of this rule implements section 7(e) of the Executive Order, which provides that for SCA-covered contracts, the Executive Order applies only to those prime contracts that exceed the $2,500 threshold for prevailing wage requirements specified in the SCA. 79 FR 9853. Consistent with the SCA, there is no value threshold requirement for subcontracts awarded under such prime contracts.

Contracts for concessions: Proposed § 10.3(a)(1)(iii) implements the Executive Order's coverage of a "contract or contract-like instrument for concessions, including any concessions contract excluded by the Department of Labor's regulations at 29 C.F.R. 4.133(b)." 79 FR 9853. As explained above, the NPRM interprets a "contract or contract-like instrument for

concessions" under section 7(d)(i)(C) of the Executive Order as a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The proposed definition of the term concessions contract includes every contract the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public. The SCA generally covers contracts for concessionaire services. See 29 CFR 4.130(a)(11). However, pursuant to the Secretary's authority under section 4(b) of the SCA, the SCA's regulations specifically exempt from coverage concession contracts "principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public." 29 CFR 4.133(b); Preamble to the SCA Final Rule, 48 FR 49736, 49753 (Oct. 27, 1983). Section 7(d)(i)(C) of the Executive Order specifies that the Order applies to all contracts with the Federal Government for concessions, including any concessions contract that are excluded from SCA coverage by 29 CFR 4.133(b). Proposed § 10.3(a)(1)(iii) implements this provision and extends coverage of the Executive Order and this part to all concession contracts with the Federal Government. Consistent with the SCA's implementing regulations at 29 CFR 4.107(a), the Department notes that the Executive Order generally applies to concessions contracts with nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies.

Proposed § 10.3(b) of this rule implements the value threshold requirements of section 7(e) of Executive Order 13658. 79 FR 9853. Pursuant to that section, the Executive Order applies to an SCA-covered concessions contract only if it exceeds $2,500. Id.; 41 U.S.C. 6702(a)(2). Section 7(e) of the Executive Order further provides that, for procurement contracts

where workers' wages are governed by the FLSA, such as procurement contracts for concessionaire services that are excluded from SCA coverage under 29 CFR 4.133(b), this part applies only to contracts that exceed the $3,000 micro-purchase threshold, as defined in 41 U.S.C. 1902(a). There is no value threshold for subcontracts awarded under prime contracts or for non-procurement concessions contracts or contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

Contracts in connection with Federal property and related to offering services: Proposed § 10.3(a)(1)(iv) implements Section 7(d)(i)(D) of the Executive Order, which extends coverage of the Order to contracts "entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public." 79 FR 9853. To the extent that such agreements are not otherwise covered by proposed § 10.3(a)(1), the Department interprets this provision as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services to the Federal Government, its personnel, or the general public. In other words, private entities that lease space in a Federal building to provide services to Federal employees or the general public are covered by the Executive Order and this part. Although evidence that an agency has retained some measure of control over the terms and conditions of the lease or license to provide services is not necessary for purposes of determining applicability of this section, such a circumstance strongly indicates that the agreement involved is covered by section 7(d)(i)(D) of the Executive Order and proposed § 10.3(a)(1)(iv). Pursuant to this interpretation, a private fast food or casual dining restaurant that rents space in a Federal building and serves food to the general public will be

subject to the Executive Order minimum wage requirement. Additional examples of agreements that would generally be covered by the Executive Order and this part include delegated leases of space in a Federal building from an agency to a contractor whereby the contractor operates a child care center, credit union, gift shop, barber shop, or fitness center in the Federal agency building to serve Federal employees and/or the general public. Coverage of this section only extends, however, to contracts that are "in connection with Federal property or lands." 79 FR 9853. For example, if a Federal agency contracts with an outside catering company to provide and deliver coffee for a conference, such a contract may be covered by the SCA but it will not be considered a covered contract under section 7(d)(i)(D) of the Order because it is not a contract in connection with Federal property.

Pursuant to proposed § 10.3(b) and section 7(e) of Executive Order 13658, 79 FR 9853, the Order and this part apply only to SCA-covered prime contracts in connection with Federal property and related to offering services if such contracts exceed $2,500. Id.; 41 U.S.C. 6702(a)(2). For procurement contracts in connection with Federal property and related to offering services where workers' wages are governed by the FLSA (rather than the SCA), this part applies only to such contracts that exceed the $3,000 micro-purchase threshold, as defined in 41 U.S.C. 1902(a).

Relation to the Walsh-Healey Public Contracts Act: Finally the Department notes that contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, i.e., those subject to the Walsh-Healey Public Contracts Act (PCA), 41 U.S.C. 6501 et seq. are not covered by Executive Order 13658 or this part. The Department intends to follow the SCA's regulations at 29 CFR 4.117 in distinguishing between work that is subject to the PCA and work that is subject to the SCA (and therefore the Executive Order). The

Department similarly proposes to follow the regulations set forth in the FAR at 48 CFR 22.402(b) in addressing whether the DBA (and thus the Executive Order) applies to construction work on a PCA contract. Under that proposed approach, where a PCA-covered contract involves a substantial and segregable amount of construction work that is subject to the DBA, workers whose wages are governed by the DBA or FLSA are entitled to the Executive Order minimum wage for the time that they spend performing on such DBA-covered construction work.

Coverage of workers

Proposed § 10.3(a)(2) implements section 7(d)(ii) of Executive Order 13658, which provides that the minimum wage requirements of the Order only apply to contracts covered by section 7(d)(i) of the Order if the wages of workers under such contracts are subject to the FLSA, SCA, or the DBA. 79 FR 9853. The Executive Order thus provides that its minimum wage protections only extend to workers performing on contracts covered by the Executive Order whose wages are governed by the FLSA, SCA, or the DBA. Id. For example, the Order does not extend to workers whose wages are governed by the PCA. Moreover, as discussed below, the Department proposes that, except for workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) and workers who are otherwise covered by the SCA or DBA, employees who are exempt from the minimum wage protections of the FLSA under 29 U.S.C. 213(a) are similarly not subject to the minimum wage protections of Executive Order 13658 and this part.

In determining whether a worker's wages are "governed by" the FLSA for purposes of section 7(d)(ii) of the Executive Order and this part, the Department interprets this provision as referring to employees who are entitled to the minimum wage under FLSA section 6(a)(1), employees whose wages are calculated pursuant to special certificates issued under FLSA

section 14(c), and tipped employees under FLSA section 3(t) who are not otherwise covered by the SCA or the DBA. See 29 U.S.C. 203(t), 206(a)(1), 214(c).

In evaluating whether a worker's wages are "governed by" the SCA for purposes of the Executive Order, the Department interprets such provision as referring to service employees who are entitled to prevailing wages under the SCA. See 29 CFR 4.150-56. The Department notes that workers whose wages are subject to the SCA include individuals who are employed on an SCA contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. The Department also interprets the language in section 7(d)(ii) of Executive Order 13658 and proposed § 10.3(a)(2) as extending coverage to FLSA-covered employees performing on a SCA-covered contract who provide support on a service contract but who are not "service employees" under the contract for purposes of the SCA. 41 U.S.C. 6701(3). Although such workers performing on SCA-covered service contracts are not covered by the SCA because they are not "service employees," such workers would be covered by the plain language of section 7(d) of the Executive Order because they are performing on a contract covered by the Order and their wages are governed by the FLSA. For example, a non-exempt accounting clerk who is covered by the FLSA and who exclusively processes invoices and work orders and responds to other administrative matters on an SCA-covered contract would be covered by the Executive Order even though the non-exempt accounting clerk may not qualify as a "service employee" for purposes of the SCA. Similarly, the Department interprets the language in section 7(d)(ii) of the Executive Order and proposed § 10.3(a)(2) as extending coverage to job coaches who assist FLSA section 14(c) workers in

performing on covered contracts, to the extent that the job coach's wages would be governed by the FLSA, even if such individuals may not be "service employees" under the SCA.

However, if a contractor that performs work on SCA-covered contracts employs a security officer who is covered under the FLSA to guard the contractor's headquarters, that security officer would not be covered by the Executive Order because the employee is not engaged in working on or in connection with the contract, either in performing the specific services called for by the contract's terms or in performing other duties necessary to the performance of the contract. See 29 CFR 4.150

In evaluating whether a worker's wages are "governed by" the DBA for purposes of the Order, the proposed rule interprets such language as referring to laborers and mechanics who are covered by the DBA, including any individual who is employed on a DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. The Department also interprets the language in section 7(d)(ii) of Executive Order 13658 and proposed § 10.3(a)(2) as extending coverage to workers performing on DBA-covered contracts for construction who are not laborers or mechanics but whose wages are governed by the FLSA. Although such workers are not covered by the DBA itself because they are not "laborers and mechanics," 40 U.S.C. 3142(b), such individuals are workers performing on a contract subject to the Executive Order whose wages are governed by the FLSA and thus are covered by the plain language of section 7(d) of the Executive Order. 79 FR 9853. For example, the Department would view an administrative employee working on a DBA-covered contract or a security guard patrolling a construction worksite where DBA-covered work is being performed whose wages are governed

by the FLSA as a covered worker entitled to the minimum wage established by the Executive Order. The NPRM extends this coverage to FLSA-covered employees working on DBA-covered contracts regardless of whether such employees are physically present on the DBA-covered construction worksite. However, if a contractor that performs work on DBA-covered contracts employs a technician who is covered under the FLSA to repair its electronic time system, that technician would not be covered by the Executive Order because the employee is not engaged in working on or in connection with the contract, either in performing the specific services called for by the contract's terms or in performing other duties necessary to the performance of the contract. See 29 CFR 4.150.

The Department notes that where state or local government workers are performing on covered contracts and their wages are subject to the FLSA or the SCA, such workers are entitled to minimum wage protections of the Executive Order and this part. The DBA does not apply to construction performed by state or local government workers.

Geographic Scope

Finally, proposed § 10.3(c) provides that the Executive Order and this part only apply to contracts with the Federal Government requiring performance in whole or in part within the United States. This interpretation is similarly reflected in the Department's proposed definition of the term United States, which provides that when used in a geographic sense, the United States means the 50 States and the District of Columbia. Under this approach, the minimum wage requirements of the Executive Order and this part do not apply to contracts with the Federal Government to be performed in their entirety outside the geographical limits of the United States as thus defined. However, if a contract with the Federal Government is to be performed in part within and in part outside these geographical limits and is otherwise covered

by the Executive Order and this part, the minimum wage requirements of the Order and this proposed rule apply with respect to that part of the contract that is performed within these geographical limits. This approach is consistent with the enforcement position adopted under the SCA and set forth at 29 CFR 4.112(b).

Proposed § 10.4 addresses and implements the exclusionary provisions expressly set forth in section 7(f) of Executive Order 13658 and provides other limited exclusions to coverage as authorized by section 4(a) of the Executive Order. See 79 FR 9852-53. Specifically, proposed §§ 10.4(a)-(d) set forth the limited categories of contractual arrangements for services or construction that are excluded from the minimum wage requirements of the Executive Order and this part, while proposed § 10.4(e) establishes narrow categories of workers that are excluded from coverage of the Order and this part. Each of these proposed exclusions is discussed below.

Proposed § 10.4(a) implements section 7(f) of Executive Order 13658, which states that the Order does not apply to "grants." 79 FR 9853. The Department interprets this provision to mean that the minimum wage requirements of the Executive Order and this part do not apply to grants, as that term is used in the Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6301 et seq. That statute defines a "grant agreement" as "the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when--(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement." 31 U.S.C. 6304.

Section 2.101 of the FAR similarly excludes "grants," as defined in the Federal Grant and Cooperative Agreement Act, from its coverage of contracts. 48 CFR 2.101. Several appellate courts have similarly adopted this construction of "grants" in defining the term for purposes of other Federal statutory schemes. See, e.g., Chem. Service, Inc. v. Environmental Monitoring Systems Laboratory, 12 F.3d 1256, 1258 (3rd Cir. 1993) (applying same definition of "grants" for purposes of 15 U.S.C. 3710a); East Arkansas Legal Services v. Legal Services Corp., 742 F.2d 1472, 1478 (D.C. Cir. 1984) (applying same definition of "grants" in interpreting 42 U.S.C. 2996a). If a contract or contract-like instrument qualifies as a grant within the meaning of the Federal Grant and Cooperative Agreement Act, it would thereby be excluded from coverage of Executive Order 13658 and this part.

Proposed § 10.4(b) implements the other exclusion set forth in section 7(f) of Executive Order 13658, which states that the Order does not apply to "contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended." 79 FR 9853.

The remaining exclusionary provisions of the proposed rule are derived from the authority granted to the Secretary pursuant to section 4(a) of the Executive Order to "provid[e] exclusions from the requirements set forth in this order where appropriate" in implementing regulations. 79 FR 9852. In issuing such regulations, the Executive Order instructs the Secretary to "incorporate existing definitions" under the FLSA, SCA, and DBA "to the extent practicable." Id. Accordingly, the proposed exclusions discussed below incorporate existing applicable statutory and regulatory exclusions and exemptions set forth in the FLSA, SCA, and DBA.

As discussed in the coverage section above, the Department has proposed to interpret section 7(d)(i)(A) of the Executive Order, which states that the Order applies to "procurement contract[s] for . . . construction," 79 FR 9853, as referring to any contract covered by the DBA, as amended, and its implementing regulations. See proposed § 10.3(a)(1)(i). In order to provide further definitional clarity to the regulated community for purposes of proposed § 10.3(a)(1)(i), the Department would thus establish in § 10.4(c) that any procurement contracts for construction that are not subject to the DBA are similarly excluded from coverage of the Executive Order and this part. To assist all interested parties in understanding their rights and obligations under Executive Order 13658, the Department proposes to make coverage of construction contracts under the Executive Order and this part consistent with coverage under the DBA to the greatest extent possible.

Similarly, the Department has proposed to implement the coverage provisions set forth in sections 7(d)(i)(A) and (B) of the Executive Order, which state that the Order applies respectively to a "procurement contract for services" and a "contract or contract-like instrument for services covered by the Service Contract Act," 79 FR 9853, by providing that the requirements of the Order apply to all service contracts covered by the SCA. See proposed § 10.3(a)(1)(ii). Proposed § 10.4(d) provides additional clarification by incorporating, where appropriate, the SCA's exclusion of certain service contracts into the exclusionary provisions of the Executive Order. This proposed provision excludes from coverage of the Executive Order and this part any contracts for services, except for those expressly covered by proposed § 10.3(a)(1)(ii)-(iv), that are exempted from coverage under the SCA. The SCA specifically exempts from coverage seven types of contracts (or work) that might otherwise be subject to its requirements. See 41 U.S.C. 6702(b). Pursuant to this statutory provision, the SCA expressly

does not apply to (1) a contract of the Federal Government or the District of Columbia for the construction, alteration, or repair, including painting and decorating, of public buildings or public works; (2) any work required to be done in accordance with chapter 65 of title 41; (3) a contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect; (4) a contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934, 47 U.S.C. 151 et seq.; (5) a contract for public utility services, including electric light and power, water, steam, and gas; (6) an employment contract providing for direct services to a Federal agency by an individual; or (7) a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations. Id.; see 29 CFR 4.115-4.122; WHD FOH ¶ 14c00.

The SCA also authorizes the Secretary to "provide reasonable limitations" and to "prescribe regulations allowing reasonable variation, tolerances, and exemptions with respect to this chapter . . . but only in special circumstances where the Secretary determines that the limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Federal Government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards." 41 U.S.C. 6707(b); see 29 CFR 4.123. Pursuant to this authority, the Secretary has exempted a specific list of contracts from SCA coverage to the extent regulatory criteria for exclusion from coverage are satisfied as provided at 29 CFR 4.123(d), (e). To assist all interested parties in understanding their rights and obligations under Executive Order 13658, the Department proposes to make coverage of service contracts under the Executive Order and this part consistent with coverage under the SCA to the greatest extent possible.

The Department therefore provides in proposed § 10.4(d) that contracts for services that are exempt from SCA coverage pursuant to its statutory language or implementing regulations are not subject to this part unless expressly included by proposed § 10.3(a)(1)(ii)-(iv). For example, the SCA exempts contracts for public utility services, including electric light and power, water, steam, and gas, from its coverage. See 41 U.S.C. 6702(b)(5); 29 CFR 4.120. Such contracts would also be exempt from coverage of the Executive Order and this part. Similarly contracts principally for the maintenance, calibration, or repair of automated data processing equipment and office information/word processing systems are exempted from SCA coverage pursuant to the SCA's implementing regulations at 29 CFR 4.123(e)(1)(i)(A); such contracts are thus not covered by the Executive Order or this proposed rule. However, certain types of concessions contracts are excluded from SCA coverage pursuant to 29 CFR 4.133(b) but are explicitly covered by the Executive Order and this part under proposed § 10.3(a)(1)(iii). 79 FR 9853. Moreover, to the extent that a contract is excluded from SCA coverage but subject to the DBA (e.g., a contract with the Federal Government for the construction, alteration, or repair, including painting and decorating, of public buildings or public works that would be excluded from the SCA under 41 U.S.C. 6702(b)(1)), such a contract would be covered by the Executive Order and this part as "procurement contract for . . . construction." 79 FR 9853; proposed § 10.3(a)(1)(i).

The Department proposes to provide in § 10.4(e) that, except for workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) and workers who are otherwise covered by the SCA or DBA, employees who are exempt from the minimum wage protections of the FLSA under 29 U.S.C. 213(a) are similarly not subject to the minimum wage protections of Executive Order 13658 and this part. Proposed §§ 10.4(e)(1)-(3), which are

discussed briefly below, highlight some of the narrow categories of employees that are not entitled to the minimum wage protections of the Order and this part pursuant to this exclusion.

Proposed §§ 10.4(e)(1) and (2) specifically exclude from the requirements of Executive Order 13658 and this part workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a) and (b). Specifically, proposed § 10.4(e)(1) excludes from coverage learners, apprentices, or messengers employed under special certificates pursuant to 29 U.S.C. 214(a). Id.; see 29 CFR part 520. Proposed § 10.4(e)(2) also excludes from coverage full-time students employed under special certificates issued under 29 U.S.C. 214(b). Id.; see 29 CFR part 519.

Proposed § 10.4(e)(3) provides that the Executive Order and this part do not apply to individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR part 541. This proposed exclusion is consistent with the FLSA, SCA, and DBA and their implementing regulations. See, e.g., 29 U.S.C. 213(a)(1) (FLSA); 41 U.S.C. 6701(3)(C) (SCA); 29 CFR 5.2(m) (DBA).

Proposed § 10.5 sets forth the minimum wage rate requirement for Federal contractors and subcontractors established in Executive Order 13658. See 79 FR 9851-52. This section generally discusses the minimum hourly wage protections provided by the Executive Order for workers performing on covered contracts with the Federal Government, as well as the methodology that the Secretary will utilize for determining the applicable minimum wage rate under the Executive Order on an annual basis beginning at least 90 days before January 1, 2016. The Executive Order provides that the minimum wage beginning January 1, 2016, and annually thereafter, will be an amount determined by the Secretary. It further provides that such rates be increased by the annual percentage increase in the CPI for the most recent month, quarter, or

year available as determined by the Secretary. The Secretary proposes to base such increases on the most recent year available to minimize the impact of seasonal fluctuations on the Executive Order minimum wage rate. This section emphasizes that nothing in the Executive Order or this part shall excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Executive Order and this part. See 79 FR 9851.

Proposed § 10.6 establishes an antiretaliation provision stating that it shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or has testified or is about to testify in any such proceeding. This language is derived from the FLSA's antiretaliation provision set forth at 29 U.S.C. 215(a)(3) and is consistent with the Executive Order's direction to adopt enforcement mechanisms as consistent as practicable with the FLSA, SCA, or DBA. The Department believes that such a provision will help ensure effective enforcement of Executive Order 13658. Consistent with the Supreme Court's observation in interpreting the scope of the FLSA's antiretaliation provision, enforcement of Executive Order 13658 will depend "upon information and complaints received from employees seeking to vindicate rights claimed to have been denied." Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1333 (2011) (internal quotation marks omitted). Accordingly, the Department is proposing to include an antiretaliation provision based on the FLSA's antiretaliation provision. See 29 U.S.C. 215(a)(3). Importantly, and consistent with the Supreme Court's interpretation of the FLSA's antiretaliation provision, the Department's proposed rule protects workers who file oral as well as written complaints. See Kasten, 131 S. Ct. at 1336. Moreover, as under the

FLSA, the proposed antiretaliation provision under this part protects workers who complain to the Department as well as those who complain internally to their employers about alleged violations of the Order or this part. See, e.g., Minor v. Bostwick Laboratories, 669 F.3d 428, 438 (4th Cir. 2012); Hagan v. Echostar Satellite, LLC, 529 F.3d 617, 626 (5th Cir. 2008); Lambert v. Ackerley, 180 F.3d 997, 1008 (9th Cir. 1999) (en banc); Valerio v. Putnam Associates, 173 F.3d 35, 43 (1st Cir. 1999); EEOC v. Romeo Community Sch., 976 F.2d 985, 989 (6th Cir. 1992). The Department also notes that the antiretaliation provision set forth herein, like the FLSA's antiretaliation provision, would apply in situations where there is no current employment relationship between the parties; for example, it protects a worker from retaliation by a prospective or former employer.

Proposed § 10.7 provides that workers cannot waive, nor may contractors induce workers to waive, their rights under Executive Order 13658 or this part. The Supreme Court has consistently concluded that an employee's rights and remedies under the FLSA, including payment of minimum wage and back wages, cannot be waived or abridged by contract. See, e.g., Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302 (1985); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 112-16 (1946); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706-07 (1945). The Supreme Court has reasoned that the FLSA was intended to establish a "uniform national policy of guaranteeing compensation for all work" performed by covered employees. Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 161, 167 (1945) (internal quotation marks omitted). Consequently, the Court has held that "[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." Id. (internal

quotation marks omitted). In Barrentine, the Supreme Court reaffirmed the "nonwaivable nature" of these fundamental FLSA protections and stated that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." 450 U.S. at 740 (quoting Brooklyn Sav. Bank, 324 U.S. at 707). Moreover, FLSA rights are not subject to waiver because they serve an important public interest by protecting employers against unfair methods of competition in the national economy. See Tony & Susan Alamo Found., 471 U.S. at 302. Releases and waivers executed by employees for unpaid wages (and fringe benefits) due them under the SCA are similarly without legal effect. 29 CFR 4.187(d). Because the public policy interests underlying the issuance of the Executive Order would be similarly thwarted by permitting workers to waive, or contractors to induce workers to waive, their rights under Executive Order 13658 or this part, proposed § 10.7 makes clear that such waiver of rights is impermissible.

Subpart B –Government Requirements

Proposed subpart B of part 10 establishes the requirements for the Federal Government to implement and comply with Executive Order 13658. Proposed § 10.11 addresses contracting agency requirements, while proposed § 10.12 explains the requirements placed upon the Department.

Contracting Agency Requirements

Proposed § 10.11(a) implements section 2 of Executive Order 13658, which directs that executive departments and agencies must include a contract clause in any new contracts or solicitations for contracts covered by the Executive Order. 79 FR 9851. Proposed § 10.11(a) briefly describes the basic function of the contract clause, which is to require that workers performing on covered contracts be paid the applicable Executive Order minimum wage. For all

contracts subject to Executive Order 13658, except for procurement contracts subject to the Federal Acquisition Regulation (FAR), the contracting agency shall include the Executive Order minimum wage contract clause set forth in appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 10.3. The required contract clause directs, as a condition of payment, that all workers performing on covered contracts must be paid the applicable, currently effective minimum wage under Executive Order 13658 and § 10.5. For procurement contracts subject to the FAR, contracting agencies shall use the clause set forth in the FAR developed to implement this rule. Such clause shall accomplish the same purposes as the clause set forth in appendix A and shall be consistent with the requirements set forth in this rule.

Proposed § 10.11(b) states the consequences in the event that a contracting agency fails to include the contract clause in a covered contract. Proposed § 10.11(b) first provides that if a contracting agency made an erroneous determination that Executive Order 13658 or this part did not apply to a particular contract or failed to include the applicable contract clause in a contract to which the Executive Order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department, shall include the clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed. The Administrator possesses analogous authority under the DBA, 29 CFR 1.6(f), and the Department believes a similar mechanism for addressing a failure to include the contract clause in a contract subject to the Executive Order will enhance its ability to obtain compliance with the Executive Order.

Proposed § 10.11(c) addresses the obligations of a contracting agency in the event that the contract clause has been included in a covered contract but the contractor may not have

complied with its obligations under the Executive Order or this part. Specifically, proposed § 10.11(c) provides that the contracting agency shall, upon its own action or upon written request of an authorized representative of the Department, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be necessary to pay workers the full amount of wages required by the Executive Order. Both the SCA and DBA provide for withholding to ensure the availability of monies for the payment of back wages to covered workers when a contractor or subcontractor has failed to pay the full amount of required wages. 29 CFR 4.6(i); 29 CFR 5.5(a)(2). Withholding likewise is an appropriate remedy under the Executive Order for all covered contracts because the Order directs the Department to adopt SCA and DBA enforcement processes to the extent practicable and to exercise authority to obtain compliance with the Order. 79 FR 9852. Consistent with withholding procedures under the SCA and DBA, proposed § 10.11(c) allows the contracting agency and the Department to withhold or cause to be withheld funds from the prime contractor not only under the contract on which covered workers were not paid the Executive Order minimum wage, but also under any other contract that the prime contractor has entered into with the Federal Government. Finally, a withholding remedy is consistent with the requirement in section 2(a) of the Executive Order that compliance with the specified obligations is an express "condition of payment" to a contractor or subcontractor. 79 FR 9851.

