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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 10, 516, 531, 578, 579, and 580

RIN 1235-AA21

Tip Regulations under the Fair Labor Standards Act (FLSA)

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking; withdrawal of proposed rulemaking; request for comments.

SUMMARY: In the Consolidated Appropriations Act, 2018 (CAA), Congress amended section 3(m) of the Fair Labor Standards Act (FLSA) to prohibit employers from keeping tips received by their employees, regardless of whether the employers take a tip credit under section 3(m). In this Notice of Proposed Rulemaking (NPRM), the Department proposes to amend its tip regulations to address this Congressional action. The Department also proposes to codify policy regarding the tip credit's application to employees who performed tipped and non-tipped duties. This NPRM also withdraws the Department's December 5, 2017 NPRM proposing changes to the Department's tip regulations, as the CAA has superseded it.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION].

The proposed rule Tip Regulations under the Fair Labor Standards Act, published December 5, 2017 at 82 FR 57395, is withdrawn as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To facilitate the receipt and processing of written comments on this NPRM, the Department encourages interested persons to submit their comments electronically. You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA21, by either of the following methods:

Electronic Comments: Follow the instructions for submitting comments on the Federal eRulemaking Portal <http://www.regulations.gov>.

Mail: Address written submissions to Amy DeBisschop, Acting Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210.

Instructions: This NPRM is available through the Federal Register and the <http://www.regulations.gov> website. You may also access this document via the Wage and Hour Division's (WHD) website at <http://www.dol.gov/whd/>. All comment submissions must include the agency name and Regulatory Information Number (RIN 1235-AA21) for this NPRM. Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Submit only one copy of your comment by only one method (*e.g.*, persons submitting comments electronically are encouraged not to submit paper copies). Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a

matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this NPRM; comments received after the comment period closes will not be considered. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period. Electronic submission via <http://www.regulations.gov> enables prompt receipt of comments submitted as the Department continues to experience delays in the receipt of mail in our area. 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: Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693-0406 (this is not a toll-free number). Copies of this NPRM 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 (877) 889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's existing 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 WHD's website at <http://www.dol.gov/whd/america2.htm> for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The FLSA generally requires covered employers to pay employees at least a Federal minimum wage, which is currently \$7.25 per hour. *See* 29 U.S.C. 206(a)(1). Section 3(m) of the FLSA allows an employer that meets certain requirements to count a limited amount of the tips its “tipped employees” receive as a credit toward its Federal minimum wage obligation (known as a “tip credit”). *See* 29 U.S.C. 203(m)(2)(A). An employer may take a tip credit only for “tipped employees”, and only if, among other things, its tipped employees retain all their tips. *Id.* This requirement, however, does not preclude an employer that takes a tip credit from implementing a tip pool in which tips are shared only among those employees who “customarily and regularly receive tips.” *Id.*

In 2011, the Department revised its tip regulations to reflect its view at the time that the FLSA required that tipped employees retain all tips received by them, except for tips distributed through a tip pool limited to employees who customarily and regularly receive tips, regardless of whether their employer takes a tip credit. *See, e.g.,* 29 CFR 531.52. On December 5, 2017, the Department published an NPRM, 82 FR 57,395, which proposed to rescind the parts of its tip regulations that applied to employers that pay a direct cash wage of at least the full Federal minimum wage and do not take a tip credit.

On March 23, 2018, Congress amended section 3(m) of the FLSA in the CAA, Pub. L. No. 115-141, Div. S., Tit. XII, § 1201, 132 Stat. 348, 1148-49 (2018). Among other things, the CAA revised section 3(m) by renumbering the existing tip credit provision as section 3(m)(2)(A). Significantly, the CAA added a new section 3(m)(2)(B), which prohibits employers, whether or not they take a tip credit, from keeping their employees’

tips “for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips.” The CAA amended sections 16(b) and 16(c) of the FLSA to permit private parties and the Department to recover any tips unlawfully kept by an employer in violation of section 3(m)(2)(B), in addition to an equal amount of liquidated damages. The CAA also amended section 16(e) of the FLSA to provide the Department discretion to impose civil money penalties (CMPs) up to \$1,100 when employers unlawfully keep employee’s tips.

Congress specified in the CAA that the portions of the 2011 final rule that “are not addressed by section 3(m) . . . (as such section was in effect on April 5, 2011), shall have no further force or effect until any future action taken by [the Department of Labor].” As the Department explained in a Field Assistance Bulletin (FAB) published shortly thereafter, that statement applies to those portions of the Department’s regulations at §§ 531.52, 531.54, and 531.59 that restricted tip pooling when employers pay tipped employees a direct cash wage of at least the full FLSA minimum wage and do not claim a tip credit. FAB No. 2018-3 (Apr. 6, 2018), available at https://www.dol.gov/whd/FieldBulletins/fab2018_3.pdf.

Because the Congressional amendments to the FLSA directly impacted the subject of the Department’s 2017 NPRM, this document withdraws that proposal. This document also explains the impact of the 2018 CAA amendments on the Department’s current tip pooling regulations. The CAA did not change the existing rules that apply to employers that take a tip credit, now in section 3(m)(2)(A) of the FLSA, which provide that such employers may institute a mandatory, “traditional” tip pool that is limited to employees who “customarily and regularly” receive tips. But the CAA did eliminate the regulatory

restrictions on an employer's ability to require tip pooling when it does not take a tip credit: such employers may now implement mandatory, "nontraditional" tip pools in which employees who do not customarily and regularly receive tips, such as cooks and dishwashers, may participate.

The CAA also created a new statutory provision, 3(m)(2)(B), which applies to all employers regardless of whether they take a tip credit, and provides that employers may not keep employees' tips and may not allow managers or supervisors to keep employees' tips. Among other things, this new statutory provision prohibits employers, managers, and supervisors from receiving employees' tips from any tip pooling arrangement. As explained further herein, section 3(m)(2)(B) also prohibits employers from operating tip pools in a manner such that they "keep" tips.

The Department is proposing to update its tip regulations to incorporate the CAA's amendments to the FLSA. Although the CAA renumbered the FLSA's existing tip credit provision as section 3(m)(2)(A), it did not substantively change that provision. Therefore, this rulemaking does not address the Department's existing regulations and guidance implementing 3(m)(2)(A) that apply to employers that take a tip credit unless it is necessary to clarify how those provisions relate to the statutory amendment. The Department is proposing to incorporate the new statutory provision, section 3(m)(2)(B)—which applies regardless of whether the employer takes a tip credit—into its existing regulations and is proposing to incorporate a new recordkeeping provision to assist the Department with its administration of that provision. The Department is additionally proposing, consistent with Congressional action, to remove the portions of its regulations that prohibited employers that pay their tipped employees a direct cash wage of at least

the full Federal minimum wage and do not take a tip credit against their minimum wage obligations from including employees who do not customarily and regularly receive tips, such as cooks and dishwashers, in mandatory tip pooling arrangements. The Department is also proposing to amend its tip regulations to reflect recent guidance explaining that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. The proposed regulation would also address which non-tipped duties are related to a tip-producing occupation.