Proposed § 10.11(d) describes a contracting agency's responsibility to forward to the WHD any complaint alleging a contractor's non-compliance with Executive Order 13658, as well as any information related to the complaint. Although the Department proposes in § 10.41 that complaints be filed with the WHD rather than with contracting agencies, the Department

recognizes that some workers or other interested parties nonetheless may file formal or informal complaints concerning alleged violations of the Executive Order or this part with contracting agencies. Proposed § 10.11(d) therefore specifically requires the contracting agency to transmit the complaint-related information identified in § 10.11(d)(1)(ii)(A)-(E) to the WHD's Branch of Government Contracts Enforcement within 14 calendar days of receipt of a complaint alleging a violation of the Executive Order or this part, or within 14 calendar days of being contacted by the WHD regarding any such complaint. This language is substantially similar to an analogous provision in the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. See 29 CFR 9.11(d). The Department believes adoption of the language in proposed § 10.11(d), which includes an obligation to transmit such complaint-related information to WHD even absent a specific request (e.g., when a complaint is filed with a contracting agency rather than with WHD), is appropriate because prompt receipt of such information from the relevant contracting agency would allow the Department to fulfill its charge under the Order to implement enforcement mechanisms for obtaining compliance with the Order. 79 FR 9852.

Department of Labor Requirements

Proposed § 10.12 addresses the Department's requirements under the Executive Order. The Order requires the Secretary to establish a minimum wage that Federal contractors and subcontractors must pay to workers on covered contracts. 79 FR 9851. Proposed § 10.12(a) accordingly sets forth the Secretary's obligation to establish the Executive Order minimum wage on an annual basis in accordance with this Order. Proposed § 10.12(b) explains that the Secretary will determine the applicable minimum wages on an annual basis by utilizing methods set forth in § 10.5(b).

Section 10.12(c) explains how the Secretary will provide notice to contractors and subcontractors of the applicable minimum wages on an annual basis. Specifically, the Administrator of the WHD will publish a notice in the Federal Register on an annual basis at least 90 days before any new minimum wage is to take effect. Additionally, the Administrator will publish and maintain on Wage Determinations OnLine (WDOL), www.wdol.gov, or any successor website, the applicable minimum wage to be paid to workers on covered contracts, including the cash wage to be paid to tipped employees. The Administrator may also publish the applicable wage to be paid to workers on covered contracts, including the cash wage to be paid to tipped employees, on an annual basis at least 90 days before any such minimum wage is to take effect in any other media the Administrator deems appropriate.

Proposed § 10.12(d) addresses the WHD's obligation to notify a contractor in the event of a request for the withholding of funds. Under proposed § 10.11(c), the Administrator may direct that payments due on the covered contract or any other contract between the contractor and the Government may be withheld as may be considered necessary to pay unpaid wages. If the Administrator elects to exercise his authority under proposed § 10.11(c) to request withholding, proposed § 10.12(d) would require the Administrator or the contracting agency to notify the affected prime contractor of the Administrator's withholding request to the contracting agency.

Subpart C – Contractor Requirements

Contractor Requirements

Proposed Subpart C articulates the requirements that contractors must comply with under Executive Order 13658 and this part. This section sets forth the general obligation to pay no less than the applicable Executive Order minimum wage to workers for all time worked on or in

connection with the covered contract, and to include the Executive Order minimum wage contract clause in subcontracts and lower-tiered contracts. Proposed Subpart C also sets forth contractor requirements pertaining to permissible deductions, frequency of pay, and recordkeeping, as well as a prohibition against taking kickbacks from wages paid on covered contracts.

Contract clause

Proposed § 10.21(a) requires the contractor, as a condition of payment, to abide by the terms of the Executive Order minimum wage contract clause described in proposed § 10.11(a). The contract clause contains the obligations with which the contractor must comply on the covered contract and is reflective of the contractor's requirements as stated in the proposed regulations. Proposed § 10.21(b) articulates the obligation that contractors and subcontractors must insert the Executive Order minimum wage contract clause in any covered subcontracts and shall require, as a condition of payment, that subcontractors include the clause in all lower-tier subcontracts. Under the proposal, the prime contractor and upper-tier contractor will be responsible for compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage contract clause. This responsibility on the part of prime and upper-tier contractors for subcontractor compliance parallels that of the SCA and DBA. See 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA).

Rate of pay

Proposed § 10.22 addresses contractors' obligations to pay the Executive Order minimum wage to workers performing on a covered contract under Executive Order 13658. Proposed § 10.22(a) states the general obligation that contractors must pay workers on a covered contract the applicable minimum wage under Executive Order 13658 for all time spent performing work

on the covered contract. Workers performing on contracts covered by the Executive Order must receive not less than the minimum hourly wage of $10.10 beginning January 1, 2015. In order to comply with the Executive Order's minimum wage requirement, a contractor may compensate workers on a daily, weekly, or other time basis, or by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis each workweek, will provide a rate per hour that is no lower than the applicable Executive Order minimum wage. Whatever system of payment is used, however, must ensure that each hour of work in performance of the contract is compensated at not less than the required minimum rate. Failure to pay for certain hours at the required rate cannot be transformed into compliance with the Executive Order or this part by reallocating portions of payments made for other hours that are in excess of the specified minimum.

The Department believes that the principles, processes, and practices that it utilizes in its implementing regulations under the SCA, which incorporates by reference the principles applied under the FLSA as set forth in 29 CFR part 785, will be useful to contractors in determining and segregating hours worked on contracts with the Federal Government subject to the Executive Order. See 29 CFR 4.169, 4.178-79; WHD FOH ¶¶ 14c07, 14g00-01.[4] In determining whether a worker is performing within the scope of a covered contract, the Department proposes that all workers who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are thus subject to the Executive Order and

[4] Contractors subject to the Executive Order are likely already familiar with these segregation principles and should, as a matter of usual business practices, already have recordkeeping systems in place that enable the segregation of hours worked on different contracts or at different locations. The Department believes that such systems will enable contractors to identify and pay for hours worked subject to the Executive Order without having to employ an additional systems or processes.

this part unless a specific exemption is applicable. This standard is derived from the SCA's implementing regulations at 29 CFR 4.150.

Because workers covered by the Executive Order are entitled to its minimum wage protections for all time worked in performance of a covered contract, a computation of their hours worked in each workweek on the covered contract is essential. See 29 CFR 4.178. For purposes of the Executive Order, the hours worked by a worker generally include all periods in which the worker is suffered or permitted to work, whether or not required to do so, and all time during which the worker is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. Id. The hours worked which are subject to the minimum wage requirement of the Executive Order are those in which the worker is engaged in performing work on or in connection with a contract subject to the Executive Order. Id. However, unless such hours are adequately segregated or there is affirmative proof to the contrary that such work did not continue throughout the workweek, as discussed below, compensation in accordance with the Executive Order will be required for all hours of work in any workweek in which the worker performs any work in connection with a contract covered by the Executive Order. Id.

In situations where contractors are not exclusively engaged in contract work covered by the Executive Order, and there are adequate records segregating the periods in which work was performed on contracts subject to the Order from periods in which other work was performed, the minimum wage requirement of the Executive Order need not be paid for hours spent on work not covered by the Order. See 29 CFR 4.169. However, in the absence of records adequately segregating non-covered work from the work performed on or in connection with the covered contract, all workers working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the

period of its performance, unless affirmative proof establishing the contrary is presented. Id. Similarly, in the absence of such records, a worker performing any work on or in connection with the covered contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. Id.

If a contractor desires to segregate covered work from non-covered work under the Executive Order for purposes of applying the minimum wage established in the Order, the contractor must therefore identify such covered work accurately in its records or by other means. See 29 CFR 4.169, 4.179; WHD FOH ¶ 14g00. In this regard, an arbitrary assignment of time on the basis of a formula, as between covered and non-covered work, is not sufficient. However, if the contractor does not wish to keep detailed hour-by-hour records for segregation purposes under the Executive Order, records can be segregated on the wider basis of departments, work shifts, days, or weeks in which covered work was performed. For example, if on a given day no work covered by the Executive Order was performed by a contractor that day could be segregated and shown in the records. See WHD FOH ¶ 14g00.

Finally, the Department notes that the Supreme Court has held that when an employer has failed to keep adequate or accurate records of employees' hours under the FLSA, employees should not effectively be penalized by denying them recovery of back wages on the ground that the precise extent of their uncompensated work cannot be established. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946). Specifically, the Supreme Court concluded that where an employer has not maintained adequate or accurate records of hours worked, an employee need only prove that "he has in fact performed work for which he was improperly compensated" and produce "sufficient evidence to show the amount and extent of that work as a

matter of just and reasonable inference." Id. Once the employee establishes the amount of uncompensated work as a matter of "just and reasonable inference," the burden then shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." Id. at 687-88. If the employer fails to meet this burden, the court may award damages to the employee "even though the result be only approximate." Id. at 688. These principles for determining hours worked and accompanying back wage liability apply with equal force to the Executive Order.

Proposed § 10.22(a) explains that the contractor's obligation to pay the applicable minimum wage to workers on covered contracts does not excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under Executive Order 13658. This provision implements section 2(c) of the Executive Order, which states that the Order does not relieve the contractor or any subcontractor under the contract from compliance with a higher wage obligation to workers under any other Federal, State, or local law. 79 FR 9851.

The Department notes that the minimum wage requirements of Executive Order 13658 are separate and distinct legal obligations from the prevailing wage requirements of the SCA and the DBA. If a contract is covered by the SCA or DBA and the wage rate on the applicable SCA or DBA wage determination for the classification of work the worker performs is less than the applicable Executive Order minimum wage, the contractor must pay the Executive Order minimum wage in order to comply with the Order and this part. If, however, the applicable SCA or DBA prevailing wage rate exceeds the Executive Order minimum wage rate, the contractor

must pay that prevailing wage rate to the SCA- or DBA- covered worker in order to be in compliance with the SCA or DBA.

The minimum wage requirements of Executive Order 13658 are also separate and distinct from the commensurate wage rates under 29 U.S.C. 214(c). If the commensurate wage rate paid to a worker on a covered contract whose wages are calculated pursuant to a special certificate issued under 29 U.S.C. 214(c), whether hourly or piece rate, is less than the Executive Order minimum wage, the contractor must pay the Executive Order minimum wage rate to achieve compliance with the Order. The Department notes that if the commensurate wage due under the certificate is greater than the Executive Order minimum wage, the contractor must pay the 14(c) worker the greater commensurate wage.

Proposed § 10.22(b) explains how the contractor's obligation to pay the applicable Executive Order minimum wage applies to workers who receive fringe benefits. Pursuant to the Executive Order and this part, a contractor may not discharge any part of its minimum wage obligation under the Executive Order by furnishing fringe benefits (or, with respect to workers whose wages are governed by the SCA, the cash equivalent thereof). Under this proposal and for the reasons discussed below, contractors must pay the Executive Order minimum wage rate in monetary wages, and may not receive credit for the cost of fringe benefits provided.

Executive Order 13658 increases, initially to $10.10, "the hourly minimum wage" paid by contractors with the Federal Government. 79 FR 9851. By repeatedly referencing that it is establishing a higher hourly minimum wage, without any reference to fringe benefits, the text of the Executive Order makes clear that a contractor cannot discharge its minimum wage obligation by furnishing fringe benefits. This interpretation is consistent with the SCA, which does not permit a contractor to meet its minimum wage obligation through the furnishing of fringe

benefits, but rather imposes distinct "minimum wage" and "fringe benefit" obligations on contractors. 41 U.S.C. 6703(1)-(2); 29 CFR 4.177(a). Similarly, the FLSA does not allow a contractor to meet its minimum wage obligation through the furnishing of fringe benefits. Although the DBA specifically includes fringe benefits within its definition of minimum wage, thereby allowing a contractor to meet its minimum wage obligation, in part, through the furnishing of fringe benefits, 40 U.S.C. 3141(2), Executive Order 13658 contains no similar provision expressly authorizing a contractor to discharge its Executive Order minimum wage obligation through the furnishing of fringe benefits. Consistent with the Executive Order, proposed § 10.22(b) would accordingly preclude a contractor from discharging its minimum wage obligation by furnishing fringe benefits.

Proposed § 10.22(b) also prohibits a contractor from discharging its minimum wage obligation to workers whose wages are governed by the SCA by providing the cash equivalent of fringe benefits. As discussed above, the SCA imposes distinct "minimum wage" and "fringe benefit" obligations on contractors. 41 U.S.C. 6703(1)-(2). A contractor cannot satisfy any portion of its SCA minimum wage obligation through the provision of fringe benefit payments or cash equivalents furnished or paid pursuant to 41 U.S.C. 6703(2). See also 29 CFR 4.177(a). Consistent with the treatment of fringe benefit payments or their cash equivalents under the SCA, proposed § 10.22(b) would not allow contractors to discharge any portion of their minimum wage obligation under the Executive Order to workers whose wages are governed by the SCA through the provision of either fringe benefits or their cash equivalent.

Proposed § 10.22(c) states that a contractor may satisfy the wage payment obligation to a tipped employee under the Executive Order through a combination of an hourly cash wage and a credit based on tips received by such employee pursuant to the provisions in proposed § 10.28.

Proposed § 10.23 explains that deductions that reduce a worker's wages below the Executive Order minimum wage rate may only be made under the limited circumstances set forth in this section. Proposed § 10.23 permits deductions required by Federal, State, or local law, including Federal or State withholding of income taxes. See 29 CFR 531.38 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). This proposed provision would permit deductions for payments made to third parties pursuant to court orders. Permissible deductions made pursuant to a court order may include such deductions as those made for child support. See 29 CFR 531.39 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). It also permits deductions directed by a voluntary assignment of the worker or his or her authorized representative. See 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). Deductions made for voluntary assignments include items such as, but not limited to, deductions for the purchase of U.S. savings bonds, donations to charitable organizations, and the payment of union dues. Deductions made for voluntary assignments must be made for the worker's account and benefit pursuant to the request of the worker or his or her authorized representative. See 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). Finally, the Department proposes to permit deductions made for the reasonable cost or fair value of board, lodging, and other facilities. See 29 CFR part 531 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). Deductions made for these items must be in compliance with the regulations in 29 CFR part 531. The Department notes that an employer may take credit for the reasonable cost or fair value of board, lodging, or other facilities against a worker's wages, rather than taking a deduction for the reasonable cost or fair value of these items. See 29 CFR part 531.

Proposed § 10.24(a) explains that workers who are covered under the FLSA or the Contract Work Hours and Safety Standards Act (CWHSSA) must receive overtime pay of not

less than one and one-half times the regular hourly rate of pay or basic rate of pay for all hours worked over 40 hours in a workweek. See 29 U.S.C. 207(a), 40 U.S.C. 3702(a). These statutes, however, do not require workers to be compensated on an hourly rate basis; workers may be paid on a daily, weekly, or other time basis; or by piece rates, task rates, salary, or some other basis, so long as the measure of work and compensation used, when reduced by computation to an hourly basis each workweek, will provide a rate per hour (i.e., the regular rate of pay) that will fulfill the requirements of the Executive Order or applicable statute. The regular rate of pay is generally determined by dividing the worker's total earnings in any workweek by the total number of hours actually worked by the worker in that workweek for which such compensation was paid. See 29 CFR 778.5-.7; .105, .107, .109; 29 CFR 4.166, 4.180-.182; 29 CFR 5.32(a).

Proposed § 10.24(b) addresses the payment of overtime premiums to tipped employees who are paid with a tip credit. In calculating overtime payments, the regular rate of an employee paid with a tip credit consists of both the cash wages paid and the amount of the tip credit taken by the contractor. Overtime payments are not computed based solely on the cash wage paid; for example, if after January 1, 2015, a contractor pays a tipped employee performing on a covered contract a cash wage of $4.90 and claims a tip credit of $5.20, the worker is entitled to $15.15 per hour for each overtime hour ($10.10 × 1.5), not $7.35 ($4.90 × 1.5). A contractor may not claim a higher tip credit in an overtime hour than in a straight time hour. Accordingly, as of January 1, 2015 for contracts covered by the Executive Order, if a contractor pays the minimum cash wage of $4.90 per hour and claims a tip credit of $5.20 per hour, then the cash wage due for each overtime hour would be $9.95 ($15.15 – $5.20). Tips received by a tipped employee in excess of the amount of the tip credit claimed are not considered to be wages under the Executive Order and are not included in calculating the regular rate for overtime payments.

Proposed § 10.25 describes how frequently the contractor must pay its workers. Under the proposed rule, wages shall be paid no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. Proposed § 10.25 also provides that a pay period under the Executive Order may not be of any duration longer than semi-monthly. (The Department notes that workers whose wages are governed by the DBA must be paid no less often than once a week and reiterates that compliance with the Executive Order does not excuse noncompliance with applicable FLSA, SCA, or DBA requirements.) These provisions are derived from the contract clauses applicable to contracts subject to the SCA and the DBA, see 29 CFR 4.6(h) (SCA); 29 CFR 5.5(a)(1) (DBA). While the FLSA does not specify a minimum pay period duration, WHD believes this will not be a burden for FLSA-covered employers as WHD experience suggests that most covered employers pay no less frequently than semi-monthly.

Proposed § 10.26 explains the recordkeeping and related requirements for contractors. The obligations set forth in proposed § 10.26 are derived from the FLSA, SCA, and DBA. See 29 CFR part 516 (FLSA); 29 CFR 4.6(g) (SCA); 29 CFR 5.5(a)(3) (DBA). Proposed § 10.26(a) states that contractors and subcontractors shall make and maintain, for three years, records containing the information enumerated in the proposed § 10.26(a)(1)-(4) for each worker: name, address, and Social Security number; the rate or rates of wages paid to the worker; the number of daily and weekly hours worked by each worker; and any deductions made. The records required to be kept by contractors pursuant to this part are coextensive with recordkeeping requirements that already exist under, and are consistent across, the FLSA, SCA, and DBA; as a result, compliance by a covered contractor with these payroll records obligations will not impose any obligations to which the contractor is not already subject under the FLSA, SCA, or DBA. This

proposed section further provides that the contractor and each subcontractor performing work subject to the Executive Order shall make such records available for inspection and transcription by authorized representatives of the WHD.

Proposed § 10.26(b) requires the contractor to permit authorized representatives of the WHD to conduct interviews of workers at the worksite during normal working hours. Proposed § 10.26(c) provides that nothing in this part limits or otherwise modifies a contractor's payroll and recordkeeping obligations, if any, under the FLSA, SCA, or DBA, or their implementing regulations, respectively.

Proposed § 10.27 makes clear that all wages paid to workers performing on covered contracts must be paid free and clear and without subsequent deduction (unless set forth in proposed § 10.23), rebate, or kickback on any account. Kickbacks directly or indirectly to the contractor or to another person for the benefit the contractor for the whole or part of the wage are also prohibited. This proposal is intended to ensure full payment of the applicable Executive Order minimum wage to covered workers.

Proposed § 10.28 explains how tipped workers must be compensated under the Executive Order on covered contracts. Section 3 of the Executive Order governs how the minimum wage for Federal contractors and subcontractors applies to tipped employees. Section 3 of the Order provides: (a) For workers covered by section 2 of this order who are tipped employees pursuant to 29 U.S.C. 203(t), the hourly cash wage that must be paid by an employer to such workers shall be at least: (i) $4.90 an hour, beginning on January 1, 2015; (ii) for each succeeding 1-year period [beginning on January 1, 2016] until the hourly cash wage under this section equals 70 percent of the wage in effect under section 2 of this order for such period, an hourly cash wage equal to the amount determined under this section for the preceding year, increased by the lesser

of: (A) $0.95; or (B) the amount necessary for the hourly cash wage under this section to equal 70 percent of the wage under section 2 of this order; and (iii) for each subsequent year, 70 percent of the wage in effect under section 2 for such year rounded to the nearest multiple of $0.05; (b) Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their wages are equal to the minimum wage under section 2 of this order, the cash wage paid by the employer, as set forth in this section for those workers, shall be increased such that their wages equal the minimum wage under section 2 of this order. Consistent with applicable law, if the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 et seq., or any other applicable law or regulation is higher than the wage required by section 2, the employer shall pay additional cash wages sufficient to meet the highest wage required to be paid.

Accordingly, as of January 1, 2015, section 3 of the Executive Order requires contractors to pay tipped employees covered by the Executive Order performing on covered contracts a cash wage of at least $4.90, provided the employees receive sufficient tips to equal the minimum wage under section 2 when combined with the cash wage. In each succeeding year, beginning January 1, 2016, the required cash wage increases by $0.95 (or a lesser amount if necessary) until it reaches 70 percent of the minimum wage under section 2 of the Executive Order. For subsequent years, the cash wage for tipped employees is 70 percent of the Executive Order minimum wage rounded to the nearest $0.05. At all times, the amount of tips received by the employee must equal at least the difference between the cash wage paid and the Executive Order minimum wage; if the employee does not receive sufficient tips, the contractor must increase the cash wage paid so that the cash wage in combination with the tips received equals the Executive Order minimum wage. If the contractor is required to pay a wage higher than the Executive

Order minimum wage by the Service Contract Act or other applicable law or regulation, the contractor must pay additional cash wages equal to the difference between the higher required wage and the Executive Order minimum wage.

For purposes of the Executive Order and this part, tipped workers (or tipped employees) are defined by section 3(t) of the FLSA. 29 U.S.C. 203(t). The FLSA defines a tipped employee as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." Id. Section 3 of the Executive Order sets forth a wage payment method for tipped employees that is similar to the tipped employee wage provision of the FLSA. 29 U.S.C. 203(m). As with the FLSA "tip credit" provision, the Executive Order permits contractors to take a partial credit against their wage payment obligation to a tipped employee under the Order based on tips received by the employee. The wage paid to the tipped employee comprises both the cash wage paid under section 3(a) of the Executive Order and the amount of tips used for the tip credit, which is limited to the difference between the cash wage paid and the Executive Order minimum wage. Because contractors with a contract subject to the Executive Order may be required by the SCA or any other applicable law or regulation to pay a wage in excess of the Executive Order minimum wage, section 3(b) of the Order provides that in such circumstances contractors must pay the difference between the Executive Order minimum wage and the higher required wage in cash to the tipped employees and may not make up the difference with additional tip credit.

In the proposed regulations implementing section 3 of the Executive Order, the Department has set forth procedures that closely follow the FLSA requirements for payment of tipped employees with which employers are already familiar. This is consistent with the directive in section 4(c) of the Executive Order that regulations issued pursuant to the order

should, to the extent practicable, incorporate existing procedures from the FLSA, SCA and DBA. 79 FR 9852. In an effort to assist contractors who employ tipped workers and avoid the need for extensive cross references to the FLSA tip credit regulations, the requirements for paying tipped employees under the Executive Order have been fully set forth in proposed § 10.28. The Department has also sought to use plain language in the proposed tipped employee regulations to make clear contractors' wage payment obligations to tipped employees under the Executive Order.

Section 10.28(a) of the proposed regulations sets forth the provisions of section 3 of the Executive Order explaining contractors' wage payment obligation under section 2 to tipped employees. Proposed § 10.28(a)(1) and (2) makes clear that the wage paid to a tipped employee under section 2 of the Executive Order is composed of two components: a cash wage payment (which must be at least $4.90 as of January 1, 2015 and rises yearly thereafter) and a credit based on tips (tip credit) received by the worker equal to the difference between the cash wage paid and the Executive Order minimum wage. Accordingly, on January 1, 2015, if a contractor pays a tipped employee performing on a covered contract a cash wage of $4.90 per hour, the contractor may claim a tip credit of $5.20 per hour (assuming the worker receives at least $5.20 per hour in tips). Under no circumstances may a contractor claim a higher tip credit than the difference between the required cash wage and the Executive Order minimum wage; contractors may, however, pay a higher cash wage than required by section 3 and claim a lower tip credit. Because the sum of the cash wage paid and the tip credit equals the Executive Order minimum wage, any increase in the amount of the cash wage paid will result in a corresponding decrease in the amount of tip credit that may be claimed, except as provided in proposed § 10.28(a)(4). For example, if on January 1, 2015, a contractor on a contract subject to the Executive Order paid a

tipped worker a cash wage of $5.50 per hour instead of the minimum requirement of $4.90, the contractor would only be able to claim a tip credit of $4.60 per hour to reach the $10.10 Executive Order minimum wage. If the tipped employee does not receive sufficient tips in the workweek to equal the amount of the tip credit claimed, the contractor must increase the cash wage paid so that the amount of cash wage paid and tips received by the employee equal the section 2 minimum wage for all hours in the workweek.

Proposed § 10.28(a)(3) makes clear that a contractor may pay a higher cash wage than required by subsection (3)(a)(i) of the Executive Order – and claim a correspondingly lower tip credit – but may not pay a lower cash wage than that required by section 3(a)(i) of the Executive Order and claim a higher tip credit. In order for the contractor to claim a tip credit the employee must receive tips equal to at least the amount of the credit claimed. If the employee receives less in tips than the amount of the credit claimed, the contractor must pay the additional cash wages necessary to ensure the employee receives the Executive Order minimum wage in effect under section 2 on the regular pay day.

Proposed § 10.28(a)(4) sets forth the contractors' wage payment obligation when the wage required to be paid under the SCA or any other applicable law or regulation is higher than the Executive Order minimum wage. In such circumstances, the contractor must pay the tipped employee additional cash wages equal to the difference between the Executive Order minimum wage and the highest wage required to be paid by other applicable State or Federal law or regulation. This additional cash wage is on top of the cash wage paid under § 10.28(a)(1) and any tip credit claimed. Unlike raising the cash wage paid under § 10.28(a)(1), additional cash wages paid under § 10.28(a)(4) do not impact the calculation of the amount of tip credit the employer may claim.