The Department is also proposing to incorporate the FLSA's new CMP provision into its existing regulations. Since the Department is proposing to revise its CMP regulations to reflect the statutory amendments, the Department also proposes to revise portions of its CMP regulations to address courts of appeals' decisions that have raised concerns that some of the regulations' statements regarding willful violations are inconsistent with Supreme Court authority and how the Department actually litigates willfulness.

Finally, the Department is proposing to amend the provisions of its regulations that address the payment of tipped employees under Executive Order 13658 (Establishing a Minimum Wage for Contractors) to reflect the rescissions proposed in the FLSA regulations for tipped employees, to incorporate the Department's guidance on when an employee performing non-tipped work is a tipped employee, and to otherwise align those regulations with the authority provided in the Executive Order.

The Department estimates the rule updating WHD's regulations to reflect the CAA amendments, if finalized as proposed, could result in a potential transfer of \$107 million,

as tip pools are expanded to share tips among both front-of-the-house and back-of-the-house employees. The directly-observable transfer would only occur among employees because section 3(m)(2)(B) prohibits employers from participating in these tip pools or otherwise keeping employee's tips. However, because back-of-the-house workers may now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay back-of-the-house workers (as long as they do not reduce their wage below the applicable minimum wage). This could allow employers to capture some of the transfer. The Department estimates that regulatory familiarization costs associated with this proposed rule would be \$3.86 million in the first year. For purposes of Executive Order 13771, it is expected that this proposed rule would, if finalized as proposed, qualify as a deregulatory action.

II. Background

A. Section 3(m)

As explained above, the FLSA generally requires covered employers to pay employees at least the Federal minimum wage, which is currently \$7.25 per hour. Section 3(m) (now 3(m)(2)(A)) of the FLSA, however, permits an employer to count a limited amount of an employee's tips (up to \$5.12 per hour) as a partial credit, called a "tip credit," to satisfy the difference between the direct cash wage paid and the Federal minimum wage. This partial credit is known as a tip credit. An employer may take a tip credit only for a "tipped employee," which section 3(t) of the FLSA defines as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips." In addition, an employer may take a tip credit under section 3(m)(2)(A) only if, among other things, the tipped employees retain all the tips they receive. An employer

taking a tip credit is allowed, however, to implement a mandatory tip pool in which tips are shared only among employees who “customarily and regularly receive tips.”

Section 3(m)(2)(B) of the FLSA, added through the CAA, provides that “an employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips.” *See* Div. S., Tit. XII, § 1201. Importantly, section 3(m)(2)(B) applies regardless of whether an employer takes a tip credit.

B. Statutory and Regulatory History

i. 1966 and 1974 Amendments to the FLSA¹

Congress created the FLSA’s tip credit provision within the definition of “wages” in section 3(m) in 1966. *See* Pub. L. No. 89-601, § 101(a), 80 Stat. 830 (1966). In 1974, Congress amended section 3(m) to provide that an employer could not credit tips received by its employees toward its Federal minimum wage obligation unless, among other things:

all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Pub. L. No. 93-259, § 13(e), 88 Stat. 55 (1974). As a result of the amendment, an employer that takes a tip credit can require a tipped employee to share tips with other employees in occupations in which they customarily and regularly receive tips, but it

¹ Congress amended section 3(m)’s tip credit provision three times between 1974 and 2018, in 1977, 1989, and 1996. These amendments changed only the applicable amount of tips received by employees that could be used as a credit against an employer’s minimum wage obligations. *See* Pub. L. No. 95-151, § 3(b), 91 Stat. 1245 (1977); Pub. L. No. 101-157, § 5, 103 Stat. 938 (1989); Pub. L. No. 104-188, § 2105(b), 110 Stat. 1755 (1996).

cannot use employees' tips for any other purpose or require tipped employees to share them with employees who do not customarily and regularly receive tips. As the text of the statute makes plain, Congress only intended to regulate employers who take a tip credit, stating that those employers cannot take employees' tips except to pool them among employees who customarily and regularly receive them. The text contains no indication that Congress intended to regulate employers who do not take a tip credit and who use tip pools for other purposes, such as by sharing tips with "back of the house" employees like cooks and dishwashers.

The Department promulgated its initial tip regulations in 1967, one year after Congress created the tip credit. *See* 32 FR 13,575 (Sept. 28, 1967). Consistent with the Department's understanding of the 1966 amendments, the 1967 tip regulations permitted agreements under which tips received by employees would be transferred to the employer. Immediately after the 1974 amendments, the Department's WHD stated in a number of opinion letters that its 1967 regulations were superseded to the extent they conflicted with those amendments. *See, e.g.,* WHD Opinion Letter WH-310, 1975 WL 40934 (Feb. 18, 1974), at *1.

In 2010, the Ninth Circuit analyzed section 3(m) and observed that "nothing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken." *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 583 (9th Cir. 2010). The Ninth Circuit reasoned that section 3(m)'s "plain text" merely "imposes *conditions* on taking a tip credit and does not state freestanding *requirements* pertaining to all tipped employees." *Id.* at 580–81. The contrary position, the court concluded, would render Section 203(m)'s "reference to the tip credit, as well as its conditional language and structure, superfluous."

Id. at 581. The court thus held that the employer, which did not take a tip credit, did not violate section 203(m) by requiring its tipped employees to contribute to a tip pool that included employees who were not customarily and regularly tipped. *See id.*

ii. 2011 Regulations

In 2011, however, the Department revised its 1967 tip regulations to reflect its view of the 1974 amendments to the FLSA. *See* 76 FR 18,832, 18,854–56 (Apr. 5, 2011).

Notwithstanding the *Cumbie* decision, the 2011 regulations prohibited employers from, among other things, establishing mandatory tip pools that include employees who are not customarily and regularly tipped—regardless of whether employers took a tip credit. *See* 29 CFR 531.52 (2011) (“The employer is prohibited from using an employee’s tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.”); *see also* § 531.54 (providing that “an employer . . . may not retain any of the employees’ tips”); § 531.59 (“With the exception of tips contributed to a valid tip pool as described in § 531.54, the tip credit provisions of section 3(m) also require employers to permit employees to retain all tips received by the employee.”). The Department acknowledged that section 3(m) did not expressly address the use of an employee’s tips when an employer does not take a tip credit and pays a direct cash wage equal to or greater than the Federal minimum wage, but stated that the regulation would fill a “gap” that the Department then believed to exist in the statutory scheme. 76 FR at 18,841–42.

Multiple lawsuits have involved challenges to the Department’s authority under section 3(m) to regulate employers that pay a direct cash wage of at least the Federal minimum

wage. The parties challenging the validity of the 2011 regulations argued, and courts ruling in favor of such parties have held, that the text of section 3(m) reflected Congress' intent to impose conditions only on employers that take a tip credit. *See, e.g., Trinidad v. Pret A Manger (USA) Ltd.*, 962 F. Supp. 2d 545, 562 (S.D.N.Y. 2013) (“Although the Court need not resolve this issue definitively . . . [it] finds Pret’s argument more persuasive: The DOL regulations are contrary to the plain language of § 203(m).”).