Proposed § 10.28(b) follows section 3(t) of the FLSA, 29 U.S.C. 203(t), in defining a tipped employee as one who customarily and regularly receives more than $30 a month in tips. If an employee receives less than that amount, he or she is not considered a tipped employee and is entitled to not less than the full Executive Order minimum wage in cash. Workers may be considered tipped employees regardless of whether they work full time or part time, but the amount of tips required per month to be considered a tipped employee is not prorated for part time workers. Only the tips actually retained by the employee may be considered in determining if he or she is a tipped employee (i.e., only tips retained after any redistribution of tips through a valid tip pool). As explained in proposed § 10.28(b), the tip credit may only be taken for hours an employee works in a tipped occupation. Accordingly, where a worker works in both a tipped and a non-tipped occupation for the contractor (dual jobs), the tip credit may only be used for the hours worked in the tipped occupation and no tip credit may be taken for the hours worked in the non-tipped occupation. The tip credit, however, may be used for time spent performing incidental activities related to the tipped occupation that do not directly produce tips, such as cleaning tables and filling salt shakers, etc.

Proposed § 10.28(c) defines what constitutes a tip. Consistent with common understanding, a tip is defined as a sum presented by a customer in recognition of a service performed for the customer. Whether a tip is to be given and its amount are determined solely by the customer. Thus, a tip is different from a fixed charge assessed by a business for service. Tips may be made in cash presented to, or left for, the worker, or may be designated on a credit card bill or other electronic payment. Gifts that are not cash equivalents are not considered to be tips for purposes of wage payments under the Executive Order. A contractor with a contract subject to the Executive Order is prohibited from using an employee's tips, whether it has

claimed a tip credit or not, for any reason other than as a credit against the contractor's wage payment obligations under section 3 of the Executive Order, or in furtherance of a valid tip pool. Employees and contractors may not agree to waive the employee's right to retain his or her tips.

Proposed § 10.28(d) addresses payments that are not considered to be tips. Paragraph (d)(1) addresses compulsory service charges added to a bill by the business, which are not considered tips. Compulsory service charges are considered to be part of the business' gross receipts and, even if distributed to the worker, cannot be counted as tips for purposes of determining if a worker is a tipped employee. Paragraph (d)(2) of this section addresses a contractor's use of service charges to pay wages to tipped employees. Where the contractor distributes compulsory service charges to workers the money will be considered wages paid to the worker and may be used in their entirety to satisfy the minimum wage payment obligation under the Executive Order.

Proposed § 10.28(e) addresses a common practice at many tipped workplaces of pooling all or a portion of employees' tips and redistributing them to other employees. Contractors may not use employees' tips to supplement the wages paid to non-tipped employees. Accordingly, a valid tip pool may only include workers who customarily and regularly receive tips; inclusion of employees who do not receive tips such as "back of the house" workers (dishwashers, cooks, etc.), will invalidate the tip pool and result in denial of the tip credit for any tipped employees who contributed to the invalid tip pool. A contractor that requires tipped employees to participate in a tip pool must notify workers of any required contribution to the tip pool, may only take a credit for the amount of tips ultimately received by a tipped employee, and may not retain any portion of the employee's tips for any other purpose.

Proposed § 10.28(f) addresses the requirements for a contractor with a contract subject to the Executive Order to avail itself of a tip credit in paying wages to a tipped employee under the Executive Order. These requirements follow the requirements for taking a tip credit under the FLSA and are familiar to employers of tipped employees. Before a contractor may claim a tip credit it must inform the tipped employee of the amount of the cash wage that will be paid; the additional amount of tip credit that will be claimed in determining the wages paid to the employee; that the amount of tip credit claimed may not be greater than the amount of tips received by the employee in the workweek and that the contractor has the obligation to increase the cash wage paid in any workweek in which the employee does not receive sufficient tips; that all tips received by the worker must be retained by the employee except for tips that are redistributed through a valid tip pool and the amount required to be contributed to any such pool; and that the contractor may not claim a tip credit for any employee who has not been informed of its use of the tip credit.

Subpart D – Enforcement

Section 5 of Executive Order 13658, titled "Enforcement," grants the Secretary "authority for investigating potential violations of and obtaining compliance with th[e] order." 79 FR 9852. Section 4(c) of the Order directs that the regulations the Secretary issues should, to the extent practicable, incorporate existing procedures, remedies, and enforcement processes under the FLSA, SCA and DBA. Id. The Department has adhered to these two requirements in drafting proposed subpart D.

Specifically, consistent with the Secretary's authority to obtain compliance with the Order, as well as the Secretary's obligation to promulgate implementing regulations that incorporate, to the extent practicable, existing procedures, remedies, and enforcement processes

under the FLSA, SCA, and DBA, subpart D of this part incorporates FLSA, SCA, and DBA remedies, procedures, and enforcement processes that the Department believes will facilitate investigations of potential violations of the Order, address and remedy violations of the Order, and promote compliance with the Order. Most of the enforcement procedures and remedies contained in this part therefore are based on the statutory text or implementing regulations of the FLSA, SCA, and DBA. The Department also proposes to adopt, in instances where it is appropriate, enforcement procedures set forth in the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. See 29 CFR part 9.

Proposed § 10.41 establishes the procedure for filing complaints. Section 10.41(a) outlines the procedure to file a complaint with any office of the WHD. It additionally provides that a complaint may be filed orally or in writing and that the WHD will accept a complaint in any language if the complainant is unable to file in English. Section 10.41(b) states the well-established policy of the Department with respect to confidential sources. See 29 CFR 4.191(a); 29 CFR 5.6(a)(5).

Proposed § 10.42 establishes an informal complaint resolution process for complaints filed with the WHD. The provision would allow WHD, after obtaining the necessary information from the complainant regarding the alleged violations, to contact the party against whom the complaint is lodged and attempt to reach an acceptable resolution through conciliation.

Proposed § 10.43, which is derived primarily from regulations implementing the SCA and the DBA, see 29 CFR 4.6(g)(4) and 29 CFR 5.6(b), outlines WHD's investigative authority. Proposed § 10.43 permits the Administrator to initiate an investigation either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the

Administrator would be able to inspect the relevant records of the applicable contractors (and make copies or transcriptions thereof) as well as interview the contractors. The Administrator would additionally be able to interview any of the contractors' workers at the worksite during normal work hours, and require the production of any documentary or other evidence deemed necessary to determine whether a violation of this part (including conduct warranting imposition of debarment) has occurred. The section would also require Federal agencies and contractors to cooperate with authorized representatives of the Department in the inspection of records, in interviews with workers, and in all aspects of investigations.

Proposed § 10.44 discusses remedies and sanctions. Proposed § 10.44(a), which is derived from the back wage and withholding provisions of the SCA and the DBA, provides that when the Administrator determines a contractor has failed to pay the Executive Order's minimum wage to workers, the Administrator will notify the contractor and the contracting agency of the violation and request the contractor to remedy the violation. It additionally states that if the contractor does not remedy the violation, the Administrator will direct the contractor to pay all unpaid wages in the Administrator's investigation findings letter issued pursuant to proposed § 10.51. Proposed § 10.44(a) further provides that the Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Government be withheld as necessary to pay unpaid wages, and that, upon the final order of the Secretary that unpaid wages are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department for disbursement.

Proposed § 10.44(b), which is derived from the FLSA's antiretaliation provision set forth at 29 U.S.C. 215(a)(3) as well as 29 U.S.C. 216(b)(2) of the FLSA, provides that the Administrator may provide for any relief appropriate, including employment, reinstatement,

promotion and payment of unpaid wages, when the Administrator determines that any person has discharged or in any other manner retaliated against a worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or has testified or is about to testify in any such proceeding. For the reasons described in the preamble to subpart A, the Department believes that such a provision will promote compliance with the Executive Order.

Proposed § 10.44(c) provides that if the Administrator determines a contractor has disregarded its obligations to workers under the Executive Order or this part, a standard the Department derived from the DBA implementing regulations at 29 CFR 5.12(a)(2), the Secretary shall order that the contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, shall be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to three years from the date of publication of the name of the contractor or person(s) on the ineligible list. Proposed § 10.44(c) further provides that neither an order for debarment of any contractor or responsible officer from further Government contracts under this section nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors shall be carried out without affording the contractor or responsible officers an opportunity for a hearing.

This proposed debarment provision is derived from the debarment provisions of the SCA and the DBA and reflects both the Executive Order's instruction that the Department incorporate remedies from the FLSA, SCA, and DBA to the extent practicable and the Executive Order's conferral of authority on the Secretary to adopt an enforcement scheme that will both remedy violations and obtain compliance with the Order. Debarment is a long-established remedy for a

contractor's failure to fulfill its labor standard obligations under the SCA and the DBA. 40 U.S.C. 3144(b); 41 U.S.C. 6706(b); 29 CFR 5.5(a)(7); 29 CFR 5.12(a)(2); 29 CFR 4.188(a). The possibility that a contractor will be unable to obtain government contracts for a fixed period of time due to debarment promotes contractor compliance with the SCA and DBA. Since the government contract statutes whose remedies the Executive Order instructs the Department to incorporate include a debarment remedy to promote contractor compliance, the Department has also included debarment as a remedy for certain violations of the Executive Order by covered contractors.

Proposed § 10.44(d), which is derived from the SCA, 41 U.S.C. § 6705(b)(2), allows for initiation of an action, following a final order of the Secretary, against a contractor in any court of competent jurisdiction to collect underpayments when the amounts withheld under § 10.11(c) are insufficient to reimburse workers' lost wages. Proposed § 10.44(d) also authorizes initiation of an action, following the final order of the Secretary, in any court of competent jurisdiction when there are no payments available to withhold. For example, the Executive Order will cover concessions contracts (and possibly other contracts) under which the contractor may not receive payments from the Federal Government; similarly, in some instances the Administrator may be unable to direct withholding of funds because at the time it discovers a contractor owes wages to workers no payments remain owing under the contract or another contract between the same contractor and the Federal Government. With respect to such contractors, there will be no funds to withhold. Proposed section § 10.44(d) allows the Department to pursue an action in any court of competent jurisdiction to collect underpayments against such contractors. Proposed § 10.44(d) additionally provides that any sums the Department recovers shall be paid to affected

workers to the extent possible, but that sums not paid to workers because of an inability to do so within three years shall be transferred into the Treasury of the United States.

Proposed § 10.44(e) addresses what remedy is available when a contracting agency fails to include the contract clause in a contract subject to the Executive Order. The section would provide that the contracting agency shall on its own initiative or within 15 calendar days of notification by the Department, incorporate the clause retroactive to commencement of performance under the contract through the exercise of any and all authority necessary. This clause would provide the Administrator authority to collect underpayments on behalf of affected workers on the applicable contract retroactive to commencement of performance under the contract. The Administrator possesses comparable authority under the DBA, 29 CFR 1.6(f), and the Department believes a similar mechanism for addressing a failure to include the contract clause in a contract subject to the Executive Order will further the interest in both remedying violations and obtaining compliance with the Executive Order.

Finally, as noted in the preamble to subpart A, the Executive Order covers certain non-procurement contracts. Because the FAR does not apply to all contracts covered by the Executive Order, there will be instances where, pursuant to section 4(b) of the Executive Order, a contracting agency takes steps to the extent permitted by law, including but not limited to insertion of the contract clause set forth in appendix A, to exercise any applicable authority to ensure that covered contracts as described in section 7(d)(1)(C) and(D) of this order comply with the requirements set forth in sections 2 and 3 of the Executive Order, including payment of the Executive Order minimum wage. In such instances, the enforcement provisions contained in subpart D (as well as the remainder of this part) fully apply to the covered contract, consistent

with the Secretary's authority under section 5 of the Executive Order to investigate potential violations of, and obtain compliance with, the Order.

Subpart E – Administrative Proceedings

As discussed with respect to proposed subpart D, section 5 of Executive Order 13658, titled "Enforcement," grants the Secretary "authority for investigating potential violations of and obtaining compliance with th[e] order." 79 FR 9852. Section 4(c) of the Order directs that the regulations the Secretary issues should, to the extent practicable, incorporate existing procedures, remedies, and enforcement processes under the FLSA, SCA and DBA. Id. The Department has adhered to these two requirements in drafting proposed subpart E.

Specifically, subpart E of this part incorporates, to the extent practicable, the DBA and SCA administrative procedures necessary to remedy potential violations and ensure compliance with the Executive Order. The administrative procedures included in this subpart also closely adhere to existing practices of the Office of Administrative Law Judges and the Administrative Review Board.

Proposed § 10.51, which is derived primarily from 29 CFR 5.11 addresses how the Administrator will process disputes regarding a contractor's compliance with this part. Proposed § 10.51(a) provides that the Administrator or a contractor may initiate a proceeding covered by § 10.51. Proposed § 10.51(b)(1) provides that when it appears that relevant facts are at issue in a dispute covered by § 10.51(a), the Administrator will notify the affected contractor (and the prime contractor, if different) of the investigation's findings by certified mail to the last known address. If the Administrator determines there are reasonable grounds to believe the contractor(s) should be subject to debarment, the investigative findings letter will so indicate.

Proposed § 10.51(b)(2) requires a contractor desiring a hearing concerning the investigative findings letter to request a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. It further requires the request to set forth those findings which are in dispute with respect to the violation(s) and/or debarment, as appropriate, and to explain how such findings are in dispute, including by reference to any applicable affirmative defenses.

Proposed § 10.51(b)(3) requires the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief Administrative Law Judge by Order of Reference for designation of an ALJ to conduct such hearings as may be necessary to resolve the disputed matter in accordance with the procedures set forth in 29 CFR part 6. It also requires the Administrator to attach a copy of the Administrator's letter, and the response thereto, to the Order of Reference that the Administrator sends to the Chief Administrative Law Judge.

Proposed § 10.51(c)(1) applies when it appears there are no relevant facts at issue and there is not at that time reasonable cause to institute debarment proceedings. It requires the Administrator to notify the contractor, by certified mail to the last known address, of the investigative findings and to issue a ruling on any issues of law known to be in dispute. Proposed § 10.51(c)(2)(i) applies when a contractor disagrees with the Administrator's factual findings or believes there are relevant facts in dispute. It would allow the contractor to advise the Administrator of such disagreement by letter postmarked within 30 calendar days of the date of the Administrator's letter. The response would have to explain in detail the facts alleged to be in dispute and attach any supporting documentation.

Proposed § 10.51(c)(2)(ii) requires the Administrator to examine the information submitted in the response alleging the existence of a factual dispute. Where the Administrator

determines there is a relevant issue of fact, the Administrator will refer the case to the Chief Administrative Law Judge as under § 10.51(b)(3). If the Administrator determines there is no relevant issue of fact, the Administrator shall so rule and advise the contractor(s) accordingly.

Proposed § 10.51(d) provides that the Administrator's investigative findings letter shall become the final order of the Secretary if a timely response to the letter is not made or a timely petition for review is not filed. It additionally provides if a timely response or a timely petition for review is filed, the investigative findings letter shall be inoperative unless and until the decision is upheld by the ALJ or the ARB, or the letter otherwise becomes a final order to the Secretary.

Proposed § 10.52, which is primarily derived from 29 CFR 5.12, addresses debarment proceedings. Proposed § 10.52(a)(1) provides that whenever any contractor is found by the Administrator to have disregarded its obligations to workers or subcontractors under Executive Order 13658 or this part, such contractor and its responsible officers, and/or any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, shall be ineligible for a period of up to three years to receive any contracts or subcontracts subject to the Executive Order from the date of publication of the name or names of the contractor or persons on the ineligible list.

Proposed § 10.52(b)(1) provides that where the Administrator finds reasonable cause to believe a contractor has committed a violation of the Executive Order or this part that constitutes a disregard of its obligations to its workers or subcontractors, the Administrator will notify by certified mail to the last known address the contractor and its responsible officers (and/or any firms, corporations, partnerships, or associations in which the contractor or responsible officers is known to have an interest) of the finding. Pursuant to § 10.52(b)(1), the Administrator must

additionally furnish those notified a summary of the investigative findings and afford them an opportunity for a hearing regarding the debarment issue. Those notified must request a hearing on the debarment issue, if desired, by letter to the Administrator postmarked within 30 calendar days of the date of the letter from the Administrator. The letter requesting a hearing must set forth any findings which are in dispute and the reasons therefore, including any affirmative defenses to be raised. Proposed § 10.52(b)(1) also requires the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the Administrator's investigative findings letter and the response thereto, for designation to an ALJ to conduct such hearings as may be necessary to determine the matters in dispute. Proposed § 10.52(b)(2) provides that hearings under § 10.52 shall be conducted in accordance with 29 CFR part 6. If no timely request for hearing is received, the Administrator's findings shall become the final order of the Secretary.

Proposed § 10.53 is derived from the SCA and DBA rules of practice for administrative proceedings in 29 CFR part 6. Proposed § 10.53(a) provides that upon receipt of a timely request for a hearing under § 10.51 (where the Administrator has determined that relevant facts are in dispute) or § 10.52 (debarment), the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an ALJ to conduct such hearings as may be necessary to decide the disputed matters. It further provides that a copy of the Order of Reference and attachments thereto shall be served upon the respondent and that the investigative findings letter and the response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceeding.

Proposed § 10.53(b) states that at any time prior to the closing of the hearing record, the complaint or answer may be amended with permission of the ALJ upon such terms as he/she shall approve, and that for proceedings initiated pursuant to § 10.51, such an amendment may include a statement that debarment action is warranted under § 10.52. It further provides that such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. It additionally states that when issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. Proposed § 10.53(b) further provides that the presiding ALJ may, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved. It also authorizes the ALJ to grant a continuance in the hearing, or leave the record open, to enable the new allegations to be addressed.

Proposed § 10.54, which is derived from 29 CFR 6.18 and 6.32, provides a process whereby parties may at any time prior to the ALJ's receipt of evidence or, at the ALJ's discretion, at any time prior to issuance of a decision, amicably dispose of the matter, or any part thereof, by entering into consent findings and an order. Proposed § 10.54(b) identifies four requirements of any agreement containing consent findings and an order. Proposed § 10.54(c) provides that within 30 calendar days of receipt of any proposed consent findings and order, the ALJ shall accept the agreement by issuing a decision based on the agreed findings and order, provided the ALJ is satisfied with the proposed agreement's form and substance.

Proposed § 10.55, which is primarily derived from 29 CFR 6.19 and 6.33, addresses the ALJ's proceedings and decision. Proposed § 10.55(a) provides that the Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's determinations issued under § 10.51 or § 10.52. It further provides that any party may, when requesting an appeal or during the pendency of a proceeding on appeal, timely move an ALJ to consolidate a proceeding initiated hereunder with a proceeding initiated under the SCA or DBA. This language would allow the Office of Administrative Law Judges and interested parties to efficiently dispose of related proceedings arising out of the same contract with the Federal Government. Proposed § 10.55(b) provides that each party may file with the ALJ proposed findings of fact, conclusions of law, and a proposed order, together with a brief, within 20 calendar days of filing of the transcript (or a longer period if the ALJ permits). It also provides that each party shall serve such proposals and brief on all other parties.

Proposed § 10.55(c)(1) requires an ALJ to issue a decision within a reasonable period of time after receipt of the proposed findings of fact, conclusions of law, and order, or within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the matter in whole. It further provides that the decision shall contain appropriate findings, conclusions of law, and an order and be served upon all parties to the proceeding. Proposed § 10.55(c)(2) provides that if the Administrator has requested debarment, and the ALJ concludes the contractor has violated the Executive Order or this part, the ALJ must issue an order regarding whether the contractor is subject to the ineligible list that includes any findings related to the contractor's disregard of its obligations to workers or subcontractors under the Executive Order or this part.

Proposed § 10.55(d) provides that the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. 504, does not apply to these proceedings. The proceedings proposed here are not required by an underlying statute to be determined on the record after an opportunity for an agency hearing. Therefore, an ALJ would have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the EAJA for any proceeding under this part.

Proposed § 10.55(e) provides that if the ALJ concludes a violation occurred, the final order must require action to correct the violation, including, but not limited to, monetary relief for unpaid wages. It also requires an ALJ to determine whether an order imposing debarment is appropriate, if the Administrator has sought debarment. Proposed § 10.55(f) provides that the ALJ's decision shall become the final order of the Secretary, provided a party does not timely appeal the matter to the ARB.

Proposed § 10.56, which is derived from 29 CFR 6.20 and 6.34, applies to petitions for review to the ARB from ALJ decisions. Proposed § 10.56(a) provides that within 30 calendar days after the date of the decision of the ALJ, or such additional time as the ARB grants, any party aggrieved thereby who desires review shall file a petition for review with supporting reasons in writing to the ARB with a copy thereof to the Chief Administrative Law Judge. It further requires the petition to refer to the specific findings of fact, conclusions of law, and order at issue and that a petition concerning a debarment decision state the disregard of obligations to workers and subcontractors, or lack thereof, as appropriate. It additionally requires a party to serve the petition for review, and all briefs, on all parties and on the Chief Administrative Law Judge. It also states a party must timely serve copies of the petition and all briefs on the Administrator and the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor.

Proposed § 10.56(b) provides that if a party files a timely petition for review, the ALJ's decision shall be inoperative unless and until the ARB issues an order affirming the letter or decision, or the letter or decision otherwise becomes a final order of the Secretary. It further provides that if a petition for review concerns only the imposition of debarment, the remainder of the decision shall be effective immediately. It additionally states that judicial review shall not be available unless a timely petition for review to the ARB is first filed. Failure of the aggrieved party to file a petition for review with the ARB within 30 calendar days of the ALJ decision shall render the decision final, without further opportunity for appeal.

Proposed § 10.57, which is derived primarily from 29 CFR 9.35, outlines the ARB proceedings under the Executive Order. Proposed § 10.57(a)(1) states the ARB has jurisdiction to hear and decide in its discretion appeals from the Administrator's investigative findings letters issued under § 10.51(c)(1) or § 10.51(c)(2), Administrator's rulings issued under § 10.58, and from decisions of ALJ's issued under § 10.55. It further provides that in considering the matters within its jurisdiction, the Board shall act as the Secretary's authorized representative and act fully and finally on behalf of the Secretary. Proposed § 10.57(a)(2) identifies the limitations on the ARB's scope of review, including a restriction on passing on the validity of any provision of this part, a general prohibition on receiving new evidence in the record (because the ARB is an appellate body and shall decide cases before it based on substantial evidence in the existing record), and a bar on granting attorney's fees or other litigation expenses under the Equal Access to Justice Act.

Proposed § 10.57(b) requires the ARB to issue a final decision within a reasonable period of time following receipt of the petition for review and to serve the decision by mail on all parties at their last known address, and on the Chief Administrative Law Judge, if the case

involves an appeal from an ALJ's decision. Proposed § 10.57(c) requires the ARB's order to mandate action to remedy the violation, including, but not limited to, providing monetary relief for unpaid wages, if the Board concludes a violation occurred. If the Administrator has sought debarment, the Board must determine whether a debarment remedy is appropriate. Proposed § 10.57(d) provides the ARB's decision shall become the Secretary's final order in the matter.

Proposed § 10.58 sets forth a procedure for addressing questions regarding the application and interpretation of the rules contained in this part. Proposed § 10.58(a), which is derived primarily from 29 CFR 5.13, provides that such questions may be referred to the Administrator. It further provides that the Administrator shall issue an appropriate ruling or interpretation related to the question. Requests for rulings under this section should be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210. Any interested party may, pursuant to § 10.58(b), appeal a final ruling of the Administrator issued pursuant to § 10.58(a) to the ARB.

Appendix A (Contract Clause)

Section 2 of Executive Order 13658 provides that executive departments and agencies (agencies), shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, the minimum wage to be paid to workers under the Order. 79 FR 9851. Section 4 of the Executive Order provides that the Secretary shall issue regulations by October 1, 2014, to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act, to implement the requirements of the Order. Id. at 9852. Section 4 of the Order also

requires that, to the extent permitted by law, within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council (FARC) shall issue regulations in the Federal Acquisition Regulation (FAR) to provide for inclusion of the contract clause in Federal procurement solicitations and contracts subject to the Executive Order. Id. The Order further specifies that any regulations issued pursuant to section 4 of the Order should, to the extent practicable and consistent with section 8 of the Order, incorporate existing definitions, procedures, remedies, and enforcement processes under the FLSA, SCA, and DBA. Id. Section 5 of the Order grants authority to the Secretary to investigate potential violations of and obtain compliance with the Order. Id.

As a contract clause is a requirement of the Order, the text of a proposed contract clause is set forth in appendix A to proposed part 10. As required by the Order, the proposed contract clause specifies the minimum wage to be paid to workers under the Order. Consistent with the Secretary's authority under the Order to obtain compliance with the Order, as well as the Secretary's responsibility under the Order to issue regulations implementing the requirements of the Order that incorporate, to the extent practicable, existing procedures, remedies, and enforcement processes under the FLSA, SCA, and DBA, the additional provisions of the contract clause are based on the statutory text or implementing regulations of the FLSA, SCA, and DBA and are intended to obtain compliance with the Order.

For all contracts subject to Executive Order 13658, except for procurement contracts subject to the Federal Acquisition Regulation (FAR), the contracting agency shall include the Executive Order minimum wage contract clause set forth in appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 10.3. The required contract clause directs, as a condition of payment, that all workers performing on covered

contracts must be paid the applicable, currently effective minimum wage under Executive Order 13658 and § 10.5. For procurement contracts subject to the FAR, contracting agencies shall use the clause set forth in the FAR developed to implement this rule. Such clause shall accomplish the same purposes as the clause set forth in appendix A and shall be consistent with the requirements set forth in this rule.