On February 23, 2016, a divided Ninth Circuit panel upheld the validity of the 2011 regulations. *See Oregon Rest. & Lodging Ass’n (ORLA) v. Perez*, 816 F.3d 1080, 1090 (9th Cir. 2016). Although the Ninth Circuit declined *en banc* review of the decision, ten judges dissented on the ground that the FLSA authorized the Department to address tip pooling and tip retention only when an employer takes a tip credit. *See ORLA*, 843 F.3d 355, 356 (9th Cir. 2016) (O’Scannlain, J., dissenting from denial of reh’g en banc). The dissent noted the Ninth Circuit’s decision in *Cumbie* that the FLSA “clearly and unambiguously permits employers who forgo a tip credit to arrange their tip-pooling affairs however they see fit.” *Id.* at 358 (citing *Cumbie*, 596 F.3d at 579 n.6, 581, 581 n.11, 582, 583). The dissent therefore concluded that “because the Department has not been delegated authority to ban tip pooling by employers who forgo the tip credit, the Department’s assertion of regulatory jurisdiction is manifestly contrary to the statute and exceeds its statutory authority.” *Id.* at 363 (internal quotation marks omitted). On January 19, 2017, the National Restaurant Association, on behalf of itself and other *ORLA* plaintiffs, sought Supreme Court review. *See Pet’n for Writ of Cert., ORLA sub nom. Nat’l Rest. Ass’n v. U.S. DOL*, (Jan. 19, 2017) (No. 16-920).

On June 30, 2017, the Tenth Circuit ruled that the Department’s 2011 tip regulations were invalid to the extent they barred an employer from using or sharing tips with employees who do not customarily and regularly receive tips when the employer pays a direct cash wage of at least the Federal minimum wage and does not take a section 3(m) tip credit. *See Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1159 (10th Cir. 2017). The Tenth Circuit held that the text of the FLSA limits an employer’s use of tips only when the employer takes a tip credit, “leaving [the Department] without authority to regulate to the contrary.” *See Marlow*, 861 F.3d at 1163–64.

On July 20, 2017, the Department adopted a nationwide “nonenforcement policy” under which the Department would “not enforce” the 2011 regulations in any context in which an employer pays its employees a direct cash wage of at least the Federal minimum wage. *See* 82 FR 57395, 57399 (Dec. 5, 2017).

On May 22, 2018, the government responded to the petition for certiorari in *ORLA*, then captioned as *Nat’l Rest. Ass’n (NRA) et al. v. Dept. of Labor et al.*, explaining that the Department had reconsidered its defense of the 2011 regulations in light of the ten-judge dissent from denial of rehearing in *ORLA* and the Tenth Circuit’s decision in *Marlow*, and that it believed that it had exceeded its statutory authority in promulgating the 2011 regulations as they apply to employers that do not take a tip credit against their Federal minimum wage obligations. The government explained that “until the 2018 [congressional] amendments, Section 203(m) placed limits only on employers that took a tip credit,” and that “[n]either Section 203(m) nor any other provision of the FLSA prevents an employer that pays at least the minimum wage from instituting a nontraditional tip pool [that includes back-of-the-house employees like cooks and

janitors] for employees' tips." Br. for the Respondents at 26–27, *NRA* (No. 16-920). On June 25, 2018, the Supreme Court denied the petition for certiorari.

iii. 2017 Notice of Proposed Rulemaking

On December 5, 2017, the Department published an NPRM proposing to rescind the portions of its 2011 tip regulations that imposed restrictions on employers that pay a direct cash wage of at least the full Federal minimum wage and do not take a tip credit against their minimum wage obligations. *See* 82 FR 57395 (Dec. 5, 2017). The Department issued the 2017 NPRM in part because of its concerns, in light of the *ORLA* rehearing dissent and the Tenth Circuit's decision in *Marlow*, that it had misconstrued the statute when it promulgated the 2011 regulations. 82 FR 57399. The Department stated that where "an employer has paid a direct cash wage of at least the full Federal minimum wage and does not take the employee tips directly, a strong argument exists that the statutory protections of section 3(m) do not apply." 82 FR 57402. The Department also proposed allowing these employers to establish tip pools that include employees who contribute to the customers' experience but do not customarily and regularly receive tips—such as dishwashers or cooks. *See, e.g.*, 82 FR 57399.

A number of commenters on the NPRM supported allowing employers to establish these tip pools. Several commenters pointed out that these workers contribute to each customer's overall service, which directly affects the size of the customer's tip. Many commenters, however, expressed concern that without regulatory protections in place, an employer would take tips received by employees for its own purposes.

During a hearing on March 6, 2018, before the Subcommittee on Labor, Health and Human Services, and Education of the U.S. House of Representatives Committee on

Appropriations, Secretary of Labor R. Alexander Acosta was asked about the proposed rulemaking. The Secretary explained that the Tenth Circuit had made clear in *Marlow*, in reasoning the Secretary found persuasive, that the Department lacked statutory authority for its 2011 regulations at issue, and that the Secretary had concluded that Congress has not authorized the Department to fully regulate in this space. The Secretary, however, explained that Congress had the authority to implement a solution, and he suggested that Congress enact legislation providing that establishments, whether or not they take a tip credit, may not keep any portion of employees' tips.²

C. The CAA's Amendments to the FLSA

On March 23, 2018, Congress amended the FLSA through the CAA to further address employers' practices with respect to their employees' tips. Public Law 115-141, Div. S., Tit. XII, sec. 1201. The Department issued a FAB that provided guidance concerning WHD enforcement of the CAA amendments on April 6, 2018. *See* FAB No. 2018-3 (Apr. 6, 2018).

i. Amendments to Section 3(m) of the FLSA

The CAA left unchanged the existing text of section 3(m), but recodified it as section 3(m)(2)(A). Thus, the CAA did not alter the FLSA's longstanding requirements that apply to employers that take a tip credit.

The CAA did, however, add new requirements for all employers. The CAA added a new section to the FLSA, 3(m)(2)(B). This provision expressly prohibits employers—

² A recording of the testimony is available at: <https://www.congress.gov/committees/video/house-appropriations/hsap00/6Weo1vfNM1k>.

regardless of whether they take a tip credit under section 3(m)—from keeping tips received by their employees, including by distributing them to managers or supervisors: “An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.” CAA, Div. S, Tit. XII, § 1201(a) (codified as amended at 29 U.S.C. 203(m)(2)(B)); *see* FAB No. 2018-3.

ii. Effect on Regulations

The CAA amendments also expressly addressed the portions of the Department’s 2011 regulations that restricted tip pooling when employers pay tipped employees a direct cash wage of at least the full FLSA minimum wage and do not take a tip credit. CAA, Div. S, Tit. XII, § 1201(c). Section 1201(c) of the CAA provides that the portions of WHD’s regulations at 29 CFR 531.52, 531.54, and 531.59 that were “not addressed by section 3(m) . . . (as such section was in effect on April 5, 2011), shall have no further force or effect until any future action taken by [the Department of Labor].” The Department explained in a FAB that this statutory language had the effect of depriving of any further force or effect the Department’s existing regulations prohibiting employers that pay tipped employees the full Federal minimum wage from including back-of-the-house workers, such as cooks and dishwashers, in a tip pool. *See* FAB No. 2018-3.

iii. Amendments to Section 16 of the FLSA

The CAA also amended section 16(b) of the FLSA, which provides in part that an employee may sue for unpaid minimum wages or overtime compensation. The amendment to this provision states that “[a]ny employer who violates section 3(m)(2)(B) shall be liable to the employee or employees affected in the amount of the sum of any tip

credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages.” CAA, Div. S, Tit. XII, sec. 1201(b)(1).

The amendment thus permits employees to sue for double the sum of any tips illegally kept by their employer and the amount of any tip credit taken by such employer.

Section 16(c) of the FLSA authorizes the Department to enforce the proper payment of unpaid minimum wages and/or unpaid overtime compensation. The CAA amended section 16(c) by adding to the Department’s enforcement authority: “The authority and requirements described in this subsection shall apply with respect to a violation of section 3(m)(2)(B), as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages.” CAA, Div. S, Tit. XII, sec. 1201(b)(2). Accordingly, when an employer unlawfully keeps an employee’s tips in violation of section 3(m)(2)(B), the Department may recover on behalf of the employee the same doubled sum of any tips kept and tip credit taken by the employer.

Section 16(e)(2) provides that any person who repeatedly or willfully violates the minimum wage or overtime provisions of the FLSA shall be subject to a civil money penalty not to exceed \$1,100 for each such violation.³ The CAA amended this section to add: “Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed \$1,100 for each such violation, as the Secretary determines appropriate, in

³ The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 (Pub. L. No. 114-74, sec. 701), requires that inflationary adjustments be made annually in these civil money penalties according to a specified cost-of-living formula.

addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages[.]” CAA, Div. S, Tit. XII, sec. 1201(b)(3). The amendment thus added a new civil money penalty for violations of section 3(m)(2)(B).

III. Withdrawal of the 2017 NPRM

As noted above, on December 5, 2017, the Department published an NPRM which proposed to rescind the parts of its tip regulations that applied to employers that pay a direct cash wage of at least the full Federal minimum wage and do not take a tip credit.

The CAA amendments to the statutory text of the FLSA, which were signed into law on March 23, 2018, directly impacted the subject of the 2017 proposed rulemaking—employers that pay at least the full Federal minimum wage and do not take a tip credit under section 3(m). For that reason, the Department is withdrawing the 2017 NPRM and is addressing the 2018 CAA amendments through this rulemaking.

IV. Section-by-Section Analysis of Proposed Regulatory Revisions

This section describes in detail the Department’s proposed changes to its tip regulations to implement the CAA amendments and address other issues. As discussed above, the CAA amendments deprived of any further force or effect the portions of the Department’s 2011 regulations that restricted tip pooling when employers pay tipped employees a direct cash wage of at least the full FLSA minimum wage and do not take a tip credit, until future action by the WHD Administrator. At the same time, the CAA amendments expressly prohibit employers from keeping tips received by their employees for any purposes, regardless of whether the employer takes a tip credit. Pursuant to section 1201(c) of the CAA amendments and consistent with its position articulated in

the 2017 NPRM, the Department proposes to strike the portions of its current regulations that prohibit employers that pay their tipped employees a direct cash wage at least equal to the Federal minimum wage and do not take a tip credit from establishing mandatory tip pools with employees who do not customarily and regularly receive tips, such as dishwashers and cooks.

The Department also proposes to amend § 531.52 to implement newly added section 3(m)(2)(B), which prohibits employers—regardless of whether they take a tip credit—from keeping employees’ tips for any purposes, including allowing managers and supervisors to keep the tips. The proposed regulation defines an individual who is a manager or supervisor, and therefore may not keep employees’ tips under section 3(m)(2)(B), as an individual who meets the duties test at § 541.100(a)(2)–(4) or § 541.101.

The Department also proposes to amend § 531.54 to reflect the new statutory provision, section 3(m)(2)(B). Proposed § 531.54(b) clarifies that section 3(m)(2)(B)’s prohibition on keeping tips applies regardless of whether the employer takes a tip credit and precludes employers from including themselves, managers, and/or supervisors in employer-mandated tip pools. Proposed § 531.54(b) also explains that although section 3(m)(2)(B) prohibits employers from sharing employees’ tips with supervisors, managers, and employees, an employer may institute a mandatory tip pool that requires employees to share or pool tips with other eligible employees. Proposed § 531.54(b) further provides that any employer that collects tips to facilitate a mandatory tip pool must fully redistribute the tips, no less often than when it pays wages, to avoid “keep[ing]” the tips in violation of section 3(m)(2)(B).

Proposed §§ 531.54(c) and (d) would also set forth the different tip pooling requirements for employers that take a tip credit and for those that do not. Because the CAA did not substantively amend the statutory requirements under 3(m)(2)(A) that apply to employers that take a tip credit, the Department does not propose to change its existing tip pooling requirements in § 531.54 that apply to those employers. Those existing requirements, in relevant part, state that employers can only require tipped employees to contribute tips to a “traditional” tip pool, comprised of employees who customarily and regularly receive tips. In contrast, under the CAA amendments, an employer that chooses not to take a tip credit may require tipped employees to contribute tips to a “nontraditional” pool that includes employees, such as dishwashers and cooks, who are not employed in an occupation in which employees customarily and regularly receive tips. The proposed regulation clarifies that an employer that requires such a tip pool must pay a direct cash wage of at least the full Federal minimum wage to any tipped employee who contributes tips to the pool.

The Department is also proposing to amend § 531.56(e) to reflect recent guidance that an employer may take a tip credit for time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with or a reasonable time immediately before or after performing the tipped duties. The proposed regulation would also address which non-tipped duties are related to a tip-producing occupation.

The Department additionally proposes incorporating into its regulations the CAA amendments that provide for civil money penalties for violations of section 3(m)(2)(B). Since the Department is proposing to revise its regulations to reflect this new CMP provision, which, as proposed, would apply only to repeated and willful violations, the

Department also proposes to revise its existing CMP regulations to address courts of appeals' decisions that have raised concerns that some of the regulations' statements regarding willful violations are inconsistent with Supreme Court authority and how the Department actually litigates willfulness.

Finally, the Department proposes to amend the provisions of § 10.28, which addresses the payment of tipped employees under Executive Order 13658 (Establishing a Minimum Wage for Contractors), to make them consistent with its proposed rescissions to the FLSA regulations, to remove similar restrictions on an employer's use of nontraditional tip pools, to otherwise align those regulations with the authority provided in the Executive Order, and to incorporate the Department's recent guidance on when an employee performing non-tipped work is a tipped employee.

The Department seeks public comment on these proposed regulatory changes. The Department asks commenters to define in their comments any terms they use to describe practices regarding tips. This NPRM uses the term "tip pooling" to describe any scenario in which a tip provided by a customer is shared, in whole or in part, among employees. The Department recognizes, however, that in some workplaces or under state laws, the term "tip pooling" may refer to a narrower set of practices, and that employers and workers may use other terms—for example "tip out," "tip sharing," or "tip jar"—to describe certain practices regarding tips.