Paragraph (a) of the proposed contract clause set forth in appendix A provides that the contract in which the clause is included is subject to Executive Order 13658, the regulations issued by the Secretary of Labor at 29 CFR part 10 to implement the Order's requirements, and all the provisions of the contract clause.

Paragraph (b) specifies the contractor's minimum wage obligations to workers pursuant to the Executive Order. Paragraph (b)(1) stipulates that each worker employed in the performance of the contract by the prime contractor or any subcontractor, regardless of any contractual relationship that may be alleged to exist between the contractor and the worker, shall be paid not less than the Executive Order's applicable minimum wage. Paragraph (b)(2) provides that the minimum wage required to be paid to each worker performing work on the contract between January 1, 2015 and December 31, 2015 shall be $10.10 per hour. It specifies that the applicable minimum wage required to be paid to each worker performing work on the contract shall thereafter be adjusted each time the Secretary's annual determination of the applicable minimum wage under section 2(a)(ii) of the Executive Order results in a higher minimum wage. Section (b)(1) further provides that adjustments to the Executive Order minimum wage will be effective January 1st of the following year, and shall be published in the Federal Register no later than 90 days before such wage is to take effect. It also provides the

applicable minimum wage will be published on www.wdol.gov (or any successor website) and is incorporated by reference into the contract.

The effect of paragraphs (b)(1) and (b)(2) would be to require the contractor to adjust the minimum wage of workers employed on a contract subject to the Executive Order each time the Secretary's annual determination of the minimum wage results in a higher minimum wage than the previous year. For example, paragraph (b)(1) would require a contractor on a contract subject to the Executive Order in 2015 to pay covered workers at least $10.10 per hour for work performed on the contract. If the contractor continued to employ workers on the covered contract in 2016 and the Secretary determined the applicable minimum wage to be effective January 1, 2016 was $10.20 per hour, sections (b)(1) and (b)(2) would require the contractor to pay covered workers $10.20 for work performed on the contract beginning January 1, 2016, thereby raising the wages of any workers paid $10.10 per hour prior to January 1, 2016.

Paragraph (b)(3), which is derived from the contract clauses applicable to contracts subject to the SCA and the DBA, see 29 CFR 4.6(h) (SCA); 29 CFR 5.5(a)(1) (DBA), is intended to ensure full payment of the applicable Executive Order minimum wage to covered workers. Specifically, paragraph (b)(3) requires the contractor to pay unconditionally to each covered worker all wages due free and clear and without deduction (except as otherwise provided by § 10.23), rebate or kickback on any account. Paragraph (b)(3) further provides that wages shall be paid no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. Paragraph (b)(3) also provides that a pay period under the Executive Order may not be of any duration longer than semi-monthly (a duration permitted under the SCA, see 29 CFR 4.165(b)). Paragraph (b)(4) provides that the contractor

and any subcontractor(s) responsible shall therefore be liable for unpaid wages in the event of any violation of the minimum wage obligation of these clauses.

Paragraphs (c) and (d) of the contract clause are derived primarily from the contract clauses applicable to contracts subject to the SCA and the DBA, see 29 CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2), (7) (DBA), and specify remedies in the event of a determination of a violation of Executive Order 13658 or this part. Paragraph (c) provides that the contracting officer shall, upon its own action or upon written request of an authorized representative of the Department, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by the contract. Consistent with withholding procedures under the SCA and the DBA, section (c) would allow the contracting agency and the Department to effect withholding of funds from the prime contractor on not only the contract covered by the Executive Order but also on any other contract that the prime contractor has entered into with the Federal Government.

Paragraph (d) states the circumstances under which the contracting agency and/or the Department may suspend, terminate, or debar a contractor for violations of the Executive Order. It provides that in the event of a failure to comply with any term or condition of the Executive Order or 29 CFR part 10, including failure to pay any worker all or part of the wages due under the Executive Order, or discriminating against an employee who has filed a complaint, the contracting agency may on its own action, or after authorization or by direction of the Department and written notification to the contractor, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Paragraph (d) additionally provides that any failure to comply with the contract clause may constitute grounds

for termination of the right to proceed with the contract work and, in such event, for the Federal Government to enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. Paragraph (d) also provides that a breach of the contract clauses may be grounds to debar the contractor as provided in 29 CFR part 10.

Paragraph (e) provides that neither a contractor nor subcontractor may discharge any portion of its minimum wage obligation under the contract by furnishing fringe benefits, or with respect to workers whose wages are governed by the SCA, the cash equivalent thereof. As noted earlier, Executive Order 13658 establishes a minimum wage for contractors and provides that the Order seeks to increase, initially to $10.10, "the hourly minimum wage" paid by contractors with the Federal Government. By repeatedly referencing that it is establishing a higher hourly minimum wage, without any reference to fringe benefits, the text of the Executive Order makes clear that a contractor cannot discharge its minimum wage obligation by furnishing fringe benefits. This interpretation is consistent with the SCA, which does not permit a contractor to meet its minimum wage obligation through the furnishing of fringe benefits, but rather imposes distinct "minimum wage" and "fringe benefit" obligations on contractors. 41 U.S.C. 6703(1)-(2). Similarly, the FLSA does not allow a contractor to meet its minimum wage obligation through the furnishing of fringe benefits. Although the DBA specifically includes fringe benefits within its definition of minimum wage, thereby allowing a contractor to meet its minimum wage obligation, in part, through the furnishing of fringe benefits, 40 U.S.C. 3141(2), Executive Order 13658 contains no similar provision expressly authorizing a contractor to discharge its Executive Order minimum wage obligation through the furnishing of fringe benefits. Consistent with the Executive Order, paragraph (e) would accordingly preclude a contractor from discharging its minimum wage obligation by furnishing fringe benefits.

Paragraph (e) also prohibits a contractor from discharging its minimum wage obligation to workers whose wages are governed by the SCA by providing the cash equivalent of fringe benefits, including vacation and holidays. As discussed above, the SCA imposes distinct "minimum wage" and "fringe benefit" obligations on contractors. 41 U.S.C. 6703(1)-(2). A contractor cannot satisfy any portion of its SCA minimum wage obligation through the provision of fringe benefit payments or cash equivalents furnished or paid pursuant to 41 U.S.C. 6703(2). 29 CFR 4.177(a). Consistent with the treatment of fringe benefit payments or their cash equivalents under the SCA, paragraph (e) would not allow contractors to discharge any portion of their minimum wage obligation under the Executive Order to workers whose wages are governed by the SCA through the provision of either fringe benefits or their cash equivalent.

Paragraph (f) provides that nothing in the contract clause shall relieve the contractor from compliance with a higher wage obligation to workers under any other Federal, State, or local law. This provision would implement section 2(c) of the Executive Order, which provides that nothing in the Order excuses noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order. 79 FR 9851. This provision thus would ensure that a contractor cannot rely on the applicable Executive Order minimum wage to justify payment of a wage that is lower than the wage the contractor is obligated to pay under any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order. For example, if a municipal law required a contractor to pay a worker $10.75 per hour on January 1, 2015, a contractor could not rely on the $10.10 Executive Order minimum wage to pay the worker less than $10.75 per hour.

Paragraph (g) sets forth recordkeeping and related obligations that are consistent with the Secretary's authority under section 5 of the Order to obtain compliance with the Order, and that the Department views as essential to determining whether the contractor has paid the Executive Order minimum wage to covered workers. The obligations set forth in paragraph (g) are derived from the FLSA, SCA, or DBA. Paragraph (g)(1) lists specific payroll records obligations of contractors and subcontractors performing work subject to the Executive Order, providing in particular that such contractors and subcontractors shall make and maintain for three years from the completion of the covered contract work records containing the following information for each covered worker: name, address, and social security number; the rate or rates paid to the worker; the number of daily and weekly hours worked by each worker; and any deductions made. The records required to be kept by contractors pursuant to this part are coextensive with recordkeeping requirements that already exist under, and are consistent across, the FLSA, SCA, and DBA; as a result, compliance by a covered contractor with these payroll records obligations will not impose any obligations to which the contractor is not already subject under the FLSA, SCA, or DBA. Paragraph (g)(1) further provides that the contractor and each subcontractor performing work subject to the Executive Order shall make such records available for inspection and transcription by authorized representatives of the WHD.

Paragraph (g)(2) requires the contractor to make available a copy of the contract for inspection or transcription by authorized representatives of the WHD. Paragraph (g)(3) provides that failure to make and maintain, or to make available to the WHD for transcription and copying, the records identified in section (g)(1) is a violation of the regulations implementing Executive Order 13658 and the contract. Paragraph (g)(3) additionally provides that in the case of a failure to produce such records, the contracting officer, upon direction of the Department

and notification of the contractor, shall take action to cause suspension of any further payment or advance of funds until such violation ceases. Paragraph (g)(4) requires the contractor to permit authorized representatives of the WHD to conduct the investigation, including interviewing workers at the worksite during normal working hours. Paragraph (g)(5) provides that nothing in the contract clauses limits or otherwise modifies a contractor's recordkeeping obligations, if any, under the FLSA, SCA, and DBA, and their implementing regulations, respectively. Thus, for example, a contractor subject to both Executive Order 13658 and the DBA with respect to a particular project is required to comply with all recordkeeping requirements under the DBA and its implementing regulations.

Paragraph (h) requires the contractor to both insert the contract clause in all its subcontracts and to require its subcontractors to include the clause in any lower–tiered subcontracts. Paragraph (h) further makes the prime contractor or upper-tier contractor responsible for the compliance by any subcontractor or lower tier subcontractor with the contract clause.

Paragraph (i), which is derived from the SCA contract clause, 29 CFR 4.6(n), sets forth the certifications of eligibility the contractor makes by entering into the contract. Paragraph (i)(1) stipulates that by entering into the contract, the contractor and its officials certify that neither the contractor, the certifying officials, nor any person or firm with an interest in the contractor's firm is a person or firm ineligible to be awarded Federal contracts pursuant to section 5 of the SCA, section 3(a) of the DBA, or 29 CFR 5.12(a)(1). Paragraph (i)(2) constitutes a certification that no part of the contract shall be subcontracted to any person or firm ineligible to receive Federal contracts. Paragraph (i)(3) contains an acknowledgement by the

contractor that the penalty for making false statements is prescribed in the U.S. Criminal Code at 18 U.S.C. 1001.

Paragraph (j) is based on section 3 of the Executive Order and addresses the employer's ability to use a partial wage credit based on tips received by a tipped employee (tip credit) to satisfy the wage payment obligation under the Executive Order. The provision sets the requirements an employer must meet in order to claim a tip credit.

Paragraph (k) establishes a prohibition on contractor retaliation that is derived from the FLSA's antiretaliation provision and is consistent with the Secretary's authority under section 5 of the Order to obtain compliance with the Order. It prohibits a contractor from discharging or discriminating against a worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or has testified or is about to testify in any such proceeding. The Department proposes to interpret the prohibition on contractor retaliation in paragraph (k) in accordance with its interpretation of the analogous FLSA provision.

Paragraph (l) is based on section 5(b) of the Executive Order and provides that disputes related to the application of the Executive Order to the contract shall not be subject to the contract's general disputes clause. Instead, such disputes shall be resolved in accordance with the dispute resolution process set forth in 29 CFR part 10. Paragraph (l) also provides that disputes within the meaning of the clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the workers or their representatives.

IV. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3506(c)(2)(A). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to the information collection requirements until they are approved by OMB under the PRA at the final rule stage.

Purpose and use: As previously explained, Executive Order 13658 provides that agencies must, to the extent permitted by law, ensure that new contracts, as described in section 7 of the Order, include a clause specifying, as a condition of payment, that the minimum wage to be paid to workers in the performance of the contract shall be at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) an amount determined by the Secretary, beginning January 1, 2016, and annually thereafter. 79 FR 9851. Section 7(d) of the Executive Order establishes that this minimum wage requirement only applies to a new contract if: (i) (A) it is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such

contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Section 7(e) of the Order states that, for contracts covered by the SCA or the DBA, the Order applies only to contracts at the thresholds specified in those statutes. Id. It also specifies that, for procurement contracts where workers' wages are governed by the FLSA, the Order applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the Order pursuant to regulations or actions taken under section 4 of the Order. 79 FR 9853. This NPRM, which implements the minimum wage requirement of Executive Order 13658, contains several provisions that could be considered to entail collections of information: the section 10.21 requirement for a contractor and its subcontractors to include the applicable Executive Order minimum wage contract clause in any covered subcontract, the section 10.26 recordkeeping requirements, the section 10.41 complaint process, and the subpart E administrative proceedings.

Proposed subpart C states the contractor's requirements in complying with the Executive Order. Proposed § 10.21 states that the contractor and any subcontractor, as a condition of payment, must abide by the Executive Order minimum wage contract clause and must include in any covered subcontracts the minimum wage contract clause in any lower-tier subcontracts.

The Department notes that the proposed rule does not require contractors to comply with an employee notice requirement. Furthermore, disclosure of information originally supplied by the Federal Government for the purpose of disclosure is not included within the definition of a collection of information subject to the PRA. See 5 CFR 1320.3(c)(2). The Department has determined that § 10.21 does not include an information collection subject to the PRA. The Department also notes that the proposed recordkeeping requirements in this NPRM are requirements that contractors must already comply with under the FLSA, SCA, or DBA under an

OMB approved collection of information (OMB control number 1235-0018). The Department believes that the proposed rule does not impose any additional notice or recordkeeping requirements on contractors for PRA purposes; therefore, the burden for complying with the recordkeeping requirements in this proposed rule is subsumed under the current approval. An information collection request (ICR), however, has been submitted to the OMB that would revise the existing PRA authorization for control number 1235-0018 to incorporate the recordkeeping regulatory citations in this proposed rule.

The WHD obtains PRA clearance under control number 1235-0021 for an information collection covering complaints alleging violations of various labor standards that the agency administers and enforces. An ICR has been submitted to revise the approval to incorporate the regulatory citations in this proposed rule applicable to complaints and adjust burden estimates to reflect any increase in the number of complaints filed against contractors who fail to comply with the minimum wage requirement.

Subpart E establishes administrative proceedings to resolve investigation findings. Particularly with respect to hearings, the rule imposes information collection requirements. The Department notes that information exchanged between the target of a civil or an administrative action and the agency in order to resolve the action would be exempt from PRA requirements. See 44 U.S.C. 3518(c)(1)(B); 5 CFR 1320.4(a)(2). This exemption applies throughout the civil or administrative action (such as an investigation and any related administrative hearings); therefore, the Department has determined the administrative requirements contained in subpart E of this proposed rule are exempt from needing OMB approval under the PRA.

Information and technology: There is no particular order or form of records prescribed by the proposed regulations. A contractor may meet the requirements of this proposed rule using

paper or electronic means. The WHD, in order to reduce burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing process that has complainants discuss their concerns with WHD professional staff. This process allows agency staff to refer complainants raising concerns that are not actionable under wage and hour laws and regulations to an agency that may be able to offer assistance.

Public comments: The Department seeks comments on its analysis that this NPRM creates a slight increase in paperwork burden associated with ICR 1235-0021 but does not create a paperwork burden on the regulated community of the information collection provisions contained in ICR 1235-0018. Commenters may send their views to the Department in the same way as all other comments (e.g., through the www.regulations.gov website). While much of the information provided to OMB in support of the information collection request appears in the preamble, interested parties may obtain a copy of the full recordkeeping and complaint process supporting statements by sending a written request to the mail address shown in the ADDRESSES section at the beginning of this preamble. Alternatively, a copy of the recordkeeping ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov website at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201405-1235-002 (this link will only become active on the day following publication of this notice). Similarly, the complaint process ICR is available from http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201405-1235-001 (this link will only become active on the day following publication of this notice) or by visiting http://www.reginfo.gov/public/do/PRAMain website. In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed

regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Wage and Hour Division, Office of Management and Budget, Room 10235, Washington, D.C. 20503; Telephone: 202-395-7316/Fax: 202-395-6974 (these are not toll-free numbers). The OMB will consider all written comments that agency receives within 30 days of publication of this proposed rule. As previously indicated, written comments directed to the Department may be submitted within 30 days of publication of this notice.

The OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and

- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Total burden for the recordkeeping and complaint process information collections, including the burdens that will be unaffected by this proposed rule and any changes are summarized as follows:

Type of review: Revisions to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor

Title: Employment Information Form

OMB Control Number: 1235-0021

Affected public: Private sector, businesses or other for-profits and Individuals or Households

Estimated number of respondents: 35,350 (35 from this rulemaking)

Estimated number of responses: 35,350 (35 from this rulemaking)

Frequency of response: on occasion

Estimated annual burden hours: 11,679 (11.66 burden hours due to this NPRM)

Estimated annual burden costs: $278,193.00 ($278 from this rulemaking)

Title: Records to be kept by Employers

OMB Control Number: 1235-0018

Affected public: Private sector, businesses or other for-profits and Individuals or Households

Estimated number of respondents: 3,486,025 (0 from this rulemaking)

Estimated number of responses: 39,462,547 (0 from this rulemaking)

Frequency of response: Weekly

Estimated annual burden hours: 853,924 (0 from this rulemaking)

Estimated annual burden costs: 0

V. Executive Orders 12866 and 13563

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive

Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under Executive Order 12866, the Department must determine whether a regulatory action is significant and therefore subject to the requirements of the Executive Order and to review by OMB. 58 FR 51735. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Id.

The Department has determined that this proposed rule is a "significant regulatory action" under section 3(f) of Executive Order 12866 because it is economically significant based on the analysis set forth below. As a result, OMB has reviewed this proposed rule.

Executive Order 13658 requires an increase in the minimum wage to $10.10 for workers on covered Federal contracts where the solicitation for such contract has been issued on or after January 1, 2015. Beginning January 1, 2016, and annually thereafter, the Secretary of Labor will determine the applicable minimum wage in accordance with section 2 of Executive Order 13658.

Workers performing on covered contracts as described in the Executive Order and this rule are entitled to the minimum wage protections of this part. The Executive Order applies only to new contracts where the solicitation for such contract has been issued on or after January 1, 2015.

In order to determine whether the proposed rule would have an annual effect on the economy of $100 million or more, it was necessary to determine how many workers on contracts covered by the Executive Order are earning below $10.10 (affected workers). Because no single source contained data reflecting how many Federal contract workers receive wages below $10.10, the Department relied on a variety of data sources to derive the number of affected workers. First, the Department used the Principal North American Industry Classification System (NAICS) to identify the industries most likely to employ workers covered by the Executive Order. Second, the Department utilized the Current Population Survey (CPS) to estimate the number of workers within a state within the applicable NAICS category receiving less than $10.10 per hour. The Department then relied on ratios it derived from USASpending.gov and the Bureau of Labor Statistics Office of Employment and Unemployment Statistics (OEUS) data to determine what percentage of the applicable CPS workers receiving less than $10.10 per hour were working on Federal contracts. Finally, the Department relied on ratios again derived from USAspending.gov data to determine what percentage of workers receiving less than $10.10 per hour while working on Federal contracts were employed on Federal contracts covered by the Executive Order. Using this methodology, the Department estimates that there are 183,814 affected workers.

It was additionally necessary to determine the average wage rate of affected workers and to estimate how many hours affected workers would spend on covered contracts. The Department estimated affected workers receive an average wage of $8.79, or $1.31 below the

Executive Order minimum wage, and work 2,080 hours per year on Executive Order covered contracts. The Department further estimated that twenty-percent (20%) of contracts extant in 2015 will qualify as "new" for purposes of the Executive Order and that approximately all contracts extant by 2019 will be "new" for purposes of the Executive Order. Based on these estimates, the Department anticipates that the annual effect of the rule in 2015 and 2019 will be approximately $100.2 million (183,814*$1.31*2080*.20= $100.2 million) and $501 million (183,814*$1.31*2080), respectively.

In estimating the annual effect on the economy of this rule, the Department proceeded in steps. The first step was to estimate the number of affected workers who currently earn less than $10.10 per hour. The second step was to estimate the average wage increase for the affected workers. The average increase in wages will reflect the range of hourly wage rates of the affected workers currently earning between $7.25 and $10.10. In the third step, the Department calculated the total increase in hourly wages for the affected workers by multiplying the number of affected workers (Step 1) by the average increase in wages of the affected workers (Step 2) and the estimated number of work hours per year. Because this rule applies only to new contracts where the solicitation for such contracts has been issued on or after January 1, 2015, the Department also needed to estimate the percentage of extant contracts that would be "new" in the years covered by this analysis.

The Federal Government does not collect data that precisely quantifies the number of private sector workers employed under Federal contracts. The Department accordingly used various methods based on the data sources available to derive an estimate of the number of affected workers. First, the Department gathered data on Federal contracts from USAspending.gov, which classifies government contract spending based on the products or

services being purchased, to determine the types of Federal contracts covered by the Executive Order.[5] Specifically, the Department's estimate of spending on contracts that are covered by this Executive Order included contracts for work related to Research and Development ("A" codes), Special Studies and Analyses - Not R&D ("B" codes), Architect and Engineering – Construction ("C" codes), Automatic Data Processing and Telecommunication ("D" codes), Purchase of Structures and Facilities ("E" codes), Natural Resources and Conservation ("F" codes), Social Services ("G" codes), Quality Control, Testing, and Inspection ("H" codes), Maintenance, Repair, and Rebuilding of Equipment ("J" codes), Modification of Equipment ("K" codes), Technical Representative ("L" codes), Operation of Government Owned Facilities ("M" codes), Installation of Equipment ("N" codes), Salvage Services ("P" codes), Medical Services ("Q" codes), Professional, Administrative and Management Support ("R" codes), Utilities and Housekeeping Services ("S" codes), Photographic, Mapping, Printing, and Publications ("T" codes), Education and Training ("U" codes), Transportation, Travel and Relocation ("V" codes), Lease or Rental of Equipment ("W" codes), Lease or Rental of Facilities ("X" codes), Construction of Structures and Facilities ("Y" codes), and Maintenance, Repair or Alteration of Real Property ("Z" codes).

The Department focused on information found in the USASpending.gov Prime Award Spending database, which enabled it to discern how some Federal contracts are further redistributed to subcontractors. For example, a business performing a Professional, Administrative and Management Support contract may subcontract with other businesses to complete their work. USASpending.gov is not a perfect data source from which to estimate all the Federal contracts subject to the Executive Order because a portion of contracts in several of

[5] The Department excluded all contracts for products from its estimate because the Executive Order generally does not cover such contracts.

the product service codes may not be covered by this proposed rule. In addition, USASpending.gov does not capture some concessions contracts and contracts in connection with Federal property or lands related to offering services for Federal employees, their dependents or the general public that will be covered by this proposed rule. Therefore, the Department's estimates of the number of affected workers may be somewhat imprecise. However, the inclusion of all contracts in the aforementioned product service codes and the exclusion of some concessions contracts and covered contracts in connection with Federal property or lands likely offset each other to at least some degree in calculating the total number of affected workers under this proposed rule.

Second, the Department utilized 2012[6] OEUS data on total output and employment by industry in conjunction with the data on total spending on Federal contracts by industry from USAspending.gov to calculate the share of workers in each industry sector employed under Federal contracts. According to USASpending.gov, the Federal Government spent $461.48 billion on procurement contracts in 2013. Subtracting amounts spent on contract work performed outside of the United States that the Executive Order does not cover resulted in Federal Government spending on procurement contracts of approximately $407.68 billion in 2013. The Department illustrates its approach using the example of the information industry; OEUS data indicated that total output and total employment for the information industry (NAICS code: 51) in 2012 were $1.25 trillion and 2.74 million workers, respectively. Total Federal contract spending for the information industry according to USASpending.gov was $10.4 billion in 2013. The Department then divided the total Federal contract spending for the information

[6] The total spending data on Federal contracts by industry in 2012 was similar to the total spending data on Federal contracts by industry in 2013. The Department accordingly concluded it was appropriate to compare the total spending data on Federal contracts from USASpending.gov in 2013 to the 2012 data on total output and employment from the OEUS.

industry by the total output for the information industry to derive a share of industry output in the information sector of .83 percent ($10.4 billion/$1.25 trillion). Using this method, the Department estimated the share for each industry sector from USAspending.gov that it identified as containing Federal contracts subject to the Executive Order (see Table A below).

The Department augmented the national contracting data with information on state-based geographic differences in the minimum wage and contracting services purchased. By integrating state-level data, the Department captured some of the variation in the minimum wage level and contracting within states. The Department determined where Federal agencies were investing by the place of performance data associated with each entry in the USASpending.gov database, which is typically the zip code of the location where the contract work takes place. In order to avoid overstating the contracts covered by this proposed rule, the Department developed an estimate to measure the proportion of total Federal spending on services and products in a given state. To measure the ratio of covered contracts, the Department divided a state-industry pair's total Federal spending on contracts covered by Executive Order 13658 by the state-industry pair's total Federal spending on all contracts (including both services and products) in 2013. The Department defined the industries in the state-industry pairs using the principal NAICS of the contractor providing the service (see Table B). For simplicity, the Department chose to aggregate the data by two-digit NAICS industries. Affected workers are estimated based on contracts by industry two-digit NAICS level. It should be noted that the Department's estimate includes all industry classification of contracts. The approach captures all vendors irrespective of industry whose contracts are covered by this proposed rule.