A. Rescission of Portions of Sections 531.52, 531.54, and 531.59

As noted above, section 1201(c) of the CAA provides that the portions of the Department's regulations at 29 CFR 531.52, 531.54, and 531.59 that were "not addressed by section 3(m)" "shall have no further force or effect[.]" CAA, Div. S, Tit. XII, sec.

1201(c). This statutory language deprives of any further force or effect the portions of §§ 531.52, 531.54, and 531.59 that impose restrictions on an employer’s use of employees’ tips when the employer does not take a tip credit. As the Department explained in its FAB, under the CAA amendments, employers that do not take a tip credit may now establish mandatory tip pools that include employees who do not customarily and regularly receive tips, such as back-of-the-house workers like cooks and dishwashers. *See* FAB No. 2018-3. Section 1201(c) of the CAA did not impact the portions of §§ 531.52, 531.54, and 531.59 that apply to employers that do take a tip credit.

Consistent with the statutory language, as well as the Department’s statements in the 2017 NPRM,⁴ the Department proposes to rescind the language in § 531.52 that bars employers from establishing mandatory tip pools that include employees who are not customarily and regularly tipped, “whether or not it takes a tip credit,” and to make additional minor clarifying edits; to revise §§ 531.54 to clarify that the restrictions and notice requirements for tip pools apply only to employers that take a tip credit; and to revise § 531.59 to provide that the bar on including employees who are not customarily and regularly tipped in a mandatory tip pool applies only to employers that take a tip credit.

⁴ As explained above, the government’s brief in response to the petition for certiorari in the *NRA* litigation explained that the Department had reconsidered its defense of the 2011 regulations, and that it believed that it had exceeded its statutory authority in promulgating the 2011 regulations as they apply to employers that do not take a tip credit against their Federal minimum wage obligations.

B. Proposed Section 531.52—General Restrictions on an Employer’s Use of Its Employees’ Tips

i. An Employer May Not Keep Tips, Regardless of Whether It Takes a Tip Credit.

Section 3(m)(2)(B) prohibits an employer, regardless of whether it takes a tip credit, from “keeping” tips received by its employees “for any purposes, including allowing managers and supervisors to keep any portion of employees’ tips.” Under the amended statute, an employer does not “keep” employees’ tips in violation of section 3(m)(2)(B) merely by requiring an employee who receives a tip to share it with other eligible employees who also contributed to the service provided to the customer. In those circumstances, the employees, not the employer, keep the tips. Section 3(m)(2)(B), however, prohibits an employer from using its employees’ tips for any other purpose. An employer would “keep” tips, for example, by using tips to cover its own general operating expenses, using tips to pay for capital improvements, or directing the tips to an individual who is not an employee, such as a vendor. This is true for tips provided through a credit card transaction, as well as for cash tips. The Department proposes to amend § 531.52 to include the new statutory language prohibiting an employer from keeping employees’ tips, and to clarify that an employer may exert control over employees’ tips only to distribute tips to the employee who received them, require employees to share tips with other eligible employees, or, where the employer facilitates tip pooling by collecting and redistributing employees’ tips, distribute tips to employees in a tip pool.

The statutory language prohibits an “employer” from “keep[ing] tips received by its employees.” The term “employer” is defined in section 3(d) of the FLSA to mean “any

person [or entity] acting directly or indirectly in the interest of an employer in relation to an employee” Therefore, a person or entity that meets the definition of a section 3(d) employer may not keep or receive tips from a tip pool.

ii. Managers and Supervisors May Not Keep Tips

As explained above, section 3(m)(2)(B) prohibits employers, regardless of whether they take a tip credit, from keeping tips, “including allowing managers or supervisors to keep any portion of employees’ tips.” 29 U.S.C. 203(m)(2)(B). This prohibition applies to managers or supervisors obtaining employees’ tips directly or indirectly, such as via a tip pool. The Department’s current enforcement policy under FAB No. 2018-3 is to use the duties test under the executive employee exemption of FLSA section 13(a)(1), as defined at 29 CFR 541.100(a)(2)–(4), to determine whether an employee is a manager or supervisor for purposes of section 3(m)(2)(B).

Proposed § 531.52 would reflect this policy. Because an employee who satisfies the executive duties test manages and supervises other employees, the test effectively identifies those employees whom Congress sought to preclude from keeping tips. The Department does not propose to use the salary requirements at § 541.100(a)(1) to help determine whether an employee is a manager or supervisor for purposes of section 3(m)(2)(B). Accordingly, this proposal would interpret the terms “manager” and “supervisor” under section 3(m)(2)(b) more broadly—and to encompass more employees—than the term “executive” as used in Section 13(a)(1).

Sections 541.100(a)(2)–(4) provide that a manager or supervisor satisfies the duties test of the executive employee exemption if (1) the employee’s primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the

enterprise (*see* § 541.100(a)(2)); (2) the employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent (*see* § 541.100(a)(3)); and (3) the employee has the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight (*see* § 541.100(a)(4)). In addition, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which she is employed, regardless of the type of business organization (*e.g.*, corporation, partnership, or other), and who is actively engaged in its management, as defined under 29 CFR 541.101, would be considered a manager or supervisor for purposes of section 3(m)(2)(B). The Department believes that these well-established criteria would effectively identify employees who manage or supervise other employees and therefore those whom Congress sought to prevent from keeping other employees' tips. The Department additionally believes that employers can readily use these criteria to determine whether an employee is a manager or supervisor for purposes of section 3(m)(2)(B) because employers are generally familiar with these longstanding regulations. Moreover, the Department's staff is highly trained, and has extensive experience, in applying and enforcing these longstanding regulations.

The Department requests comments regarding whether other criteria may also be appropriate to determine whether an employee is a manager or supervisor for purposes of section 3(m)(2)(B), particularly in the varied situations where tipping is common.

C. Proposed Section 531.54—Tip Pooling

The Department also proposes to amend § 531.54, which generally addresses tip pooling, to reflect the CAA amendments. Proposed § 531.54 incorporates section 3(m)(2)(B)'s prohibition on employers keeping tips, including allowing managers or supervisors to keep employees' tips. This prohibition applies regardless of whether the employer takes a tip credit, and therefore governs any employer that facilitates or operates a mandatory tip pool. Proposed § 531.54 also contains other specific requirements for employers that establish mandatory tip pools, depending on whether they include employees who do not customarily and regularly receive tips.

i. Requirements When an Employer Collects and Redistributes Tips

The Department recognizes that employers operate a variety of tip pooling and tip sharing arrangements and that some employers may wish to pool tips received by one set of employees and redistribute them to another. Section 3(m)(2)(B) does not prohibit an employer from doing so, as long as the employer fully redistributes the tips no less often than when it pays wages. In those circumstances, the employees' tips are only temporarily within the employer's possession, and the employer does not "keep" the tips. When an employer collects employees' tips but fails to distribute them within this time period, however, and instead holds the tips, the employer "keeps" them in violation of section 3(m)(2)(B). For example, an employer may not maintain a reserve of collected tips from one pay period to pay out in a subsequent pay period.

Proposed § 531.54(b)(1) provides that an employer that collects tips to administer a tip pool must fully distribute any tips the employer collects at the regular payday for the workweek, or when the pay period covers more than a single workweek, at the regular payday for the period in which the particular workweek ends. To the extent that it is not

possible for an employer to ascertain the amount of tips received or how tips should be distributed prior to processing payroll, the proposed rule requires the distribution of those tips to employees as soon as practicable after the regular payday. Thus, for a two-week pay period, an employer must fully distribute any tips the employer collects during those two weeks on the regular payday for that period, or to the extent that it is not possible to ascertain the amount or distribution of the tips, as soon as possible following that payday. This proposed requirement aligns with the Department's current guidance on how soon an employer must provide tips charged on credit cards to tipped employees. *See* WHD Field Operations Handbook (FOH) 30d05.

Because the proposal defines “keep” within the meaning of section 3(m)(2)(B), the proposed requirement that an employer fully and promptly distribute any tips it collects would apply regardless of whether the employer takes a tip credit, and regardless of whether the employer requires employees to participate in a “traditional” tip pool or in a “nontraditional” tip pool.

The Department requests comments on this proposed requirement, and requests information about how this requirement might affect employers' current practices for administering tip pools and tip distribution.

ii. Additional Requirements for Mandatory Tip Pools When an Employer Takes a Tip Credit

Current § 531.54 provides that an employer, regardless of whether it takes a tip credit, may only require its tipped employees to share tips with other employees who customarily and regularly receive tips. The employer also 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. Although, as discussed above, the CAA amendments deprived of any further force or effect these regulatory tip pooling requirements as they apply to employers that do not take a tip credit, the CAA did not affect these requirements as they apply to employers that do take a tip credit. Therefore, proposed § 531.54(c) retains these requirements but clarifies that they apply only to employers that take a tip credit.

iii. Conditions Under Which an Employer May Mandate Participation in a Nontraditional Tip Pool

As explained above, as a result of the CAA amendments to the FLSA, employers that do not take a tip credit may now require tipped employees to participate in nontraditional tip pools that include employees who do not customarily and regularly receive tips, such as cooks and dishwashers, so long as the pools do not include employers, managers, or supervisors. Proposed § 531.54(d) implements these conditions.

As explained above, the CAA did not substantively amend the FLSA's existing tip credit provision, which states that employers may only take a tip credit against their minimum wage obligations to employees who are employed in an occupation in which they customarily and regularly receive tips, such as bussers and servers, and that employers that take a tip credit may only require tip pooling among such employees. *See* 29 U.S.C. 203(m)(2)(A). Over the years, the Department has developed guidance for itself on how to identify customarily and regularly tipped employees. *See, e.g.*, WHD Opinion Letter FLSA 2009-12, 2009 WL 649014 (Jan. 15, 2009); WHD Opinion Letter FLSA 2008-18, 2008 WL 5483058 (Dec. 19, 2008); WHD FOH 30d04(b), (f) (listing occupations that do, and do not, meet these criteria). This guidance is based in large part

on the legislative history of the FLSA's tip credit provision. *See* S. Rep. No. 93-690, at 43 (1974).⁵ According to this guidance, employers may not take a tip credit for back-of-the-house employees who receive tips through a tip pool because those employees are not employed in an occupation in which they customarily and regularly receive tips. Similarly, employers may not include those non-customarily and regularly tipped employees in a traditional section 3(m)(2)(A) tip pool.

D. Proposed Section 516.28—Recordkeeping Requirements for Employers that Have Employees Who Receive Tips

The Department is proposing revisions to the recordkeeping requirements in § 516.28 to provide consistent and effective administration of section 3(m)(2)(B) of the FLSA. Section 516.28 imposes certain recordkeeping requirements on only those employers that take a tip credit. Among other things, § 516.28(a) requires that the employer identify each employee for whom the employer takes a tip credit (*see* § 516.28(a)(1)) and maintain records regarding the weekly or monthly amount of tips received, as reported by the employee to the employer (*see* § 516.28(a)(2)). The employer may use information on IRS Form 4070 (Employee's Report of Tips to Employer) to satisfy the requirements under § 516.28(a)(2).⁶

The Department proposes to apply similar recordkeeping requirements for employers that do not take a tip credit but still collect employees' tips to operate a mandatory tip pool. Proposed § 516.28(b)(1) would require these employers to identify on their payroll

⁵ Since the CAA did not change the FLSA's existing tip credit provision, that guidance is still applicable to an employer that takes a tip credit.

⁶ For information regarding IRS Form 4070, see https://www.irs.gov/pub/irs-access/f4070_accessible.pdf.

records each employee who receives tips. Proposed § 516.28(b)(2) would require employers that do not take a tip credit but that collect tips to operate a mandatory tip pool to keep records of the weekly or monthly amount of tips received by each employee as reported by the employee to the employer (this may consist of reports from the employees to the employer on IRS Form 4070). The proposed recordkeeping requirements would help the Department determine whether employers are complying with their tip pooling obligations. The Department requests comments on these proposed requirements.

E. Proposed Section 531.56(e) —Dual Jobs

The Department proposes to amend § 531.56(e) to reflect recent guidance, which addresses whether an employer can take a tip credit for the time that a tipped employee spends performing duties in a tipped occupation that do not produce tips. Section 3(t) of the FLSA defines a “tipped employee” for whom an employer may take a tip credit under section 3(m) as “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” 29 U.S.C. 203(t). Current § 531.56(e) recognizes that an employee may be employed both in a tipped occupation and in a non-tipped occupation, providing that in such a “dual jobs” situation, the employee is a “tipped employee” for purposes of section 3(t) only while he or she is employed in the tipped occupation, and that an employer may only take a tip credit against its minimum wage obligations for the time the employee spends in that tipped occupation. In addition to addressing dual jobs, the current regulation also recognizes that an employee in a tipped occupation may perform related duties that are “themselves not directed toward producing tips,” such as, for example, a server “who spends part of her time” performing

non-tipped duties, such as “cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses.” The regulation distinguishes this situation, in which the employee is still engaged in the tipped occupation of serving, from a dual jobs situation, in which the employee is engaged part of the time in a non-tipped occupation. 29 CFR 531.56(e).

The Department has in the past provided enforcement guidance on whether and to what extent an employer can take a tip credit for a tipped employee who is performing non-tipped duties related to the tipped occupation. Previously, the Department advised that an employer may not take a tip credit for the time an employee spent performing related duties that do not produce tips if that time exceeded 20 percent of the employee’s workweek. However, this policy was difficult for employers to administer and led to confusion, in part because employers lacked guidance to determine whether a particular non-tipped duty is “related” to the tip-producing occupation. One court described it as “infeasible,” observing that the policy would “present a discovery nightmare” and require employers to “keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts.” *Pellon v. Bus. Representation Int’l, Inc.*, 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007), *aff’d*, 291 F. App’x 310 (11th Cir. 2008). The Department believes that such a situation would help neither employer nor employee. *See* WHD Opinion Letter FLSA 2018-27, 2018 WL 5921455, at *3 (Nov. 8, 2018).