Third, the Department used wage and industry data from the CPS[7] to calculate the total number of workers in each state by two-digit NAICS level who earn less than $10.10 per hour.[8] The Department then applied the share of industry output ratios to this CPS data to estimate the total number of workers within an industry within a state who earn less than $10.10 per hour working on a Federal contract. Implicit in the Department's use of the USASpending.gov and CPS data in this manner is the Department's assumption that the industry distribution of Federal contractors is the same as that in the rest of the U.S. economy. For example, according to CPS data, there are 5,991 workers in the information industry in Maryland who earn less than $10.10 per hour, so applying the share of industry output ratio estimate of 0.83 percent indicates that there are 50 workers in the information industry who earn less than $10.10 and are employed under a Federal contract in Maryland. The Department then accounted for those workers who are performing on a covered contract by employing the applicable ratio of covered contracts. For example, the ratio of covered contracts in the information industry in Maryland is 67 percent. The Department accordingly calculated that the number of affected workers in the information industry in Maryland who earn less than $10.10 per hour is 33 (67% × 50). By following this procedure for each state-industry pair, the Department estimated that out of the 868,834 workers on Federal contract jobs, 183,814 (21 percent) were paid $10.10 per hour or less. See Table C for calculation of the number of affected workers.

[7] The CPS, sponsored jointly by the U.S. Census Bureau and the BLS, is the primary source of labor force statistics for the population of the United States. The CPS is the source of numerous high-profile economic statistics, including the national unemployment rate, and provides data on a wide range of issues relating to employment and earnings.

[8] While the ideal data set for the number of affected workers would be Federal procurement data that shows a wage distribution for all contract and subcontract workers, such a data set is not available.

This regulation affects only new contracts with the Federal Government; it does not affect existing contracts. The Department has found no precise data with which to measure the number of construction and service contracts that are new each year. According to a 2012 Small Business Administration (SBA) study, between FY 2005 and FY 2009, an average of 17.6 percent of all Federal contracts with small businesses were awarded to small businesses that were new to Federal contracting (and thus must have been new contracts) based on data from the Federal Procurement Data System (FPDS).[9] In the economic analysis of the final rule of "Nondisplacement of Qualified Workers under Service Contracts," the Department assumed that slightly more than 20 percent of all SCA covered contracts would be successor contracts subject to the nondisplacement provisions.[10] After considering these factors, and recognizing in particular that some contracts covered by the Executive Order (including those exempted from SCA coverage under 29 CFR 4.133(b)) are for terms of more than five years, the Department conservatively assumed for purposes of this analysis that roughly 20 percent of Federal contracts are initiated each year; therefore, it will take at least five years for the proposed rule's impact to fully manifest itself.

Transfers from Federal Contractor Employers and Taxpayers to Workers

The most accurate way to measure the pay increase that affected workers can expect to receive as a result of the minimum wage increase would be to calculate the difference between $10.10 and the average wage rate currently paid to the affected workers. However, the Department was unable to find data reflecting the distribution of the wages currently paid to the

[9] Small Business Administration, "Characteristics of Recent Federal Small Business Contracting," May 2012, http://www.sba.gov/sites/default/files/397tot.pdf.
[10] Department of Labor, "Nondisplacement of Qualified Workers under Service Contracts," Final Rule, Wage and Hour Division, 2011, https://www.federalregister.gov/articles/2011/08/29/2011-21261/nondisplacement-of-qualified-workers-under-service-contracts.

affected workers who earn less than $10.10 per hour. Thus, it is not possible to directly calculate the average wage rate the affected workers are currently paid.

Given this data limitation, the Department used earnings data from the CPS to calculate the average wage rate for U.S. workers who earn less than $10.10 per hour in the construction and service industries. Assuming that the wage distribution of Federal contract workers in the construction and service industries is the same as that in the rest of the U.S. economy, the Department estimated that the average wage for the affected workers associated with this proposed rule is $8.79 per hour. Thus, the difference between the average wage rate of $8.79 per hour and $10.10 would yield a $1.31 per hour pay increase for the affected workers.

The Department then applied this increase to the Federal contract workers who will be potentially affected by the change. The Department also needed to account for the fact that this rule applies only to new contracts. As noted, the Department estimated that about 20 percent of covered contracts are new each year. To estimate the total wage increase per year, the Department needed to calculate the total work hours in a year. The Department assumed a forty hour workweek, and by multiplying 40 hours per week by 52 weeks in a year, concluded that affected workers work 2,080 hours in a year.

The Department calculated the total increase that Federal contractors will pay their employees by multiplying the number of affected workers by the average wage increase of $1.31 per hour and 2,080 work hours per year. Based on the assumption that only 20 percent of contracts in 2015 will be new, the total increase that Federal contractors will pay their employees by the end of 2015 is estimated to be $100.20 million (183,814×$1.31×2,080×20%).[11] When

[11] Because the rate is effective for contracts resulting from solicitations on or after January 1, 2015, it is likely that work on covered contracts will not commence until later in 2015.

this rule's impact is fully manifested by the end of 2019, the total increase in hourly wages for Federal contract workers is expected to be $501 million (in 2014 dollars) ($100.20 million × 5 years).[12] There is however, a possibility that this estimate is overstated because the analysis does not account for what are likely higher average hourly wages paid to employees whose wages are governed by SCA or DBA prevailing wage determinations. Moreover, the analysis does not account for changes in state and local minimum wages that will raise wages independently of this proposed rule. [13]

This is the estimated transfer cost from employers and taxpayers to workers in 2019. However, the Department expects offsetting of the cost increase due to workers' increased productivity, reduced turnover, and other benefits as discussed in the Benefits section. In fact, as discussed below, the Department believes that the long-term cost savings to employers and the Federal Government justify the short-term costs that would be incurred.

Additional compliance costs

This rule requires executive departments and agencies to include a contract clause in any contracts covered by the Executive Order. The clause describes the requirement to pay all

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Therefore, our analysis overstates the cost estimate as we used 2,080 hours to reflect the full year for 2015.

[12] Beginning January 1, 2016, the minimum wage will be adjusted annually by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). Accordingly, this will adjust upward our estimated wage increase in 2016 and after. However, our estimates of wage increases for the affected workers are measured in 2014 constant dollars and therefore, remain unchanged.

[13] The estimate of rule-induced transfers is based on an assumption that the proposed rule would have no impact on employment. According to the Council of Economic Advisers, the bulk of the empirical literature shows that raising the minimum wage by a moderate amount has little or no negative effect on employment. However, these studies primarily study the impact of minimum wages in the private sector. In the public sector, many of the same factors that affect private companies, like the impact on the productivity of workers, are relevant for considering any impact on employment. However, ultimately employment related to federal contracts will largely depend on the future decisions of policymakers, such as budget and procurement decisions. .

workers on covered Federal Government contracts at least the Executive Order minimum wage. Covered contractors and their subcontractors will need to incorporate the contract clause into lower-tier subcontracts. The Department believes that the compliance cost of incorporating the contract clause will be negligible for contractors and subcontractors.

The Department has drafted this proposed rule consistent with the directive in section 4(c) of the Executive Order that any regulations issued pursuant to the Order should, to the extent practicable, incorporate existing procedures from the FLSA, SCA and DBA. As a result, most contractors subject to this rule generally will not face any new requirements, other than payment of a wage no less than the minimum wage required by the Order. The proposed rule does not require contractors to make other changes to their business practices. Therefore, the Department posits that the only regulatory familiarization cost related to this proposed rule is the time necessary for contractors to read the contract clause, evaluate and adjust their pay rates to ensure workers on covered contracts receive a rate not less than the Executive Order minimum wage, and modify their contracts to include the required contract clause. For this activity, the Department estimates that contractors will spend one hour. The estimated cost of this burden is based on data from the Bureau of Labor Statistics in the publication "Employer Costs for Employee Compensation" (September 2013), which lists hourly compensation for the Management, Professional, and Related occupational group as $51.74. There are approximately 500,000 contractor firms registered in the General Service Administration (GSA)'s System for Award Management (SAM). Therefore, the estimated hours for rule familiarization is 500,000 hours (500,000 contractor firms x 1 hour = 500,000 hours). The Department calculated the total estimated cost as $25.87 million (500,000 hours x $51.74/hour = $25,870,000).

Benefits

The Department expects that increasing the minimum wage of Federal contract workers would generate several important benefits, including reduced absenteeism and turnover in the workplace, improved employee morale and productivity, reduced supervisory costs, and increased quality of government services.

Research shows that absenteeism is negatively correlated with wages, meaning that better-paid workers are absent less frequently (Dionne and Dostie 2007; Pfeifer 2010).[14] Pfeifer (2010) finds that a one percent increase in wages is associated with a reduction in absenteeism of about one percent. According to a study by Fairris, Runstein, Briones, and Goodheart (2005), managers reported that absenteeism decreased following the passage of a living wage ordinance in Los Angeles because employees had more to lose if they did not show up for work, and employees placed greater value on their jobs because they knew they would receive a lower wage at other jobs.[15] When workers are paid higher wages, they are absent from work less often. According to studies by Allen (1983), Mefford (1986), Zhang, Sun, Woodcock, and Anis (2013), reduced absenteeism has been associated with higher productivity.[16]

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[14] Dionne, Georges and Benoit Dostie, "New Evidence on the Determinants of Absenteeism Using Linked Employer-Employee Data," Industrial and Labor Relations Review, Vol. 61, No. 1, 2007.
Pfeifer, Christian, "Impact of Wages and Job Levels on Worker Absenteeism," International Journal of Manpower, Vol. 31, No. 1, pp 59–72, 2010.

[15] Fairris, David, David Runsten, Carolina Briones, and Jessica Goodheart, "Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses," LAANE, 2005.

[16] Allen, Steven, "How Much Does Absenteeism Cost?" Journal of Human Resources, Vol. 18, No. 3, pp 379–393, 1983.
Mefford, Robert, "The Effects of Unions on Productivity in a Multinational Manufacturing Firm," Industrial and Labor Relations Review, Vol. 40, No. 1, pp 105–114, 1986.
Zhang, Wei, Huiying Sun, Simon Woodcock, and Aslam Anis, "Valuing Productivity Loss Due to Absenteeism: Firm-level Evidence from a Canadian Linked Employer-Employee Data," Canadian Health Economists' Study Group, The 12th Annual CHESG Meeting, Manitoba, Canada, May 2013.

A higher minimum wage is also associated with reduced worker turnover (Reich, Hall, and Jacobs 2003; Fairris, Runstein, Briones, and Goodheart 2005; Dube, Lester, and Reich 2013; Brochu and Green 2013).[17] In a study of homecare workers in San Francisco, Howes (2005) found that the turnover rate fell by 57 percent following implementation of a living wage policy. Furthermore, Howes found that a $1.00 per hour raise from an $8.00 hourly wage increased the probability of a new worker remaining with his or her employer for one year by 17 percentage points.[18] In their study of the effects of the living wage in Baltimore, Niedt, Ruiters, Wise, and Schoenberger (1999) found that most workers who received a pay raise expressed an improved attitude toward their job, including greater pride in their work and an intention to stay on the job longer.[19]

Reduced worker turnover is associated with lower costs to employers arising from recruiting and training replacement workers. Because seeking and training new workers is costly, reduced turnover leads to savings for employers. Research indicates that decreased turnover costs partially offset increased labor costs (Reich, Hall, and Jacobs 2003; Fairris, Runstein, Briones, and Goodheart 2005). Holzer (1990) finds that high-wage firms can offset their higher wage costs through improved productivity and lower hiring and turnover costs.

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[17] Reich, Michael, Peter Hall, and Ken Jacobs, "Living Wages and Economic Performance: The San Francisco Airport Model," Institute of Industrial Relations, University of California, Berkeley, March 2003.
Dube, Arindrajit, T. William Lester, and Michael Reich, "Minimum Wage Shocks, Employment Flows and Labor Market Frictions," UC Berkeley Institute for Research on Labor and Employment, Working Paper, July 20, 2013.
Brochu, Pierre and David Green, "The Impact of Minimum Wages on Labor Market Transitions," The Economic Journal, Vol. 123, No. 573, pp 1203–1235, December 2013.
[18] Howes, Candace, "Living Wages and Retention of Homecare Workers in San Francisco," Industrial Relations, Vol. 44, No. 1, pp 139–163, 2005.
[19] Niedt, Christopher, Greg Ruiters, Dana Wise, and Erica Schoenberger, "The Effect of the Living Wage in Baltimore," Working Paper No. 119, Department of Geography and Environmental Engineering, Johns Hopkins University, 1999.

More specifically, Holzer finds that firms with higher wages spend fewer hours on informal training, have longer job tenure, more years of previous job experience, higher performance ratings, lower vacancy rates, and greater perceived ease in hiring. Holzer concludes that firms respond to higher wage costs in a variety of ways that offset those costs.[20]

Efficiency wage theory predicts that companies pay higher wages to reduce the need for direct monitoring and related supervisory costs. Workers in higher-wage jobs exhibit greater self-policing in order to protect their higher-wage positions. Empirical studies show that higher wages are associated with less intensive supervision (Groshen and Krueger 1990; Osterman 1994; Rebitzer 1995; Georgiadis 2013).[21] Therefore, increasing the minimum wage of Federal contract workers is expected to lead to a reduction in the costs associated with supervisory expenses. Higher wages can substitute for other costly forms of supervising workers, such as hiring additional managers or including more supervisory duties in senior employees' duties.

Higher wages can also boost employee morale, thereby leading to increased effort and greater productivity. Akerlof (1982, 1984) contends that higher wages increase employee morale, which raises employee productivity.[22] Furthermore, higher productivity can have a

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[20] Holzer, Harry, "Wages, Employer Costs, and Employee Performance in the Firm," Industrial and Labor Relations Review, Vol. 43, No. 3, pp 147–164, 1990.

[21] Groshen, Erica L. and Alan B. Krueger, "The Structure of Supervision and Pay in Hospitals," Industrial and Labor Relations Review, Vol. 43, No. 3, pp 134–146, 1990.
Osterman, Paul, "Supervision, Discretion, and Work Organization," *The American Economic Review,* Vol. 84, No. 2, pp 380–84, 1994.
Rebitzer, James, "Is There a Trade-Off Between Supervision and Wages? An Empirical Test of Efficiency Wage Theory," Journal of Economic Behavior and Organization, Vol. 28, No. 1, pp 107–129, 1995.
Georgiadis, Andreas, "Efficiency Wages and the Economic Effects of the Minimum Wage: Evidence from a Low-Wage Labour Market," Oxford Bulletin of Economics and Statistics, Vol. 75, No. 6, pp 962–979, 2013.

[22] Akerlof, George, "Labor Contracts as Partial Gift Exchange," The Quarterly Journal of Economics, Vol. 97, No. 4, pp 543–569, 1982.

positive spillover effect, boosting the productivity of co-workers (Mas and Moretti 2009).[23] This means that raising the minimum wage of Federal contract workers may not only increase the productivity of Federal contract workers, but may also improve the productivity of Federal workers.

The Department also expects the quality of government services to improve when the minimum wage of Federal contract workers is raised. In some cases, higher-paying contractors may be able to attract better quality workers who are able to provide better quality services, thereby improving the experience of citizens who engage with these government contractors. For example, a study by Reich, Hall, and Jacobs (2003) found that increased wages paid to workers at the San Francisco airport increased productivity and shortened airport lines. In addition, higher wages can be associated with a higher number of bidders for government contracts, which can be expected to generate greater competition and an improved pool of contractors. Multiple studies have shown that the bidding for municipal contracts remained competitive or even improved when living wage ordinances were implemented (Thompson and Chapman 2006).[24]

The Department expects the increase in the minimum wage for Federal contract workers to result in less absenteeism, reduced labor turnover, lower supervisory costs, and higher productivity. Moreover, higher-paid contract workers who demonstrate higher productivity may also boost the productivity of those around them, including Federal employees. (The Department notes, however, that much of the evidence supporting these predicted outcomes—

Akerlof, George, "Gift Exchange and Efficiency-Wage Theory: Four Views," The American Economic Review, Vol. 74, No. 2, pp 79–83, 1984.

[23] Mas, Alexandre and Enrico Moretti, "Peers at Work," American Economic Review, Vol. 99, No. 1, pp 112–45, 2009.

[24] Thompson, Jeff and Jeff Chapman, "The Economic Impact of Local Living Wages," Economic Policy Institute, Briefing Paper #170, 2006.

encapsulated in the papers cited above—examines why firms voluntarily pay high wages. There may be differences between such firms and the contractors that would newly increase wages as a result of this proposed rule. Some may posit that a full accounting of these differences might change predictions of rule-induced impact. Furthermore, the quality of government services may improve as contractors who raise the wage rates paid to their workers incur these benefits and attract better quality workers, thereby improving the experience of citizens who use government services.

Discussion of Regulatory Alternatives

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. As discussed above, this rule has been designated an economically significant regulatory action under section 3(f)(1) of Executive Order 12866.

Executive Order 13658 delegates to the Secretary the authority to issue regulations to "implement the requirements of this order." 79 FR 9852. Because the Executive Order itself establishes the basic coverage provisions and minimum wage requirements that the Department is responsible for implementing, many potential regulatory alternatives are beyond the scope of the Department's authority in issuing this proposed rule. For illustrative purposes only, however, this section presents two possible alternatives to the provisions set forth in this proposed rule.

Alternative 1: The minimum wage increases by the annual percentage increase in the Consumer Price Index for all Urban Consumers (CPI-U).

Executive Order 13658 directs the Secretary of Labor to determine the minimum wage beginning on January 1, 2016, by indexing future increases to the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). See 79 FR 9851. The CPI-W is based on the expenditures of households in which more than 50 percent of household income comes from clerical or wage occupations. The CPI-W population represents about 32 percent of the total U.S. population and is a subset, or part, of the CPI-U population.

A broader CPI is the CPI-U, which covers all urban consumers, who represent about 88 percent of the total U.S. population. While the CPI-W is used to calculate Social Security cost-of-living adjustments (COLAs), most other COLAs cited in Federal legislation, such as the indexation of Federal income tax brackets, use the CPI-U.

Under this alternative, the minimum wage increases by the annual percentage in the CPI-U. Table 1 below shows the annual percentage changes of the CPI-W and CPI-U for 2008-2013.

Table 1: The CPI-W and CPI-U for 2008-2013

Year	CPI-W	CPI-U
2008	4.1%	3.8%
2009	-0.7%	-0.4%
2010	2.1%	1.6%
2011	3.6%	3.2%
2012	2.1%	2.1%
2013	1.4%	1.5%

(Source: US DOL, BLS, All items (1982-84=100)

The CPI-U generally has lower annual percentage changes and therefore, the minimum wage increase by the annual percentage increase in the CPI-U would likely result in a slightly smaller

impact of this proposed rule. The CPI-U is about 0.2 percent lower than the CPI-W per year on average. Thus, the annual impact of this rule, starting in the second year of the rule's implementation, would be approximately 0.2 percent smaller if the CPI-U were used rather than the CPI-W. The Department rejected this regulatory alternative because it was beyond the scope of the Department's authority in issuing this proposed rule. Executive Order 13658 specifically requires the Department to utilize the CPI-W in determining the Executive Order minimum wage beginning January 1, 2016, and annually thereafter. See 79 FR 9851.

Alternative 2: The minimum wage increases by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) on a quarterly basis.

Executive Order 13658 directs the Secretary of Labor, when calculating the annual percentage increase in the CPI-W, to compare the CPI-W for the most recent month, quarter, or year available with that for the same month, quarter, or year in the preceding year. See 79 FR 9851. As explained above, the Secretary has proposed to base such increases on the most recent year available.

Under this alternative, the annual percentage increase in the CPI-W is calculated only by comparing the CPI-W for the most recent quarter with the same quarter in the preceding year. The impact of this alternative will be either higher or lower than that of the proposed rule. However, the Department expects that the difference would be less than one per cent of the total impact of this proposed rule.

The Department rejected this regulatory alternative because utilizing the most recent year available, rather than the most recent month or quarter, minimizes the impact of seasonal fluctuations on the Executive Order minimum wage rate.

Table A: Shares of industry output by industry

Industry	NAICS Code	Share of sector
Total Wage and Salary		1.87%
Mining	21	0.07%
Oil and gas extraction	211	0.04%
Mining, except oil and gas	212	0.12%
Utilities	22	0.33%
Construction	23	3.31%
Manufacturing	31-33	4.10%
Wholesale trade	42	1.31%
Retail trade	44, 45	0.30%
Transportation and warehousing	48, 492, 493	1.15%
Information	51	0.83%
Finance and insurance	52	0.62%
Real estate, rental, and leasing	53	0.10%
Professional, scientific, and technical services	54	8.74%
Management of companies and enterprises	55	0.00%
Administrative and support and waste management and remediation services	56	5.24%
Administrative and support services	561	4.78%
Waste management and remediation services	562	8.53%
Education services	61	2.61%
Health care and social assistance	62	0.42%
Arts, entertainment, and recreation	71	0.03%
Accommodation and food services	72	0.17%
Accommodation	721	0.12%
Food services and drinking places	722	0.19%
Other services	81	0.59%
Agriculture, forestry, fishing, and hunting	11	0.12%

Table B: Ratios of covered contracts by state and industry

State	Agricultural, forestry, fishing, and hunting	Mining	Construction	manufacturing	Wholesale trade	Retail trade	Transportation and warehousing	Utilities	Information	Finance and insurance	Real estate and rental and leasing	Professional and technical services	Management, administrative and waste management services	Educational services	Health care and social assistance	er re
AK	0.84	0	0.94	0.14	0.17	0.09	0.98	0.97	0.89	0.82	0.69	0.95	0.97	0.93	1	
AL	0.63	0.62	0.96	0.13	0.12	0.21	0.91	0.98	0.49	0.84	0.68	0.94	0.96	0.93	0.88	
AR	0.9	0	0.97	0.11	0.04	0.12	0.92	0.83	0.82	0.5	0.95	0.93	0.68	0.91	0.97	
AZ	0.87	0.34	0.93	0.12	0.2	0.2	0.96	0.92	0.61	0.97	0.81	0.91	0.97	0.93	0.96	
CA	0.78	0.2	0.95	0.11	0.03	0.06	0.93	0.85	0.62	0.95	0.82	0.91	0.97	0.85	0.95	
CO	0.86	0.36	0.95	0.13	0.06	0.18	0.92	0.97	0.65	1	0.87	0.88	0.94	0.89	0.95	
CT	0.47	0.13	0.96	0.04	0.05	0.12	0.92	0.98	0.65	0.87	0.86	0.84	0.96	0.95	0.93	
DC	0.24	0.53	0.95	0.31	0.14	0.33	0.96	0.81	0.73	0.86	0.88	0.9	0.96	0.91	0.93	
DE	1	0.93	0.13		0.18	0.81		0.96		1	0.88	0.92	0.94	0.97	0.93	
FL	0.68	0.06	0.95	0.1	0.07	0.14	0.91	0.88	0.69	0.92	0.81	0.9	0.97	0.87	0.82	
GA	0.61	0.48	0.95	0.1	0.06	0.17	0.93	0.93	0.63	0.99	0.87	0.92	0.96	0.8	0.82	
HI	0.74	0.19	0.98	0.15	0.05	0.13	0.99	0.9	0.79	1	0.97	0.94	0.99	0.93	0.98	
IA	0.2	0	0.97	0.08	0.08	0.07	0.73	0.95	0.77	1	0.63	0.9	0.96	0.93	0.97	
ID	0.74	0.14	0.96	0.12	0.05	0.26	0.98	0.96	0.78	1	0.89	0.94	0.99	0.91	0.99	
IL	0.7	0.11	0.93	0.07	0.01	0.08	0.9	0.95	0.42	0.89	0.86	0.87	0.93	0.97	0.95	
IN	0.38	0.36	0.89	0.05	0.06	0.16	0.8	0.72	0.66	1	0.71	0.88	0.99	0.93	0.92	
KS	0.83	0.06	0.96	0.1	0.1	0.18	0.91	0.96	0.63	0.97	0.79	0.93	0.99	0.93	1	
KY	0.83	0.06	0.94	0.06	0.07	0.11	0.93	0.98	0.63	0.98	0.91	0.9	0.97	0.94	0.99	
LA	0.8	0.44	0.96	0.09	0.05	0.2	0.98	0.94	0.61	0.93	0.9	0.95	0.94	0.93	0.98	
MA	0.4	0.54	0.95	0.08	0.06	0.1	0.95	0.94	0.47	0.95	0.92	0.95	0.89	0.88	0.93	
MD	0.25	0.28	0.94	0.16	0.12	0.25	0.92	0.93	0.67	0.89	0.89	0.92	0.95	0.94	0.93	
ME	0.47	0	0.97	0.18	0.13	0.22	0.93	0.7	0.62	1	0.99	0.91	0.97	0.94	0.94	
MI	0.96	0.41	0.9	0.04	0.05	0.11	0.94	0.94	0.62	0.34	0.8	0.91	0.98	0.83	0.89	
MN	0.84	0	0.95	0.04	0.05	0.1	0.84	0.99	0.48	0.99	0.91	0.89	0.96	0.91	0.96	
MO	0.68	0.36	0.95	0.08	0.02	0.21	0.95	0.94	0.37	0.96	0.77	0.79	0.98	0.93	0.97	
MS	0.89	0.07	0.94	0.14	0.03	0.21	0.87	0.95	0.56	1	0.85	0.92	0.97	0.87	1	
MT	0.91	0.54	0.95	0.08	0.06	0.1	0.98	0.94	0.83	1	0.96	0.93	0.97	0.86	0.96	
NC	0.74	0.03	0.96	0.08	0.08	0.24	0.97	0.9	0.7	0.95	0.91	0.91	0.95	0.92	0.95	
ND	0.6	0.14	0.97	0.13	0.03	0.03	0.95	0.99	0.89	1	0.77	0.94	0.98	0.98	0.95	
NE	0.82	0.1	0.96	0.1	0.13	0.16	0.95	0.93	0.66	1	0.73	0.97	0.98	0.89	0.97	
NH	0.89	0.15	0.95	0.1	0.13	0.1	0.93	0.97	0.52	0.98	0.84	0.63	0.98	0.86	0.94	
NJ	0.7	0.28	0.95	0.05	0.01	0.08	0.91	0.88	0.64	0.88	0.91	0.93	0.95	0.93	0.99	
NM	0.91	0.53	0.94	0.14	0.07	0.19	0.98	0.97	0.74	0.97	0.84	0.93	0.98	0.94	0.91	
NV	0.86	0.3	0.95	0.19	0.06	0.11	0.98	0.91	0.57	1	0.96	0.91	0.98	0.96	0.98	
NY	0.5	0.21	0.93	0.05	0.03	0.06	0.71	0.93	0.56	0.82	0.93	0.92	0.96	0.82	0.99	
OH	0.42	0.11	0.96	0.06	0	0.15	0.94	0.91	0.62	1	0.9	0.96	0.99	0.94	0.97	
OK	0.86	0.32	0.95	0.15	0.08	0.16	0.99	0.84	0.72	1	0.83	0.9	0.98	0.91	0.96	
OR	0.93	0.44	0.93	0.13	0.08	0.1	0.92	0.92	0.59	0.86	0.96	0.96	0.94	0.9	0.99	
PA	0.52	0.1	0.92	0.05	0	0.2	0.91	0.77	0.69	0.95	0.92	0.91	0.97	0.92	0.95	
RI	0.5	1	0.03		0.15	0.37		0.96		0.5	0.98	0.9	0.91	0.94	0.9	
SC	0.93	0.17	0.94	0.08	0.04	0.21	0.91	0.95	0.65	0.98	0.8	0.95	0.95	0.92	0.85	
SD	0.94	0	0.98	0.11	0.14	0.2	1	0.98	0.87	0.95	0.76	0.96	0.93	0.98	0.98	
TN	0.93	0.32	0.93	0.06	0.08	0.19	0.92	0.92	0.73	0.97	0.95	0.78	0.98	0.84	0.88	
TX	0.52	0.16	0.9	0.1	0.08	0.24	0.91	0.92	0.53	0.88	0.88	0.91	0.94	0.94	0.98	
UT	0.83	0.04	0.94	0.13	0.07	0.13	0.95	0.99	0.55	0.97	0.9	0.94	0.97	0.64	0.94	
VA	0.32	0.07	0.93	0.2	0.05	0.3	0.93	0.91	0.72	0.96	0.92	0.89	0.96	0.87	0.96	
VT	1	0	0.96	0.05	0.13	0.3	1	0.76	0.5	1	0.76	0.87	0.96	0.95	0.96	
WA	0.73	0.13	0.95	0.11	0.09	0.13	0.91	0.96	0.69	0.9	0.94	0.95	0.98	0.9	0.97	
WI	0.76	0.09	0.95	0.04	0.04	0.04	0.97	0.96	0.75	0.96	0.99	0.9	0.96	0.91	0.88	
WV	0.84	0	0.93	0.11	0.09	0.15	0.97	0.94	0.7	1	0.9	0.86	0.96	0.96	0.98	
WY	0.81	0.11	0.95	0.19	0.13	0.18	1	0.97	0.64	1	0.85	0.89	0.98	0.97	0.96	

Table C: Number of affected workers by state and industry

Number of workers paid hourly rates bewteen $7.25 and $10.09 by state and major industry, 2013 annual averages.