In November 2018, the Department issued an opinion letter addressing these issues.⁷ The Department subsequently issued a FAB and revised its Field Operations Handbook (FOH) to reflect the interpretation of related duties in the opinion letter. *See* FAB 2019-2 (Feb. 15, 2019); WHD FOH 30d00(f). In these guidance documents, the Department explained that it would no longer prohibit an employer from taking a tip credit for the time an employee performs related, non-tipped duties—as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. *See* FAB 2019-2, at *2 (Feb. 15, 2019) (“[Section] 531.56(e) includes non-tipped duties in the tip credit unless they are unrelated to the tipped occupation or part of a separate, non-tipped occupation in a ‘dual job’ scenario. Accordingly, an employer may take a tip credit for any duties that an employee performs in a tipped occupation that are related to that occupation and either performed contemporaneous with the tip-producing activities or for a reasonable time immediately before or after the tipped activities.”); *see also* WHD FOH 30d00(f) WHD Opinion Letter FLSA2018-27, 2018 WL 5921455, at *3–4 (Nov. 8, 2018). The Department believes this policy is consistent with the plain statutory text, which permits employers to take a tip credit based on whether an employee is engaged in a tipped “occupation,” not on whether the employee is performing certain kinds of duties within the tipped occupation.

In its recent guidance, the Department also explained that, in addition to the examples listed in 531.56(e), it would use the Occupational Information Network (O*NET) to determine whether a tipped employee’s non-tipped duties are related to their tipped

⁷ The Department had provided the same guidance initially in WHD Opinion Letter FLSA2009-23, which was issued on January 16, 2009 and was withdrawn on March 2, 2009 “for further consideration.”

occupation. O*NET is a comprehensive database of worker attributes and job characteristics, and is available to the public online at www.onetonline.com. O*NET includes information on work activities for over 900 occupations based on the Standard Occupational Classification system, a statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.

The Department is proposing to revise § 531.56(e) to reflect the guidance on related duties in the recent opinion letter, FAB, and FOH revisions. Proposed § 531.56(e) would retain current language on dual jobs providing that when an individual is employed in a tipped occupation and a non-tipped occupation, the tip credit is available only for the hours the employee spends working in the tipped occupation. It would also continue to distinguish such a dual jobs scenario from one in which an employee performs duties that are related to her tipped occupation but not themselves directed toward producing tips. The proposed regulation would clarify that an employer may take a tip credit for any amount of time that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. Proposed § 531.56(e) would also provide that, in addition to the examples listed in the regulation, a non-tipped duty is related to a tip-producing occupation if the duty is listed as a task of the tip-producing occupation in the Occupational Information Network (O*NET).

The Department requests comments on these proposed changes to § 531.56(e). The Department is particularly interested in comments on how to identify related duties for occupations that may qualify as tipped occupations, but which lack a description in the

O*NET database, perhaps because they are newly emerging. In its enforcement guidance, the Department has stated that when an O*NET description does not exist for an occupation, the Department will consider any duties usually and customarily performed by employees in that occupation to be related duties so long as the duties are consistent with the related duties for similar occupations listed in O*NET.

F. Proposed Parts 578, 579, and 580—Civil Money Penalties

Section 1201(b)(3) of the CAA amended FLSA section 16(e)(2) by adding a new penalty provision: “Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed \$1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).”

The CAA thus provides the Department with discretion to impose CMPs up to \$1,100⁸ when employers unlawfully keep employee tips, including when they allow managers or supervisors to keep any portion of employees’ tips. *See* 29 U.S.C. 203(m)(2)(B). In assessing CMPs for violations of section 3(m)(2)(B) under amended section 16(e)(2), the Department proposes to follow the same guidelines and procedures that it follows for assessing CMPs for violation of the minimum wage (section 6) and overtime (section 7) provisions of the FLSA, and to issue CMPs only when it determines there has been a willful or repeated violation of section 3(m)(2)(B). The Department has been assessing CMPs for repeated or willful violations of the minimum wage and overtime provisions of

⁸ This number is adjusted by inflation annually as required by the authorities in footnote 5 of this NPRM.

the FLSA using the guidelines in part 578 and procedures in part 580 for nearly three decades. As such, employers are generally familiar with these regulations, and the Department's staff and Administrative Law Judges have experience applying them.

Part 578 of the Department's regulations (§§ 578.1–578.4) sets out the criteria the Department uses when determining whether a minimum wage or overtime violation is repeated or willful and thus subject to a CMP, as well as the amount of any CMP it assesses, and part 580 (§§ 580.1–580.18) sets out the procedures for assessing and contesting CMPs. Additionally, § 579.1(a) lists the maximum allowable CMPs for violations of the FLSA's child labor, minimum wage, and overtime provisions. *See* 29 CFR 579.1. The Department proposes to revise § 578.1 to provide that section 1201 of the CAA authorizes the Department to issue CMPs for violations of section 3(m)(2)(B); to revise § 578.3(a)(1) to provide that any person who willfully or repeatedly violates section 3(m)(2)(B) shall be subject to a CMP not to exceed \$1,100 (as adjusted for inflation under the IAA); to revise §§ 578.3(b)–(c) to provide that the Department will use the criteria therein to determine whether an employer's violation of section 3(m)(2)(B) is repeated or willful and thus subject to a civil penalty; and to revise § 578.4 to provide that the Department will determine the amount of the penalty for repeated or willful violations of section 3(m)(2)(B) according to the guidelines set forth in that section. The Department proposes to revise §§ 579.1(a) and 579.1(a)(2) to provide that, consistent with the CAA amendments, any person who willfully or repeatedly violates section 3(m)(2)(B) shall be subject to a CMP not to exceed \$1,100. Additionally, the Department proposes to revise §§ 580.2, 580.3, 580.12, and 580.18 to provide that the assessment of civil penalties for violations of section 3(m)(2)(B) shall be governed by the

rules and procedures set forth therein. Finally, the Department proposes additional, nonsubstantive changes to § 578.1 to better reflect the history of amendments to the civil money penalty for violations of section 6 (minimum wage) and section 7 (overtime) of the Act.

Since the Department is proposing to revise parts 578 and 579 to reflect the new CMP provision that the CAA added to the FLSA, the Department also proposes to revise §§ 578.3(c)(2) and (3), and identical language in § 579.2, to address courts of appeals' concerns that some of the regulations' statements regarding willful violations are inconsistent with Supreme Court authority and how the Department actually litigates willfulness.

When it initially promulgated § 578.3(c) to provide guidance for assessing CMPs for violations of the FLSA's minimum wage or overtime pay requirements, the Department based its definition of a "willful" violation on the Supreme Court's decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). *See* 57 FR 49,129 (Oct. 29, 1992). In *Richland Shoe*, the Supreme Court held that a violation is willful if the employer "knew or showed reckless disregard" for whether its conduct was prohibited by the FLSA. 486 U.S. at 133. Section 578.3(c)(1) incorporates this holding and provides that "[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful." Section 578.3(c)(2) provides that "an employer's conduct shall be deemed knowing" if the employer received advice from the WHD that its conduct is unlawful. Section 578.3(c)(3) provides that "an employer's conduct shall be deemed to be in reckless disregard" of the FLSA's

requirements if the employer should have inquired further into whether its conduct complied with the FLSA and failed to make adequate further inquiry.