States	Total	Agricultural, forestry, fishing, and hunting	Mining	Construction	Durable goods manufacturing	Nondurable goods manufacturing	Wholesale trade	Retail trade	Transportation and warehousing	Utilities	Information	Finance and insurance	Real estate and rental and leasing	Professional and technical services	Management, administrative and waste management services	Educational services	Healt s ass
	183,814	345	6	21,333	2,835	2,729	239	2,338	6,800	108	1,299	1,803	254	27,865	69,505	25,168	
AK	200	0.2	0.0	10.9	1.6	1.6	1.4	2.8	18.4	1.2	3.7	2.4	0.1	12.4	59.5	50.5	
AL	2,784	0.8	0.0	407.7	187.1	83.3	9.9	56.9	113.9	3.9	7.4	12.1	3.3	301.2	832.2	383.5	
AR	974	5.6	0.0	164.2	18.3	49.8	1.6	14.7	7.2	1.2	10.1	8.4	2.8	78.2	354.9	47.7	
AZ	5,076	9.4	0.0	617.3	97.1	68.1	22.6	48.1	174.6	0.0	22.7	43.3	9.2	663.9	2083.4	774.0	
CA	23,362	149.2	0.3	2239.1	477.3	577.4	16.7	99.4	940.6	17.8	149.3	241.8	22.1	2979.2	10868.4	2374.9	
CO	3,026	1.5	0.4	271.9	45.2	31.9	2.3	37.2	69.0	4.3	28.2	16.1	4.2	754.5	1089.8	393.3	
CT	893	0.6	0.0	100.6	6.5	3.6	0.3	13.5	20.0	1.5	8.1	5.8	0.7	164.1	279.5	197.1	
DC	166	0.0	0.0	21.9	0.0	1.8	0.2	4.2	2.1	0.0	1.2	1.8	0.0	12.6	62.3	33.0	
DE	502	2.7	0.0	6.2	0.0	0.0	2.8	42.3	0.0	0.0	0.0	8.4	0.1	57.3	216.7	106.0	
FL	11,261	5.6	0.0	1244.2	50.2	98.8	13.9	133.8	401.9	2.7	134.2	95.7	19.7	1697.6	5161.2	1099.5	
GA	7,229	4.9	0.0	821.8	138.9	122.4	11.9	83.0	316.0	10.9	21.4	63.0	6.0	786.3	3506.6	720.2	
HI	727	1.5	0.0	112.6	1.1	15.8	1.1	7.4	50.9	0.7	3.2	6.3	1.0	67.4	244.8	114.9	
IA	2,103	1.2	0.0	176.9	32.2	52.0	3.3	14.1	27.5	1.4	36.3	16.7	1.4	317.2	821.7	347.9	
ID	1,138	6.8	0.0	160.8	16.1	34.0	1.3	29.6	55.3	1.3	18.1	16.4	1.5	140.4	385.7	177.6	
IL	6,560	6.1	0.1	567.9	139.1	79.1	1.7	46.8	396.5	0.0	45.3	80.4	3.2	1201.0	2290.0	939.5	
IN	4,496	4.8	0.3	467.5	73.2	51.8	4.6	59.7	94.7	3.2	45.2	26.1	2.4	285.3	2092.8	767.7	
KS	2,327	0.8	0.0	231.0	52.6	31.3	3.3	27.5	42.1	0.0	13.4	17.6	2.9	419.8	708.2	484.8	
KY	3,304	5.0	0.1	307.5	45.4	32.2	5.3	30.5	183.7	2.2	23.4	21.6	10.2	436.0	1233.1	554.7	
LA	2,490	2.8	1.3	631.8	39.9	8.4	4.5	62.5	99.5	8.4	11.4	12.8	2.8	302.1	684.9	164.9	
MA	2,480	1.6	0.0	213.7	22.7	38.7	4.4	29.7	94.3	0.0	4.8	15.1	4.6	365.4	1085.4	238.4	
MD	3,312	0.6	0.0	294.5	22.6	69.1	4.8	71.9	43.1	0.0	33.3	15.8	3.7	863.1	1069.4	484.8	
ME	575	0.9	0.0	70.7	18.6	10.0	2.9	21.6	3.6	1.6	7.9	10.3	1.0	47.2	158.3	129.7	
MI	5,443	19.9	0.0	418.2	76.1	39.2	7.5	56.9	150.2	4.0	62.1	45.8	7.0	647.9	2115.7	1032.3	
MN	2,602	7.8	0.0	189.2	12.1	24.2	2.5	31.6	108.2	2.3	19.0	28.6	1.8	359.2	1082.8	324.9	
MO	2,841	8.2	0.2	232.5	37.3	41.5	1.0	63.9	125.3	5.3	4.4	36.9	4.1	316.4	873.8	636.8	
MS	1,403	6.4	0.1	190.4	93.2	89.2	0.8	36.2	72.6	2.1	3.2	16.2	1.3	62.0	446.9	147.7	
MT	437	1.6	0.1	34.6	4.3	4.3	0.2	4.3	17.9	0.6	5.6	14.4	0.5	17.6	156.6	96.2	
NC	7,630	10.7	0.0	777.4	53.2	149.7	19.6	124.8	269.9	0.0	20.8	62.1	8.3	1055.1	3323.1	841.4	
ND	328	1.2	0.1	11.4	10.2	6.0	0.1	1.3	14.7	0.5	8.3	3.2	0.5	87.2	62.0	72.3	
NE	1,331	7.3	0.0	162.7	22.8	45.3	5.3	19.2	30.4	0.0	12.8	23.4	2.8	230.2	432.8	186.2	
NH	660	1.2	0.0	68.4	11.6	5.8	2.0	8.8	18.2	0.4	4.5	2.0	0.2	89.5	240.2	135.3	
NJ	3,753	1.1	0.0	471.7	21.2	34.5	1.3	25.5	143.2	1.7	8.3	30.5	8.5	599.7	1571.9	473.1	
NM	1,619	1.3	0.4	192.8	4.0	23.6	0.9	18.2	7.7	0.0	16.7	3.8	1.0	476.2	302.1	387.9	
NV	1,609	1.0	0.1	106.3	21.3	13.9	2.2	14.1	89.4	0.0	14.0	7.5	2.9	367.4	700.7	123.3	
NY	8,778	1.9	0.0	649.5	56.3	58.9	5.0	45.7	344.2	0.0	69.2	90.7	22.1	2785.4	2299.3	1171.1	
OH	5,483	4.9	0.0	352.5	85.8	75.5	0.0	70.0	217.1	2.2	40.0	87.2	12.1	663.4	2261.9	662.3	
OK	2,418	1.8	0.5	366.9	52.5	20.0	3.5	38.1	83.4	0.0	18.8	53.1	5.0	122.3	711.8	681.0	
OR	1,000	5.0	0.0	94.3	21.7	26.6	1.9	10.0	43.3	0.0	8.7	1.7	1.2	186.6	298.8	178.7	
PA	6,011	12.2	0.0	628.3	58.4	63.4	0.0	128.1	278.4	2.3	87.1	114.6	8.0	702.6	1806.9	1365.1	
RI	377	0.1	0.0	0.8	0.0	0.0	1.1	16.3	0.0	0.0	0.0	2.5	0.9	33.8	173.8	70.8	
SC	3,503	0.0	0.0	403.6	74.6	61.4	1.4	61.5	124.2	0.0	11.5	28.8	8.0	755.4	1137.6	519.6	
SD	470	2.4	0.0	42.3	7.5	8.6	1.2	11.3	8.2	0.0	3.7	10.4	0.0	53.7	108.2	127.0	
TN	4,513	4.8	0.0	525.9	49.4	28.5	5.7	69.3	278.6	0.0	39.2	13.0	3.6	567.6	1799.9	561.5	
TX	22,416	11.5	2.3	4593.4	329.9	239.7	36.2	347.1	804.0	14.1	87.3	222.4	33.2	3465.0	6927.3	2936.7	
UT	2,348	1.6	0.0	338.7	63.5	40.9	2.0	25.0	84.9	1.5	16.8	30.4	1.3	784.3	486.4	269.2	
VA	5,235	2.3	0.0	815.5	123.7	77.1	2.7	119.5	98.6	0.0	43.1	56.7	9.8	628.1	1931.1	823.1	
VT	165	1.0	0.0	12.2	1.2	1.9	0.8	5.7	5.8	0.0	2.3	1.5	0.0	10.7	50.8	48.5	
WA	1,206	7.8	0.0	158.9	15.4	23.3	7.4	14.5	37.6	0.0	12.2	5.1	2.0	128.3	427.6	176.9	
WI	3,934	6.4	0.0	173.2	34.3	45.5	3.0	13.6	123.8	6.5	41.6	42.2	2.3	592.0	2027.7	366.1	
WV	1,091	0.0	0.0	161.0	4.9	16.4	3.1	14.9	59.6	1.5	5.4	30.3	1.4	109.8	389.3	119.4	
WY	227	0.7	0.1	20.4	3.0	3.3	0.3	5.8	6.3	0.3	3.8	0.0	0.8	15.7	69.2	48.9	

VI. Regulatory Flexibility Act/Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 et seq., establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." Public Law 96-354. To achieve that objective, the Act requires agencies promulgating proposed rules to prepare

an initial regulatory flexibility analysis, and to develop alternatives whenever possible, when drafting regulations that will have a significant economic impact on a substantial number of small entities. The Act requires the consideration of the impact of a proposed regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. Id.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. See 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department is publishing this initial regulatory flexibility analysis to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. The Department invites interested persons to submit comments on the following estimates, including the number of small entities affected by the Executive Order minimum wage requirements, the compliance cost estimates, and whether alternatives exist that will reduce the burden on small entities while still remaining consistent with the objectives of Executive Order 13658.

Why the Department is Considering Action: The Department has published this proposed rule to implement the requirements of Executive Order 13658, "Establishing a

Minimum Wage for Contractors." The Executive Order grants responsibility for enforcement of the Order to the Secretary of Labor.

Objectives of and Legal Basis for Rule: This rule will provide guidance on how to comply with the minimum wage requirements of Executive Order 13658 and how the Department intends to administer and enforce such requirements. Section 5(a) of the Executive Order grants authority to the Secretary to investigate potential violations of and obtain compliance with the Order. 79 FR 9852. Section 4(a) of the Executive Order directs the Secretary to issue regulations to implement the requirements of the Order. Id.

Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping: As explained in this proposed rule, Executive Order 13658 provides that agencies must, to the extent permitted by law, ensure that new contracts, as described in section 7 of the Order, include a clause specifying, as a condition of payment, that the minimum wage to be paid to workers in the performance of the contract shall be at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) an amount determined by the Secretary, beginning January 1, 2016, and annually thereafter. 79 FR 9851. Section 7(d) of the Executive Order establishes that this minimum wage requirement only applies to a new contract if: (i) (A) it is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded from the SCA by the Department's regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Section 7(e) of the Order states that, for contracts covered by the SCA or the DBA, the Order applies only to

contracts at the thresholds specified in those statutes. Id. It also specifies that, for procurement contracts where workers' wages are governed by the FLSA, the Order applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the Order pursuant to regulations or actions taken under section 4 of the Order. 79 FR 9853.

This NPRM, which implements the coverage provisions and minimum wage requirements of Executive Order 13658, contains several provisions that could be considered to impose compliance requirements on contractors. The general requirements with which contractors must comply are set forth in proposed subpart C of this part. Contractors are obligated by Executive Order 13658 and this proposed rule to abide by the terms of the Executive Order minimum wage contract clause. Among other requirements set forth in the contract clause, contractors must pay no less than the applicable Executive Order minimum wage to workers for all time worked on or in connection with a covered contract. Contractors must also include the Executive Order minimum wage contract clause in subcontracts and lower-tiered contracts.

The proposed rule also requires contractors to make and maintain, for three years, records containing the information enumerated in proposed § 10.26(a)(1)-(4) for each worker: name, address, and Social Security number; the rate or rates of wages paid to the worker; the number of daily and weekly hours worked by each worker; and any deductions made. However, the records required to be kept by contractors pursuant to this part are coextensive with recordkeeping requirements that already exist under, and are consistent across, the FLSA, SCA, and DBA; as a result, a contractor's compliance with these payroll records obligations will not impose any

obligations to which the contractor is not already subject under the FLSA, SCA, or DBA. The proposed rule does not impose any reporting requirements on contractors.

Contractors are also obligated to cooperate with authorized representatives of the Department in the inspection of records, in interviews with workers, and in all aspects of investigations. The proposed rule and the proposed Executive Order minimum wage contract clause set forth other contractor requirements pertaining to, inter alia, permissible deductions and frequency of pay, as well as prohibitions against taking kickbacks from wages paid on covered contracts and retaliating against workers because they have filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or have testified or are about to testify in any such proceeding.

All small entities subject to the minimum wage requirements of Executive Order 13658 and this proposed rule would be required to comply with all of the provisions of the NPRM. Such compliance requirements are more fully described above in other portions of this preamble. The following section analyzes the costs of complying with the Executive Order minimum wage requirement for small contractor firms.

Calculating Impact of Proposed Rule on Small Business Firms: The Department must determine the compliance cost of this proposed rule on small contractor firms (i.e., small business firms that enter into covered contracts with the Federal Government), and whether these costs will be significant for a substantial number of small contractor firms. If the estimated compliance costs for affected small contractor firms are less than three percent of small contractor firms' revenues, the Department considers it appropriate to conclude that this proposed rule will not have a significant economic impact on the small contractor firms covered by Executive Order 13658. The Department has chosen three percent as our significance

criteria; however, using this benchmark as an indicator of significant impact may overstate the significance of such an impact, due to offsetting of the costs associated with the increased wages by the benefits of raising the minimum wage, which are difficult to quantify. The benefits, which include reduced absenteeism, reduced employee turnover, increased employee productivity, and improved employee morale, are discussed more fully in the Executive Order 12866 section of this preamble.

The data sources used in the analysis of small business impact are the Small Business Administration's (SBA) Table of Small Business Size Standards, the Current Population Survey (CPS), and the U.S. Census Bureau's Statistics of U.S. Businesses. In addition, the industrial classifications identifying most Federal contracts covered by Executive Order 13658 are found within the following nine industries: construction (North American Industry Classification System (NAICS) code 23); transportation and warehousing (NAICS codes 48, 492, and 493); data processing, hosting, related services, and other information services (NAICS codes 518 and 519); administrative and support and waste management and remediation services (NAICS code 56); education services (NAICS code 61); health care and social assistance (NAICS code 62); accommodation and food services (NAICS code 72); other services (NAICS code 81); and agriculture, forestry, fishing, and hunting (NAICS code 11). The Department focused its analysis on these nine industries, under which most Federal contractors covered by Executive Order 13658 are classified. Because data limitations do not allow us to determine which of the small firms within these industries are Federal contractors, the Department assumed that these small firms are not significantly different from the small Federal contractors that will be directly affected by the proposed rule.

The Department used the following steps to estimate the cost of the proposed rule per small contractor firm as measured by a percentage of total annual receipts. First, the Department utilized Census SUSB data that disaggregates industry information by firm size in order to perform a robust analysis of the impact on small contractor firms. The Department applied the SBA small business size standards to the SUSB data to determine the number of small firms in each of the nine affected industries, as well as the total number of employees in small firms in the nine affected industries. Next, the Department calculated the number of employees per small firm by dividing the total number of employees in small firms in the nine affected industries by the number of small firms.

However, since the Department knows that not all workers in small contractor firms earn less than $10.10 per hour, the Department next estimated how many employees of small firms (i.e., all small businesses in the identified industries in the U.S. economy) earn less than $10.10 per hour (these employees are referred to as affected employees in the text and summary tables below). The Department used the same CPS data that was used in the Executive Order 12866 section of this preamble to ascertain the number of workers paid less than $10.10 per hour by industry. The data was then coupled with the employment levels for each industry to derive the percent of workers within an industry who will be affected by the proposed minimum wage increase. The Department assumes that wage distribution of contract workers covered by this proposed rule is the same as that of workers in the rest of the U.S. economy.

The Department then calculated the number of affected employees of small firms by multiplying the number of employees per small firm by the percentage of employees earning less than $10.10 per hour. Next, the Department calculated the cost of the increased minimum wage per small firm by multiplying the number of affected workers per small firm by the average wage

difference of $1.31 per hour ($10.10 minus the average wage of $8.79 per hour as explained in the economic analysis for this proposed rule) by the number of work hours per year (2,080 hours). Finally, the Department used receipts data from the SUSB to calculate the cost per small firm as a percent of total receipts by dividing the estimated annual cost per firm by the average annual receipts per firm. This methodology was applied to the nine industries where covered contract work principally is performed and the results by industry are presented in the summary tables below (see Tables D-1 to D-9).

In sum, the increased wage cost resulting from the proposed rule is de minimis relative to revenue at small firms, and hence small contractor firms no matter their size. All of the relevant industries had an annual cost per firm as a percent of receipts of 3.0 percent or less. For instance, the construction industry cost is estimated to range from 0.07 percent for firms that have annual receipts of approximately $30 million to 0.16 percent for firms that have annual receipts of under $2.5 million. Accommodation and food services is the industry with the highest relative costs, with a range of 2.31 percent for firms that have annual receipts of approximately $35 million to 2.94 percent for the firms that have annual receipts of under $2.5 million. A potential reason that this part has a relatively higher impact on the accommodation and food services industry is the relatively large number of low wage workers in the service industry, many of whom are tipped workers. In no instance is the effect of the wage increase greater than three percent of total receipts.

Although the Department estimates that compliance costs are less than three percent of the average revenue per small contractor firm for each of the nine industries, the Department seeks data and feedback from small firms with concessions contracts, particularly those that are exempt from the SCA but are covered under Executive Order 13658. Information and data

regarding the numbers of businesses and small businesses newly affected by this proposed rule would be particularly useful. The Department would also appreciate feedback on the factors and assumptions used in this analysis, such as data sources, small business industries, NAICS codes and size standards, the number of affected employees and annual costs per firm as a percent of receipts. The Department seeks information about which data sources should be utilized to estimate the number of Federal small subcontractors. The Department also seeks information about the potential compliance cost estimates of the minimum wage requirements, such as any differences in compliance costs for small businesses as compared to larger businesses and any compliance costs that may not have been included in this analysis. The Department specifically seeks data and feedback about the proposed rule's potential impact on management and human resources costs, impacts on staffing, and other related issues.

Estimating the Number of Small Businesses Affected by the Rulemaking:

The Department now sets forth its estimate of the number of small contractor firms actually affected by the proposed rule. This information is not readily available. The best source for the number of small contractor firms that are affected by this proposed rule is GSA's System for Award Management (SAM). The Department used SAM data to estimate the number of affected small contractor firms since SAM data allow us to directly estimate the number of small contractor firms. Federal contractor status cannot be discerned from the SBA firm size data: it can only be used to estimate the number of small firms, not the number of small contractor firms. The Department used the SBA data to estimate the impact of the proposed regulation on a 'typical' or 'average' small firm in each of the nine industries identified above. The Department then assumed that a typical small firm is similar to a small contractor firm.

Based on the most current SAM data available, if the Department defined *small* as fewer than 500 employees, then there are 328,552 small contractor firms. If the Department defined

small as firms with less than $35.5 million in revenues, then there are 315,902 small contractor firms. Thus, the Department established the range 315,902 to 328,552 as the total number of small contractor firms. Of course, not all of these contractor firms will be impacted by the proposed rule; only those contractors that are paying less than $10.10 per hour to any of their workers performing on covered contracts would be affected. Thus, this range is an overestimate of the number of firms affected by the proposed rule because some of those small contractor firms may pay all of their workers more than $10.10 per hour. The Department does not have more precise estimates of either the number of workers employed by small contractor firms or the number of small contractor firms with workers earning less than $10.10 per hour. The Department invites the public to provide information related to these two data limitations, and any data on small subcontractors.

The proposed regulation applies only to new contracts. As explained in the regulatory analysis, based on the 2012 SBA study, the Department assumed that roughly 18 percent of existing small contractor firms are awarded new contracts each year. Under the scenario that this proposed rule will impact only 18 percent[25] of the small firms performing Federal contracts in the first year, a maximum of between 56,862 and 59,139 small businesses would be impacted. When this rule's impact is fully manifested by the end of 2019, all covered Federal contracts held by small firms with workers earning less than $10.10 per hour would be impacted.

[25] The Department assumed 18 percent of small contractors are new to Federal contracting each year based on the 2012 SBA study (Small Business Administration, "Characteristics of Recent Federal Small Business Contracting," May, 2012). The 2012 SBA study shows that 17.65 percent of small businesses were new to Federal contracting each year between FY 2005 and FY 2009, and the Department rounded it up to 18 percent in this analysis. This 18 percent is separate and distinct from the Department's use of 20 percent as the number of Federal contracts that are initiated each year, which is used in the Executive Order 12866 regulatory analysis.

Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Rule: Section 4(a) of the Executive Order requires the FARC to issue regulations to provide for inclusion of the applicable contract clause in Federal procurement solicitations and contracts subject to the Order; thus, the contract clause and some requirements applicable to contracting agencies will appear in both this part and in the FARC regulations. The Department is not aware of any relevant Federal rules that conflict with this NPRM.

Alternatives to the Proposed Rule

Executive Order 13658 is prescriptive and does not authorize the Department to consider less burdensome alternatives for small businesses. However, if stakeholders can identify alternatives that would accomplish the stated objectives of Executive Order 13658 and minimize any significant economic impact of the proposed rule on small entities, the Department would welcome that feedback. Below, the Department considers the specific alternatives required by section 603(c) of the RFA.

Differing Compliance and Reporting Requirements for Small Entities: This NPRM provides for no differing compliance requirements and reporting requirements for small entities. The Department has strived to have this proposal implement the minimum wage requirements of Executive Order 13658 with the least possible burden for small entities. The NPRM provides a number of efficient and informal alternative dispute mechanisms to resolve concerns about contractor compliance, including having the contracting agency provide compliance assistance to the contractor about the minimum wage requirements, and allowing for the Department to attempt an informal conciliation of complaints instead of engaging in extensive investigations. These tools will provide contractors with an opportunity to resolve inadvertent errors rapidly and before significant liabilities develop.

Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities: This NPRM was drafted to clearly state the compliance requirements for all contractors subject to Executive Order 13658. The proposed rule does not contain any reporting requirements. The recordkeeping requirements imposed by this proposed rule are necessary for contractors to determine their compliance with the rule as well as for the Department and workers to determine the contractor's compliance with the law. The recordkeeping provisions apply generally to all businesses--large and small--covered by the Executive Order; no rational basis exists for creating an exemption from compliance and recordkeeping requirements for small businesses. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

Use of Performance Rather Than Design Standards: This NPRM was written to provide clear guidelines to ensure compliance with the Executive Order minimum wage requirements. Under the proposed rule, contractors may achieve compliance through a variety of means. The Department makes available a variety of resources to contractors for understanding their obligations and achieving compliance.

Exemption from Coverage of the Rule for Small Entities: Executive Order 13658 establishes its own coverage and exemption requirements; therefore, the Department has no authority to exempt small businesses from the minimum wage requirements of the Order.

Table D-1: Cost per small firm in the construction industry

Construction Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm[1]	Total Number of Affected Employees[2]	Average Number of Affected Employees per Firm[3]	Annual Cost per Firm[4]	Annual Receipts	Average Receipts per Firm[5]	Annual Cost per Firm as Percent of Receipts[6]
Firms with sales/receipts/revenue of $100,000 to $2,499,999	551,235	2,469,299	4.5	197,297	0.4	$975	$342,193,905,000	$620,777	0.16%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	47,962	864,701	18.0	69,090	1.4	$3,925	$167,758,626,000	$3,497,740	0.11%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	16,992	492,370	29.0	39,340	2.3	$6,309	$102,502,053,000	$6,032,371	0.10%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	7,801	308,512	39.5	24,650	3.2	$8,610	$66,977,650,000	$8,585,777	0.10%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	8,259	427,159	51.7	34,130	4.1	$11,260	$99,174,146,000	$12,008,009	0.09%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	4,354	289,441	66.5	23,126	5.3	$14,473	$73,881,089,000	$16,968,555	0.09%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	2,611	209,081	80.1	16,706	6.4	$17,434	$56,928,754,000	$21,803,429	0.08%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	1,621	150,754	93.0	12,045	7.4	$20,247	$43,119,720,000	$26,600,691	0.08%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,171	121,928	104.1	9,742	8.3	$22,669	$36,848,837,000	$31,467,837	0.07%

Note: data for firms with sales/receipts/revenue less than $100,000 was not available or not disclosed.

1 In the case of construction firms with receipts of $100,000 to $2,499,999, the average number of employees per firm (4.5) was derived by dividing the total number of employees (2,469,299) by the number of firms (551,235).

[2] As explained in the report, the total number of affected employees (197,297) was derived by multiplying the estimated percent of employees earning less than $10.10 per hour (7.99 percent) by total the number of employees (2,469,299).

[3] The average number of affected employees per firm (0.38 percent) was derived by dividing the total number of affected employees (197,297) by the number of firms (551,235).

[4] The annual cost per firm ($975) was derived by multiplying the average number of affected employees per firm (0.358) by the average wage difference ($1.31 per hour) and the number of working hours per year (2,080 hours).

[5] The average receipts per firm ($620,777) was derived by dividing the total annual receipts ($342.2 billion) by the number of firms (551,235).

[6] The annual cost per firm as a percent of receipts (0.16 percent) was derived by dividing the annual cost per firm ($975) by the average receipts per firm ($620,777). This methodology was repeated for industries represented in Tables D-1 through D-9.

Table D-2: Cost per small firm in the transportation and warehousing industry

Transportation and Warehousing Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue of $100,000 to $2,499,999	111,279	603,955	5.4	68,549	0.6	$1,679	$64,346,445,000	$578,244	0.29%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,183	223,156	24.3	25,328	2.8	$7,515	$31,359,227,000	$3,414,922	0.22%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,550	136,436	38.4	15,485	4.4	$11,886	$20,463,648,000	$5,764,408	0.21%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,800	91,408	50.8	10,375	5.8	$15,705	$14,261,554,000	$7,923,086	0.20%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,840	123,966	67.4	14,070	7.6	$20,836	$19,933,921,000	$10,833,653	0.19%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	988	85,367	86.4	9,689	9.8	$26,722	$14,057,603,000	$14,228,343	0.19%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	621	68,836	110.8	7,813	12.6	$34,281	$11,060,118,000	$17,810,174	0.19%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	429	51,989	121.2	5,901	13.8	$37,479	$8,257,805,000	$19,248,963	0.19%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	311	45,274	145.6	5,139	16.5	$45,021	$7,184,425,000	$23,101,045	0.19%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	235	32,922	140.1	3,737	15.9	$43,326	$5,902,588,000	$25,117,396	0.17%

Note: data for firms with sales/receipts/revenue less than $100,000 was not available or not disclosed.

Table D-3: Cost per small firm in the information industry

Information Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue of $100,000 to $2,499,999	47,797	268,789	5.6	24,782	0.5	$1,413	$29,386,049,000	$614,809	0.23%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,508	100,331	22.3	9,251	2.1	$5,591	$15,472,313,000	$3,432,190	0.16%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,837	65,601	35.7	6,048	3.3	$8,972	$10,856,893,000	$5,910,121	0.15%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,018	46,846	46.0	4,319	4.2	$11,561	$8,447,070,000	$8,297,711	0.14%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,092	68,058	62.3	6,275	5.7	$15,657	$12,300,328,000	$11,264,037	0.14%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	601	49,812	82.9	4,593	7.6	$20,822	$9,293,544,000	$15,463,468	0.13%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	389	37,522	96.5	3,460	8.9	$24,233	$7,616,666,000	$19,580,118	0.12%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	270	30,523	113.0	2,814	10.4	$28,401	$6,512,265,000	$24,119,500	0.12%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	175	25,649	146.6	2,365	13.5	$36,821	$4,971,718,000	$28,409,817	0.13%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	136	21,553	158.5	1,987	14.6	$39,814	$4,082,897,000	$30,021,301	0.13%
Note: data for firms with sales/receipts/revenue less than $100,000 was not available or not disclosed.									

Table D-4: Cost per small firm in the administrative and support and waste management and remediation industry

Administrative and Support and Waste Management and Remediation Services Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue less than $2,500,000	300,501	1,788,501	6.0	400,803	1.3	$3,634	$112,570,627,000	$374,610	0.97%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	12,294	678,340	55.2	152,016	12.4	$33,692	$42,093,718,000	$3,423,924	0.98%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,589	434,622	94.7	97,399	21.2	$57,832	$26,428,877,000	$5,759,180	1.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,411	311,321	129.1	69,767	28.9	$78,847	$19,304,673,000	$8,006,915	0.98%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,309	424,912	184.0	95,223	41.2	$112,370	$24,412,659,000	$10,572,828	1.06%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,266	292,501	231.0	65,549	51.8	$141,082	$17,408,483,000	$13,750,776	1.03%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	724	208,939	288.6	46,823	64.7	$176,221	$12,542,375,000	$17,323,722	1.02%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	528	174,359	330.2	39,074	74.0	$201,645	$10,341,768,000	$19,586,682	1.03%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	402	173,953	432.7	38,983	97.0	$264,230	$9,015,658,000	$22,427,010	1.18%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	267	122,013	457.0	27,343	102.4	$279,043	$6,382,657,000	$23,905,082	1.17%

Table D-5: Cost per small firm in the education service industry

Education Services Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue less than $2,500,000	66,738	535,747	8.0	48,057	0.7	$1,962	##########	$406,865	0.48%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,302	209,778	48.8	18,817	4.4	$11,918	##########	$3,438,424	0.35%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,588	117,648	74.1	10,553	6.6	$18,108	$9,314,307,000	$5,865,433	0.31%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	888	83,741	94.3	7,512	8.5	$23,049	$7,129,969,000	$8,029,244	0.29%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,003	127,781	127.4	11,462	11.4	$31,138	##########	$11,272,191	0.28%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	461	79,059	171.5	7,092	15.4	$41,916	$6,983,007,000	$15,147,521	0.28%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	355	73,045	205.8	6,552	18.5	$50,291	$6,992,060,000	$19,695,944	0.26%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	268	70,191	261.9	6,296	23.5	$64,014	$6,343,422,000	$23,669,485	0.27%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	172	60,202	350.0	5,400	31.4	$85,548	$5,119,182,000	$29,762,686	0.29%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	138	55,753	404.0	5,001	36.2	$98,745	$4,536,897,000	$32,876,065	0.30%

Table D-6: Cost per small firm in the health care and social assistance industry

Health Care and Social Assistance Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue less than $2,500,000	559,134	3,710,875	6.6	536,221	1.0	$2,613	$286,450,355,000	$512,311	0.51%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	26,466	1,107,445	41.8	160,026	6.0	$16,475	$91,034,690,000	$3,439,685	0.48%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	9,453	712,840	75.4	103,005	10.9	$29,691	$56,541,818,000	$5,981,362	0.50%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	4,867	501,258	103.0	72,432	14.9	$40,551	$41,063,966,000	$8,437,223	0.48%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	5,198	760,603	146.3	109,907	21.1	$57,613	$61,116,459,000	$11,757,687	0.49%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,468	497,184	201.5	71,843	29.1	$79,318	$40,851,963,000	$16,552,659	0.48%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,374	347,358	252.8	50,193	36.5	$99,539	$29,140,498,000	$21,208,514	0.47%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	978	284,827	291.2	41,158	42.1	$114,669	$25,026,728,000	$25,589,701	0.45%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	665	230,360	346.4	33,287	50.1	$136,392	$20,167,268,000	$30,326,719	0.45%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	485	185,982	383.5	26,874	55.4	$150,984	$16,744,181,000	$34,524,085	0.44%

Table D-7: Cost per small firm in the accommodation and food service industry

Accommodations and Food Services Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue less than $2,500,000	452,389	4,594,026	10.2	2,161,489	4.8	$13,019	$200,413,678,000	$443,012	2.94%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	14,095	896,373	63.6	421,743	29.9	$81,530	$46,231,300,000	$3,279,979	2.49%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,720	403,866	108.6	190,019	51.1	$139,184	$21,249,810,000	$5,712,315	2.44%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,621	244,772	151.0	115,165	71.0	$193,586	$12,835,230,000	$7,918,094	2.44%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,628	340,741	209.3	160,319	98.5	$268,327	$17,984,834,000	$11,047,195	2.43%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	859	252,279	293.7	118,697	138.2	$376,515	$13,054,878,000	$15,197,763	2.48%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	446	170,201	381.6	80,080	179.6	$489,239	$8,420,579,000	$18,880,222	2.59%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	363	153,594	423.1	72,266	199.1	$542,453	$7,987,110,000	$22,003,058	2.47%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	241	115,452	479.1	54,320	225.4	$614,156	$6,405,041,000	$26,576,934	2.31%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	170	90,301	531.2	42,487	249.9	$680,986	$4,832,335,000	$28,425,500	2.40%

Table D-8: Cost per small firm in the other services industry

Other Services Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue less than $2,500,000	646,563	3,229,367	5.0	484,405	0.7	$2,041	$229,618,835,000	$355,138	0.57%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	16,522	531,104	32.1	79,666	4.8	$13,138	$55,620,907,000	$3,366,475	0.39%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,967	252,838	50.9	37,926	7.6	$20,805	$28,838,406,000	$5,806,001	0.36%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,326	151,376	65.1	22,706	9.8	$26,599	$18,502,407,000	$7,954,603	0.33%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,114	173,393	82.0	26,009	12.3	$33,524	$23,140,184,000	$10,946,161	0.31%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,005	104,997	104.5	15,750	15.7	$42,701	$14,696,909,000	$14,623,790	0.29%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	620	73,209	118.1	10,981	17.7	$48,261	$11,076,548,000	$17,865,400	0.27%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	405	50,974	125.9	7,646	18.9	$51,442	$8,159,095,000	$20,145,914	0.26%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	274	42,041	153.4	6,306	23.0	$62,712	$6,643,223,000	$24,245,339	0.26%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	227	37,259	164.1	5,589	24.6	$67,086	$5,392,740,000	$23,756,564	0.28%

Table D-9: Cost per small firm in the agriculture, forestry, fishing, and hunting industry

Agriculture, Forestry, Fishing, and Hunting Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue of $100,000 to $2,499,999	15,839	72,098	4.6	14,549	0.9	$2,503	$9,826,777,000	$620,417	0.40%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	1,117	20,049	17.9	4,046	3.6	$9,870	$3,811,000,000	$3,411,817	0.29%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	289	8,997	31.1	1,816	6.3	$17,118	$1,730,128,000	$5,986,602	0.29%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	165	7,588	46.0	1,531	9.3	$25,287	$1,340,763,000	$8,125,836	0.31%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	112	6,130	54.7	1,237	11.0	$30,095	$1,288,588,000	$11,505,250	0.26%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	55	4,042	73.5	816	14.8	$40,410	$874,841,000	$15,906,200	0.25%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	44	5,325	121.0	1,075	24.4	$66,546	$858,761,000	$19,517,295	0.34%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	26	2,800	107.7	565	21.7	$59,216	$595,387,000	$22,899,500	0.26%
Note: data for firms with sales/receipts/revenue less than $100,000 was not available or not disclosed.									

VII. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate or by the private sector. The current threshold after adjustment for inflation is $141 million, using the 2012 Implicit Price Deflator for the Gross Domestic Product.

As explained in the economic analysis set forth in the section discussing Executive Orders 12866 and 13563 above, the Department estimates that the proposed rule may result in transfers of up to $500 million per year (beginning in 2019, with steady increases up to that level over the intervening years). Because this proposed rule applies only to contracts for which the solicitation will be issued on or after January 1, 2015, contractors would have the information necessary to factor into their bids the labor costs resulting from the required minimum wage, and thus it may be likely that the Federal Government would bear the burden of the transfers.

However, most contracts covered by this proposed rule are paid through appropriated funds, and how Congress and agencies respond to rising bids is subject to political processes whose unpredictability limits the Department's ability to project rule-induced outcomes. The Department therefore acknowledges that this proposed rule may yield effects that make it subject to UMRA requirements. The Department carried out the requisite cost-benefit analysis in preceding sections of this document.

VIII. Executive Order 13132, Federalism

The Department has (1) reviewed this rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

IX. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

X. Effects on Families

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.

XI. Executive Order 13045, Protection of Children

This proposed rule would have no environmental health risk or safety risk that may disproportionately affect children.

XII. Environmental Impact Assessment

A review of this proposed rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq.; the regulations of the Council on Environmental Quality, 40 CFR 1500 et seq.; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the rule would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

XIII. Executive Order 13211, Energy Supply

This proposed rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

XIV. Executive Order 12630, Constitutionally Protected Property Rights

This proposed rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

XV. Executive Order 12988, Civil Justice Reform Analysis

This proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 10

Administrative practice and procedure, Construction, Government contracts, Law enforcement, Minimum wages, Reporting and recordkeeping requirements, Wages.

Signed at Washington, D.C. this 12th day of June, 2014.

David Weil,

Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor proposes to amend title 29 of the Code of Federal Regulations by adding part 10 as follows:

PART 10 -- ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

Subpart A – General
Sec.

AUTHORITY: 4 U.S.C. 301; section 4, E.O. 13658, 79 FR 9851; Secretary's Order 5-2010, 75

FR 55352.

Subpart A—General

§ 10.1 Purpose and scope.

(a) Purpose. This part contains the Department of Labor's rules relating to the administration of Executive Order 13658 (Executive Order or the Order), "Establishing a Minimum Wage for Contractors," and implements the enforcement provisions of the Executive Order. The Executive Order assigns responsibility for investigating potential violations of and obtaining compliance with the Executive Order to the Department of Labor. The Executive Order states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. There is evidence that raising the pay of low-wage workers can increase their morale and productivity and the quality of their work, lower turnover and its accompanying costs, and reduce supervisory costs. The Executive Order thus states that cost savings and quality improvements in the work performed by parties who contract with the Federal Government will lead to improved economy and efficiency in Government procurement. Executive Order 13658 therefore generally requires that the hourly minimum wage paid by contractors to workers performing on covered contracts with the Federal Government shall be at least:

(1) $10.10 per hour, beginning January 1, 2015; and

(2) An amount determined by the Secretary of Labor, beginning January 1, 2016, and annually thereafter.

(b) Policy. Executive Order 13658 sets forth a general position of the Federal Government that increasing the hourly minimum wage paid by Federal contractors to $10.10 will increase efficiency and cost savings for the Federal Government. The Executive Order therefore establishes a minimum wage requirement for Federal contractors and subcontractors. The Order provides that executive departments and agencies shall, to the extent permitted by law, ensure

that new covered contracts, contract-like instruments, and solicitations (collectively referred to as "contracts") include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), in the performance of the contract or any subcontract thereunder, shall be at least:

(1) $10.10 per hour beginning January 1, 2015; and

(2) Beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to the Order. Nothing in Executive Order 13658 or this part shall excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order.

(c) Scope. Neither Executive Order 13658 nor this part creates any rights under the Contract Disputes Act or any private right of action. The Executive Order provides that disputes regarding whether a contractor has paid the minimum wages prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Order. However, nothing in the Order or this part is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. The Order similarly does not preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act.

§ 10.2 Definitions.

For purposes of this part:

Administrative Review Board or Board means the Administrative Review Board, U.S. Department of Labor.

Administrator means the Administrator of the Wage and Hour Division and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

Agency head means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency or any persons authorized to act on behalf of the agency head.

Concessions contract or contract for concessions means a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The term concessions contract includes but is not limited to a contract the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public.

Contract or contract-like instrument means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term contract includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and

whether entered into verbally or in writing. The term contract shall be interpreted broadly as to include, but not be limited to, any contract that may be consistent with the definition provided in the FAR or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The term contract includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, and concessions contracts not otherwise subject to the Service Contract Act. The term contract does not include grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended; or any contracts or contract-like instruments expressly excluded by § 10.4.

Contracting officer means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. This term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

Contractor means any individual or other legal entity that:

(1) Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract or a subcontract under a Government contract; or

(2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor. The term contractor refers to both a prime contractor and all of its first or lower-tier subcontractors on a contract with the Federal Government. The term contractor includes lessors and lessees, as well as employers of workers performing on covered Federal contracts whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c). The term employer is used interchangeably with the terms contractor and subcontractor in various sections of this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive Order.

Davis-Bacon Act means the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 et seq., and its implementing regulations.

Executive departments and agencies means executive departments, military departments, or any independent establishments within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

Executive Order minimum wage means, for purposes of Executive Order 13658, a wage that is at least:

(1) $10.10 per hour beginning January 1, 2015; and

(2) Beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of the Executive Order.

Fair Labor Standards Act means the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq., and its implementing regulations.

Federal Government means an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. For purposes of the Executive Order and this part, this definition does not include the District of Columbia or any Territory or possession of the United States.

Independent agencies means independent regulatory agencies within the meaning of 44 U.S.C. 3502(5).

New contract means a contract that results from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015. This term includes both new contracts and replacements for expiring contracts.

Office of Administrative Law Judges means the Office of Administrative Law Judges, U.S. Department of Labor.

Option means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

Procurement contract for construction means a procurement contract for the construction, alteration, or repair (including painting and decorating) of public buildings or public works and which requires or involves the employment of mechanics or laborers, and any subcontract of any tier thereunder. The term procurement contract for construction includes any contract subject to the provisions of the Davis-Bacon Act, as amended, and its implementing regulations.

Procurement contract for services means a procurement contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder. The term procurement contract for services includes any

contract subject to the provisions of the Service Contract Act, as amended, and its implementing regulations.

Service Contract Act means the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 et seq., and its implementing regulations.

Solicitation means any request to submit offers or quotations to the Federal Government.

Tipped employee means any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips. For purposes of the Executive Order, a worker performing on a contract covered by the Executive Order who meets this definition is a tipped employee.

United States means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities. When used in a geographic sense, the United States means the 50 States and the District of Columbia.

Wage and Hour Division means the Wage and Hour Division, U.S. Department of Labor.

Wage determination includes any determination of minimum hourly wage rates or fringe benefits made by the Secretary of Labor pursuant to the provisions of the Service Contract Act or the Davis-Bacon Act. This term includes the original determination and any subsequent determinations modifying, superseding, correcting, or otherwise changing the provisions of the original determination.

Worker means any person engaged in the performance of a contract covered by the Executive Order, and whose wages under such contract are governed by the Fair Labor

Standards Act, the Service Contract Act, or the Davis-Bacon Act, other than individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, regardless of the contractual relationship alleged to exist between the individual and the employer. The term worker includes workers performing on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) and any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the U.S. Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

§ 10.3 Coverage.

(a) This part applies to any contract with the Federal Government, unless excluded by § 10.4, that results from a solicitation issued on or after January 1, 2015 or that is awarded outside the solicitation process on or after January 1, 2015, provided that:

(1) (i) It is a procurement contract for construction covered by the Davis-Bacon Act;

(ii) It is a contract for services covered by the Service Contract Act;

(iii) It is a contract for concessions, including any concessions contract excluded from coverage under the Service Contract Act by Department of Labor regulations at 29 CFR 4.133(b); or

(iv) It is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(2) The wages of workers under such contract are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

(b) For contracts covered by the Service Contract Act or the Davis-Bacon Act, this part applies to prime contracts only at the thresholds specified in those statutes. For procurement contracts where workers' wages are governed by the Fair Labor Standards Act, this part applies when the prime contract exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a).

(c) This part only applies to contracts with the Federal Government requiring performance in whole or in part within the United States.

§ 10.4 Exclusions.

(a) Grants. The requirements of this part do not apply to grants within the meaning of the Federal Grant and Cooperative Agreement Act, as amended, 31 U.S.C. 6301 et seq.

(b) Contracts and agreements with and grants to Indian Tribes. This part does not apply to contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450 et seq.

(c) Procurement contracts for construction that are excluded from coverage of the Davis-Bacon Act. Procurement contracts for construction that are not covered by the Davis-Bacon Act are not subject to this part.

(d) Contracts for services that are exempted from coverage under the Service Contract Act. Service contracts, except for those expressly covered by § 10.3(a)(1)(ii) through (iv), that are exempt from coverage of the Service Contract Act pursuant to its statutory language or implementing regulations are not subject to this part.

(e) Employees who are exempt from the minimum wage requirements of the Fair Labor Standards Act under 29 U.S.C. 213(a) and 214(a) – (b). Except for workers who are otherwise

covered by the Davis-Bacon Act or the Service Contract Act, this part does not apply to employees who are not entitled to the minimum wage set forth at 29 U.S.C. 206(a)(1) of the Fair Labor Standards Act pursuant to 29 U.S.C. 213(a) and 214(a) – (b). Pursuant to this exclusion, individuals that are not subject to the requirements of this part include but are not limited to:

(1) Learners, apprentices, or messengers. This part does not apply to learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a).

(2) Students. This part does not apply to student workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b).

(3) Individuals employed in a bona fide executive, administrative, or professional capacity. This part does not apply to workers who are employed by Federal contractors in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR part 541.

§ 10.5 Executive Order 13658 minimum wage for Federal contractors and subcontractors.

(a) General. Pursuant to Executive Order 13658, the minimum hourly wage rate required to be paid to workers performing on covered contracts with the Federal Government is at least:

(1) $10.10 per hour beginning January 1, 2015; and

(2) Beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of Executive Order 13658. In accordance with section 2 of the Order, the Secretary will determine the applicable minimum wage rate to be paid to workers on covered contracts on an annual basis beginning at least 90 days before any new minimum wage is to take effect.

(b) Method for determining the applicable Executive Order minimum wage for workers. The minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), in the performance of a covered contract shall be at least:

(1) $10.10 per hour beginning January 1, 2015; and

(2) An amount determined by the Secretary, beginning January 1, 2016, and annually thereafter. The applicable minimum wage determined for each calendar year by the Secretary shall be:

(i) Not less than the amount in effect on the date of such determination;

(ii) Increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and

(iii) Rounded to the nearest multiple of $0.05. In calculating the annual percentage increase in the Consumer Price Index for purposes of this section, the Secretary shall compare such Consumer Price Index for the most recent year available with the Consumer Price Index for the preceding year.

(c) Relation to other laws. Nothing in the Executive Order or this part shall excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Executive Order and this part.

§ 10.6 Antiretaliation.

It shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or has testified or is about to testify in any such proceeding.

§ 10.7 Waiver of rights.

Workers cannot waive, nor may contractors induce workers to waive, their rights under Executive Order 13658 or this part.

Subpart B – Government Requirements

§ 10.11 Contracting agency requirements.

(a) Contract clause. For all contracts subject to Executive Order 13658, except for procurement contracts subject to the Federal Acquisition Regulation (FAR), the contracting agency shall include the Executive Order minimum wage contract clause set forth in appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 10.3. The required contract clause directs, as a condition of payment, that all workers performing on covered contracts must be paid the applicable, currently effective minimum wage under Executive Order 13658 and § 10.5. For procurement contracts subject to the FAR, contracting agencies shall use the clause set forth in the FAR developed to implement this rule. Such clause shall accomplish the same purposes as the clause set forth in appendix A and shall be consistent with the requirements set forth in this rule.

(b) Failure to include the contract clause. Where the Department or the contracting agency discovers or determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that Executive Order 13658 or this part did not apply to a particular contract and/or failed to include the applicable contract clause in a

contract to which the Executive Order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed.

(c) Withholding. A contracting officer shall upon his or her own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the prime contractor under the covered contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by the Executive Order. In the event of failure to pay any covered workers all or part of the wages due under Executive Order 13658, the agency may, after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with the requirements of Executive Order 13658 may be grounds for termination of the right to proceed with the contract work. In such event, the contracting agency may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

(d) Actions on complaints. (1) Reporting. (i) Reporting time frame. The contracting agency shall forward all information listed in paragraph (d)(1)(ii) of this section to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210 within 14 calendar days of receipt of a complaint alleging contractor noncompliance with the Executive Order or this part or within 14 calendar days of being contacted by the Wage and Hour Division regarding any such complaint.

(ii) Report contents. The contracting agency shall forward to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210 any:

(A) Complaint of contractor noncompliance with Executive Order 13658 or this part;

(B) Available statements by the worker, contractor, or any other person regarding the alleged violation;

(C) Evidence that the Executive Order minimum wage contract clause was included in the contract;

(D) Information concerning known settlement negotiations between the parties, if applicable; and

(E) Any other relevant facts known to the contracting agency or other information requested by the Wage and Hour Division.

(2) [Reserved]

§ 10.12 Department of Labor requirements.

(a) In general. The Executive Order minimum wage applicable from January 1, 2015 through December 31, 2015 is $10.10 per hour. The Secretary will determine the applicable minimum wage rate to be paid to workers on covered contracts on an annual basis, beginning January 1, 2016.

(b) Method for determining the applicable Executive Order minimum wage. The Secretary will determine the applicable minimum wage under the Executive Order, beginning January 1, 2016, by using the methodology set forth in § 10.5(b).

(c) Notice. (1) The Administrator will notify the public of the applicable minimum wage rate to be paid to workers on covered contracts on an annual basis at least 90 days before any new minimum wage is to take effect.

(2) Method of notification. (i) Federal Register. The Administrator shall publish a notice in the Federal Register stating the applicable minimum wage rate to be paid to workers on covered contracts on an annual basis at least 90 days before any new minimum wage is to take effect.

(ii) Wage Determinations OnLine website. The Administrator shall publish and maintain on Wage Determinations OnLine (WDOL), at http://www.wdol.gov, or any successor site, the applicable minimum wage rate to be paid to workers on covered contracts.

(iii) Other means as appropriate. The Administrator may publish the applicable minimum wage rate to be paid to workers on covered contracts on an annual basis at least 90 days before any such new minimum wage is to take effect in any other media that the Administrator deems appropriate.

(d) Notification to a contractor of the withholding of funds. If the Administrator requests that a contracting agency withhold funds from a contractor pursuant to § 10.11(c), the Administrator, or contracting agency, shall notify the affected prime contractor of the Administrator's withholding request to the contracting agency.

Subpart C—Contractor Requirements

§ 10.21 Contract Clause.

(a) Contract Clause. The contractor, as a condition of payment, shall abide by the terms of the applicable Executive Order minimum wage contract clause referred to in § 10.11(a).

(b) The contractor and any subcontractors shall include in any covered subcontracts the Executive Order minimum wage contract clause referred to in § 10.11(a) and shall require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts. The prime contractor and any upper-tier contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract.

§ 10.22 Rate of pay.

(a) General. The contractor must pay each worker performing on or in connection with a covered contract no less than the applicable Executive Order minimum wage for all time worked on or in connection with the covered contract. In determining whether a worker is performing within the scope of a covered contract, all workers who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are this subject to the Executive Order and this part unless a specific exemption is applicable. Nothing in the Executive Order or these regulations shall excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under Executive Order 13658.

(b) Workers who receive fringe benefits. The contractor may not discharge any part of its minimum wage obligation under the Executive Order by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, the cash equivalent thereof.

(c) Tipped employees. The contractor may satisfy the wage payment obligation to a tipped employee under the Executive Order through a combination of an hourly cash wage and a credit based on tips received by such employee pursuant to the provisions in § 10.28.

§ 10.23 Deductions.

The contractor may make deductions that reduce a worker's wages below the Executive Order minimum wage rate only if such deduction qualifies as a:

(a) Deduction required by Federal, State, or local law, such as Federal or State withholding of income taxes;

(b) Deduction for payments made to third parties pursuant to court order;

(c) Deduction directed by a voluntary assignment of the worker or his or her authorized representative; or

(d) Deduction for the reasonable cost or fair value, as determined by the Administrator, of furnishing such worker with "board, lodging, or other facilities," as defined in 29 U.S.C. 203(m) and part 531 of this title.

§ 10.24 Overtime payments.

(a) General. The Fair Labor Standards Act and the Contract Work Hours and Safety Standards Act require overtime payment of not less than one and one-half times the regular rate of pay or basic rate of pay for all hours worked over 40 hours in a workweek to covered workers. The regular rate of pay is generally determined by dividing the worker's total earnings in any workweek by the total number of hours actually worked by the worker in that workweek for which such compensation was paid.

(b) Tipped employees. When overtime is worked by tipped employees who are entitled to overtime pay under the Fair Labor Standards Act and/or the Contract Work Hours and Safety

Standards Act, the employees' regular rate of pay includes both the cash wages paid by the employer (see §§ 10.22(a) and 10.28(a)(1)) and the amount of any tip credit taken (see § 10.28(a)(2)). (See part 778 of this title for a detailed discussion of overtime compensation under the Fair Labor Standards Act.) Any tips received by the employee in excess of the tip credit are not included in the regular rate.

§ 10.25 Frequency of pay.

Wage payments to workers shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under Executive Order 13658 may not be of any duration longer than semi-monthly.

§ 10.26 Records to be kept by contractors.

(a) The contractor and each subcontractor performing work subject to Executive Order 13658 shall make and maintain, for three years records containing the information specified in paragraphs (a)(1) through (4) of this section for each worker and shall make them available for inspection and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(1) Name, address, and social security number of each worker;

(2) The rate or rates of wages paid;

(3) The number of daily and weekly hours worked by each worker; and

(4) Any deductions made.

(b) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

(c) Nothing in this part limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, or their implementing regulations.

§ 10.27 Anti-kickback.

All wages paid to workers performing on covered contracts must be paid free and clear and without subsequent deduction (except as set forth in § 10.23), rebate, or kickback on any account. Kickbacks directly or indirectly to the employer or to another person for the employer's benefit for the whole or part of the wage are prohibited.

§ 10.28 Tipped employees.

(a) Payment of wages to tipped employees. With respect to workers who are tipped employees as defined in § 10.2 and this section, the amount of wages paid to such employee by the employee's employer shall be equal to:

(1) An hourly cash wage of at least:

(i) $4.90 an hour beginning on January 1, 2015;

(ii) For each succeeding 1-year period until the hourly cash wage equals 70 percent of the wage in effect under section 2 of the Executive Order, the hourly cash wage applicable in the prior year, increased by the lesser of $0.95 or the amount necessary for the hourly cash wage to equal 70 percent of the wage in effect under section 2 of the Executive Order;

(iii) For each subsequent year, 70 percent of the wage in effect under section 2 of the Executive Order for such year rounded to the nearest multiple of $0.05; and

(2) An additional amount on account of the tips received by such employee (tip credit) which amount is equal to the difference between the hourly cash wage in paragraph (a)(1) of this section and the wage in effect under section 2 of the Executive Order. Where tipped employees

do not receive a sufficient amount of tips in the workweek to equal the amount of the tip credit, the employer must increase the cash wage paid for the workweek under paragraph (a)(1) of this section so that the amount of the cash wage paid and the tips received by the employee equal the minimum wage under section 2 of the Executive Order.

(3) An employer may pay a higher cash wage than required by paragraph (a)(1) of this section and take a lower tip credit but may not pay a lower cash wage than required by paragraph (a)(1) of this section and take a greater tip credit. In order for the employer to claim a tip credit, the employer must demonstrate that the worker received at least the amount of the credit claimed in actual tips. If the worker received less than the claimed tip credit amount in tips during the workweek, the employer is required to pay the balance on the regular payday so that the worker receives the wage in effect under section 2 of the Executive Order with the defined combination of wages and tips.

(4) If the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 et seq., or any other applicable law or regulation is higher than the wage required by section 2 of the Executive Order, the employer shall pay additional cash wages equal to the difference between the wage in effect under section 2 of the Executive Order and the highest wage required to be paid.

(b) Tipped employees. (1) In general, a covered worker employed in an occupation in which he or she receives tips is a "tipped employee" when he or she customarily and regularly receives more than $30 a month in tips. Only tips actually retained by the employee after any tip pooling may be counted in determining whether the person is a "tipped employee" and in applying the provisions of section 3 of the Executive Order. An employee may be a "tipped employee" regardless of whether the employee is employed full time or part time so long as the

employee customarily and regularly receives more than $30 a month in tips. An employee who does not receive more than $30 a month in tips customarily and regularly is not a tipped employee for purposes of the Executive Order and must receive the full minimum wage in section 2 of the Executive Order without any credit for tips received under the provisions of section 3.

(2) Dual Jobs. In some situations an employee is employed in a tipped occupation and a non-tipped occupation (dual jobs), as for example, where a maintenance person in a hotel also works as a server. In such a situation if the employee customarily and regularly receives at least $30 a month in tips for the work as a server, the employee is a tipped employee only when working as a server. The tip credit can only be taken for the hours spent in the tipped occupation and no tip credit can be taken for the hours of employment in the non-tipped occupation. Such a situation is distinguishable from that of a tipped employee performing incidental duties that are related to the tipped occupation but that are not directed toward producing tips, for example when a server spends part of his or her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. Related duties may not comprise more than 20 percent of the hours worked in the tipped occupation in a workweek.

(c) Characteristics of tips. A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a fixed charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. Tips are the property of the employee whether or not the employer has taken a tip credit. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than as a credit against its minimum wage obligations under the Executive Order to the employee, or in furtherance of a valid tip

pool. An employer and employee cannot agree to waive the worker's right to retain his or her tips. Customers may present cash tips directly to the employee or may designate a tip amount to be added to their bill when paying with a credit card or by other electronic means. Special gifts in forms other than money or its equivalent such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of determining wages paid under the Executive Order.

(d) Service charges. (1) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its workers, cannot be counted as a tip for purposes of determining if the worker is a tipped employee. Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to workers of the hotel, the amounts so distributed are not tips.

(2) As stated above, service charges and other similar sums are considered to be part of the employer's gross receipts and are not tips for the purposes of the Executive Order. Where such sums are distributed by the employer to its workers, however, they may be used in their entirety to satisfy the wage payment requirements of the Executive Order.

(e) Tip pooling. Where tipped employees share tips through a tip pool, only the amounts retained by the tipped employees after any redistribution through a tip pool are considered tips in applying the provisions of FLSA section 3(t) and the wage payment provisions of section 3 of the Executive Order. There is no maximum contribution percentage on valid mandatory tip pools, which can only include tipped employees. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the

amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

(f) Notice. An employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit. The employer must inform the tipped employee of the amount of the cash wage that is to be paid by the employer, which cannot be lower than the cash wage required by paragraph (a)(1) of this section; the additional amount by which the wages of the tipped employee will be considered increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to tipped employees; and that the tip credit shall not apply to any worker who has not been informed of these requirements in this section.

Subpart D—Enforcement.

§10.41 Complaints.

(a) Any worker, contractor, labor organization, trade organization, contracting agency, or other person or entity that believes a violation of the Executive Order or this part has occurred may file a complaint with any office of the Wage and Hour Division. No particular form of complaint is required. A complaint may be filed orally or in writing. If the complainant is unable to file the complaint in English, the Wage and Hour Division will accept the complaint in any language.

(b) It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of

any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. Disclosure of such statements shall be governed by the provisions of the Freedom of Information Act (5 U.S.C. 552, see 29 CFR part 70) and the Privacy Act of 1974 (5 U.S.C. 552a).

§ 10.42 Wage and Hour Division conciliation.

After receipt of a complaint, the Administrator may seek to resolve the matter through conciliation.

§ 10.43 Wage and Hour Division investigation.

The Administrator may investigate possible violations of the Executive Order or this part either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator may conduct interviews with the relevant contractor, as well as the contractor's workers at the worksite during normal work hours; inspect the relevant contractor's records (including contract documents and payrolls, if applicable); make copies and transcriptions of such records; and require the production of any documentary or other evidence the Administrator deems necessary to determine whether a violation, including conduct warranting imposition of debarment, has occurred. Federal agencies and contractors shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all aspects of investigations.

§10.44 Remedies and sanctions.

(a) Unpaid wages. When the Administrator determines a contractor has failed to pay the applicable Executive Order minimum wage to workers, the Administrator will notify the

contractor and the applicable contracting agency of the unpaid wage violation and request the contractor to remedy the violation. If the contractor does not remedy the violation of the Executive Order or this part, the Administrator shall direct the contractor to pay all unpaid wages to the affected workers in the investigative findings letter it issues pursuant to § 10.51. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Government be withheld as necessary to pay unpaid wages. Upon the final order of the Secretary that unpaid wages are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(b) Antiretaliation. When the Administrator determines that any person has discharged or in any other manner retaliated against any worker because such worker filed any complaint or instituted or caused to be instituted any proceeding under or related to the Executive Order or this part, or because such worker testified or is about to testify in any such proceeding, the Administrator may provide for any relief to the worker as may be appropriate, including employment, reinstatement, promotion, and the payment of lost wages.

(c) Debarment. Whenever a contractor is found by the Secretary of Labor to have disregarded its obligations under the Executive Order, or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, shall be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to three years from the date of publication of the name of the contractor or responsible officer on the ineligible list. Neither an order for debarment of any contractor or its responsible officers from further Government contracts nor the inclusion of a contractor or its responsible officers on a published list of

noncomplying contractors under this section shall be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge.

(d) Civil action to recover greater underpayments than those withheld. If the payments withheld under § 10.11(c) are insufficient to reimburse all workers' lost wages, or if there are no payments to withhold, the Department, following a final order of the Secretary, may bring action against the contractor in any court of competent jurisdiction to recover the remaining amount of underpayments. The Department shall, to the extent possible, pay any sums it recovers in this manner directly to the underpaid workers. Any sum not paid to a worker because of inability to do so within three years shall be transferred into the Treasury of the United States as miscellaneous receipts.

(e) Retroactive inclusion of contract clause. If a contracting agency fails to include the applicable contract clause in a contract to which the Executive Order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed.

Subpart E—Administrative Proceedings

§ 10.51 Disputes concerning contractor compliance.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning a contractor's compliance with subpart C of this part. The procedures in this section may be initiated upon the Administrator's own motion or upon request of the contractor.

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor(s) and the prime contractor (if different) of the investigative findings by certified mail to the last known address.

(2) A contractor desiring a hearing concerning the Administrator's investigative findings letter shall request such a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. The request shall set forth those findings which are in dispute with respect to the violations and/or debarment, as appropriate, and explain how the findings are in dispute, including by making reference to any affirmative defenses.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation to an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 10.52, the Administrator shall notify the contractor(s) of the investigation findings by certified mail to the last known address, and shall issue a ruling in the investigative findings letter on any issues of law known to be in dispute.

(2)(i) If the contractor disagrees with the factual findings of the Administrator or believes that there are relevant facts in dispute, the contractor shall so advise the Administrator by letter postmarked within 30 calendar days of the date of the Administrator's letter. In the response, the

contractor shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a response under paragraph (c)(2)(i) of this section alleging the existence of a factual dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor accordingly.

(3) If the contractor desires review of the ruling issued by the Administrator under paragraph (c)(1) or (c)(2)(ii) of this section, the contractor shall file a petition for review thereof with the Administrative Review Board postmarked within 30 calendar days of the date of the ruling, with a copy thereof to the Administrator. The petition for review shall be filed in accordance with the procedures set forth in 29 CFR part 7.

(d) If a timely response to the Administrator's investigative findings letter is not made or a timely petition for review is not filed, the Administrator's investigative findings letter shall become the final order of the Secretary. If a timely response or petition for review is filed, the Administrator's letter shall be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Administrative Review Board, or otherwise becomes a final order of the Secretary.

§ 10.52 Debarment proceedings.

(a) Whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to workers or subcontractors under Executive Order 13658 or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in

which such contractor or responsible officers have an interest, shall be ineligible for a period of up to 3 years to receive any contracts or subcontracts subject to Executive Order 13658 from the date of publication of the name or names of the contractor or persons on the ineligible list.

(b)(1) Whenever the Administrator finds reasonable cause to believe that a contractor has committed a violation of Executive Order 13658 or this part which constitutes a disregard of its obligations to workers or subcontractors, the Administrator shall notify by certified mail to the last known address, the contractor and its responsible officers (and any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest), of the finding. The Administrator shall afford such contractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under Executive Order 13658 or this part. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter to the Administrator postmarked within 30 calendar days of the date of the investigative findings letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute.

(2) Hearings under this section shall be conducted in accordance with the procedures set forth in 29 CFR part 6. If no hearing is requested within 30 calendar days of the letter from the Administrator, the Administrator's findings shall become the final order of the Secretary.

§ 10.53 Referral to Chief Administrative Law Judge; amendment of pleadings.

(a) Upon receipt of a timely request for a hearing under § 10.51 (where the Administrator has determined that relevant facts are in dispute) or § 10.52 (debarment), the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the respondent. The investigative findings letter from the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceedings.

(b) At any time prior to the closing of the hearing record, the complaint (investigative findings letter) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as he/she may approve. For proceedings pursuant to § 10.51, such an amendment may include a statement that debarment action is warranted under § 10.52. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The presiding Administrative Law Judge may, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are

relevant to any of the issues involved. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 10.54 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the Administrative Law Judge's discretion prior to the issuance of the Administrative Law Judge's decision, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the Administrator's findings letter and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and the Administrative Review Board regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 10.55 Proceedings of the Administrative Law Judge.

(a) The Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's investigative findings letters issued under §§ 10.51 and 10.52. Any party may, when requesting an appeal or during the pendency of a proceeding on appeal, timely move an Administrative Law Judge to consolidate a proceeding initiated hereunder with a proceeding initiated under the Service Contract Act or the Davis-Bacon Act.

(b) Proposed findings of fact, conclusions, and order. Within 20 calendar days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals. Each party shall serve such proposals and brief on all other parties.

(c) Decision. (1) Within a reasonable period of time after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 calendar days of receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall issue a decision. The decision shall contain appropriate findings, conclusions, and an order, and be served upon all parties to the proceeding.

(2) If the respondent is found to have violated Executive Order 13658 or this part, and if the Administrator requested debarment, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the ineligible list, including any findings that the contractor disregarded its obligations to workers or subcontractors under the Executive Order or this part.

(d) Limit on Scope of Review. The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, Administrative Law Judges shall have no

authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(e) Orders. If the Administrative Law Judge concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, monetary relief for unpaid wages. Where the Administrator has sought imposition of debarment, the Administrative Law Judge shall determine whether an order imposing debarment is appropriate.

(f) Finality. The Administrative Law Judge's decision shall become the final order of the Secretary, unless a timely petition for review is filed with the Administrative Review Board.

§ 10.56 Petition for review.

(a) Within 30 calendar days after the date of the decision of the Administrative Law Judge (or such additional time as is granted by the Administrative Review Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on debarment shall also state the disregard of obligations to workers and/or subcontractors, or lack thereof, as appropriate. A party must serve the petition for review, and all briefs, on all parties and the Chief Administrative Law Judge. It must also timely serve copies of the petition and all briefs on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(b) Effect of filing. If a party files a timely petition for review, the Administrative Law Judge's decision shall be inoperative unless and until the Administrative Review Board issues an

order affirming the letter or decision, or the letter or decision otherwise becomes a final order of the Secretary. If a petition for review concerns only the imposition of debarment, however, the remainder of the decision shall be effective immediately. No judicial review shall be available unless a timely petition for review to the Administrative Review Board is first filed.

§ 10.57 Administrative Review Board proceedings.

(a) Authority. (1) General. The Administrative Review Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from investigative findings letters of the Administrator issued under § 10.51(c)(1) or (c)(2), Administrator's rulings issued under § 10.58, and decisions of Administrative Law Judges issued under § 10.55. In considering the matters within the scope of its jurisdiction, the Administrative Review Board shall act as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary concerning such matters.

(2) Limit on scope of review. (i) The Board shall not have jurisdiction to pass on the validity of any provision of this part. The Board is an appellate body and shall decide cases properly before it on the basis of substantial evidence contained in the entire record before it. The Board shall not receive new evidence into the record.

(ii) The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, the Administrative Review Board shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(b) Decisions. The Board's final decision shall be issued within a reasonable period of time following receipt of the petition for review and shall be served upon all parties by mail to

the last known address and on the Chief Administrative Law Judge (in cases involving an appeal from an Administrative Law Judge's decision).

(c) Orders. If the Board concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, monetary relief for unpaid wages. Where the Administrator has sought imposition of debarment, the Board shall determine whether an order imposing debarment is appropriate.

(d) Finality. The decision of the Administrative Review Board shall become the final order of the Secretary.

§ 10.58 Administrator ruling.

(a) Questions regarding the application and interpretation of the rules contained in this part may be referred to the Administrator, who shall issue an appropriate ruling. Requests for such rulings should be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210.

(b) Any interested party may appeal to the Administrative Review Board for review of a final ruling of the Administrator issued under paragraph (a) of this section. The petition for review shall be filed with the Administrative Review Board within 30 calendar days of the date of the ruling.

Appendix A to Part 10

For all contracts subject to Executive Order 13658, except for procurement contracts subject to the Federal Acquisition Regulation (FAR), the following clause shall be included by the contracting agency in every contract, contract-like instrument, and solicitation to which Executive Order 13658 applies:

(a) Executive Order 13658. This contract is subject to Executive Order 13658, the regulations issued by the Secretary of Labor in this part pursuant to the Executive Order, and the following provisions.

(b) Minimum Wages. (1) Each worker (as defined in §10.2) employed in the performance of this contract by the prime contractor or any subcontractor, regardless of any contractual relationship which may be alleged to exist between the contractor and worker, shall be paid not less than the applicable minimum wage under Executive Order 13658.

(2) The minimum wage required to be paid to each worker performing work on or in connection with this contract between January 1, 2015 and December 31, 2015 shall be $10.10 per hour through December 31, 2015. The minimum wage shall be adjusted each time the Secretary of Labor's annual determination of the applicable minimum wage under section 2(a)(ii) of Executive Order 13658 results in a higher minimum wage. Adjustments to the Executive Order minimum wage under section 2(a)(ii) of Executive Order 13658 will be effective for all workers subject to the Executive Order beginning January 1 of the following year. The Secretary of Labor will publish annual determinations in the Federal Register no later than 90 days before such new wage is to take effect. The Secretary will also publish the applicable minimum wage on www.wdol.gov (or any successor website). The applicable published minimum wage is incorporated by reference into this contract.

(3) The contractor shall pay unconditionally to each worker all wages due free and clear and without subsequent deduction (except as otherwise provided by §10.23), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Executive Order may not be of any duration longer than semi-monthly.

(4) In the event of any violation of the minimum wage obligation of this clause, the contractor and any subcontractor(s) responsible therefore shall be liable for the unpaid wages.

(c) Withholding. The agency head shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the prime contractor under this or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by Executive Order 13658.

(d) Contract Suspension/Contract Termination/Contractor Debarment. In the event of a failure to pay any worker all or part of the wages due under Executive Order 13658 or this part, or a failure to comply with any other term or condition of Executive Order 13658 or this part, the contracting agency may on its own action or after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in §10.52.

(e) The contractor may not discharge any part of its minimum wage obligation under Executive Order 13658 by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, the cash equivalent thereof.

(f) Nothing herein shall relieve the contractor of any other obligation under Federal, State or local law, or under contract, for the payment of a higher wage to any worker.

(g) Payroll Records. (1) The contractor shall make and maintain for 3 years records containing the information specified in paragraphs (g)(1) (i) through (iv) of this section for each worker and shall make the records available for inspection and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(i) Name, address, and social security number.

(ii) The rate or rates of wages paid.

(iii) The number of daily and weekly hours worked by each worker.

(iv) Any deductions made.

(2) The contractor shall also make available a copy of the contract, as applicable, for inspection or transcription by authorized representatives of the Wage and Hour Division.

(3) Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of this part and this contract, and in the case of failure to produce such records, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, shall take such action as may be necessary to cause suspension of any further payment or advance of funds until such time as the violations are discontinued.

(4) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct investigations, including interviewing workers at the worksite during normal working hours.

(5) Nothing in this clause limits or otherwise modifies the contractor's payroll and recordkeeping obligations, if any, under the Davis-Bacon Act, as amended, and its implementing regulations; the Service Contract Act, as amended, and its implementing regulations; the Fair Labor Standards Act, as amended, and its implementing regulations; or any other applicable law.

(h) The contractor (as defined in §10.2) shall insert this clause in all of its subcontracts and shall require its subcontractors to include this clause in any lower-tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with this contract clause.

(i) Certification of Eligibility. (1) By entering into this contract, the contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Service Contract Act, section 3(a) of the Davis-Bacon Act, or 29 CFR 5.12(a)(1).

(2) No part of this contract shall be subcontracted to any person or firm whose name appears on the list of persons or firms ineligible to receive Federal contracts.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(j) Tipped employees. In paying wages to a tipped employee as defined in section 3(t) of the Fair Labor Standards Act, 29 U.S.C. 203(t), the contractor may take a partial credit against the wage payment obligation (tip credit) to the extent permitted under section 3(a) of Executive Order 13658. In order to take such a tip credit, the employee must receive an amount of tips at least equal to the amount of the credit taken; where the tipped employee does not receive sufficient tips to equal the amount of the tip credit the contractor must increase the cash wage paid for the workweek so that the amount of cash wage paid and the tips received by the employee equal the applicable minimum wage under Executive Order 13658. To utilize this proviso:

(1) The employer must inform the tipped employee in advance of the use of the tip credit;

(2) The employer must inform the tipped employee of the amount of cash wage that will be paid and the additional amount by which the employee's wages will be considered increased on account of the tip credit;

(3) The employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received); and

(4) The employer must be able to show by records that the tipped employee receives at least the applicable Executive Order minimum wage through the combination of direct wages and tip credit.

(k) Antiretaliation. It shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or has testified or is about to testify in any such proceeding.

(l) Disputes concerning labor standards. Disputes related to the application of Executive Order 13658 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in this part. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the workers or their representatives.

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