An appellate court has identified an “incongruity” between §§ 578.3(c)(2) and (3) and “the *Richland Shoe* standard on which the regulation is based.” *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 680 (1st Cir. 1998). The court expressed “significant reservations about [§ 578.3(c)(2)’s] blanket assertion that a party’s decision not to comply with [WHD’s] advice constitutes a ‘knowing’ violation” under *Richland Shoe*. *Id.* The court further stated that § 578.3(c)(3) “by its terms—specifically, that a party ‘should have inquired further’ about the legality of its conduct—embraces a negligence standard of liability,” which *Richland Shoe* “expressly rejected.” *Id.* at 680–81 (citing 486 U.S. at 133–35). Describing §§ 578.3(c)(2) and (3) as “incomplete” and “unhelpful,” the court urged the Department “to reconsider [them] to ensure that they comport with the Court’s reading of . . . ‘willful’ in *Richland Shoe*.” *Id.* at 681 n.16.

In several cases addressing this issue, the Department has argued that advice from WHD to an employer that its conduct was unlawful “would not necessarily be dispositive of willfulness” in a future enforcement action, and that the employer would have the opportunity “to contest the assertion that the violation was willful notwithstanding its receipt of such advice.” *See, e.g., Br. for Appellee at 22–23, Rhea Lana, Inc. v. DOL*, 824 F.3d 1023 (D.C. Cir. 2016) (No. 15-5014), 2015 WL 4052846, at *22-23. The Department stated that § 578.3(c)(2) “simply reflects the commonsense principle that, in the absence of persuasive and relevant evidence presented by an employer, notice from the agency of a FLSA violation may be used to establish willfulness,” and that such notice is “but one piece of evidence.” *Id.* at 26. In *Rhea Lana*, the court did not reject

outright the Department's reading of § 578.3(c), but pointed out that it was possible to read the regulation as "a stand-alone trigger for willfulness penalties" in a future enforcement action against the employer. 824 F.3d at 1031-32.

In light of *Baystate, Rhea Lana*, and § 578.3(c)(1)'s command that "[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful," the Department proposes to revise §§ 578.3(c)(2) and (3) to clarify that no single fact or circumstance is automatically dispositive as to willfulness to the exclusion of consideration of all other facts and circumstances. Revising §§ 578.3(c)(2) and (3) as proposed would ensure consistency between the regulation and how the Department litigates and briefs the issue of willfulness under the FLSA; resolve concerns that the regulation is inconsistent with *Richland Shoe*; and provide greater clarity to the regulated community regarding the standard for willfulness under the FLSA, including by specifying that no one fact or circumstance will preclude an employer from arguing that its conduct was not willful. To ensure consistent guidance regarding willful violations, the Department proposes to similarly revise identical language in § 579.2 addressing the proper assessment of CMPs for willful violations of the FLSA's child labor provisions.

G. Additional Proposed Regulatory Revisions

Section 531.50 currently sets forth the provisions of the FLSA that apply to tips and tipped employees. The Department proposes to revise § 531.50 to reflect the language that the CAA added to the FLSA. The Department also proposes to update §§ 531.50, 531.51, 531.52, 531.55, 531.56, 531.59, and 531.60 to reflect the new statutory citation to the FLSA's existing tip credit provision, previously cited as section 3(m), as section

3(m)(2)(A). The Department also proposes to clarify references in §§ 531.56(d), 531.59(a) and (b), and 531.60 to the amount an employer can take as a tip credit under section 3(m) (now 3(m)(2)(A)). The Department's regulations currently state that the an employer can take a tip credit for each employee equal to the difference between the minimum wage required by section 6(a)(1) of the FLSA (currently \$7.25 an hour) and \$2.13 an hour. To ensure that the Department's regulations clearly state employers' obligations under the FLSA, the Department proposes to revise §§ 531.56(d), 531.59(a) and (b), and 531.60 to provide, consistent with the text of the statute, that the tip credit permitted by section 3(m)(2)(A) is equal to the difference between the Federal minimum wage and the cash wage paid by the employer. That cash wage must be at least \$2.13 per hour, but the statute does not preclude an employer from paying more.

Finally, the Department proposes to amend the tip provisions of its Executive Order 13658 regulations. Executive Order 13658 raised the hourly minimum wage paid by contractors to workers performing work on or in connection with covered Federal contracts. The Executive Order also established a tip credit for workers covered by the Order who are tipped employees pursuant to section 3(t) of the FLSA. Section 4(c) of the Executive Order encourages the Department, when promulgating regulations under that Order, to incorporate existing "definitions, procedures, remedies, and enforcement processes" from a number of laws that the agency enforces, including the FLSA. The Department's current Executive Order 13658 regulations are modeled after the Department's current FLSA tip regulations, and prohibit covered employers from implementing tip pools that include employees who are not customarily and regularly tipped. The Department proposes to amend § 10.28, consistent with its proposed

rescissions to portions of the Department’s FLSA regulations, to remove similar restrictions on an employer’s use of such tip pools and to otherwise align those regulations with the authority provided in the Executive Order. Federal contractors covered by the FLSA would, of course, also be subject to the FLSA regulations proposed herein. The Department also proposes to amend § 10.28, consistent with its proposed revisions to § 531.56(e), to reflect its current guidance on when an employee performing non-tipped work constitutes a tipped employee for the purposes of 3(t).

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency’s need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule.⁹ Persons are not required to respond to the information collection requirements until the Office of Management and Budget (OMB) approves them under the PRA. This NPRM would revise the existing information collection burden estimates previously approved under OMB control number 1235-0018 (Records to be Kept by Employers – Fair Labor Standards Act) because employers may choose to pay the full Federal minimum wage and not take a tip credit, and collect tips to operate an employer-required, mandatory tip pooling arrangement, thereby triggering the recordkeeping requirement in proposed § 516.28(b). The Department has opened OMB control number 1235-0NEW for this

⁹ See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

action. As the PRA requires, the Department has submitted the information collection revisions to OMB for review to reflect changes that would result from this proposed rule. The Department proposes a slight burden increase for employers keeping records concerning employees who receive tips, as well as a regulatory familiarization burden.

Summary: FLSA section 11(c) requires covered employers to make, keep, and preserve records of employees and their wages, hours, and other conditions of employment, as prescribed by regulation. The Department's regulations at 29 CFR part 516 establish the basic FLSA recordkeeping requirements. Section 516.28(a) currently requires employers to keep certain records concerning tipped employees for whom the employer takes a tip credit under the FLSA. Among other things, § 516.28(a) requires that the employer identify each employee for whom the employer takes a tip credit, identify the hourly tip credit for each such employee, and maintain records regarding the weekly or monthly amount of tips received (which may consist of IRS Form 4070) as reported by the employee to the employer. The adoption of proposed § 516.28(b)(1) and (b)(2) would require an employer that does not take a tip credit, but that collects employees' tips to operate a mandatory tip pooling arrangement, to indicate on its pay records each employee who receives tips and to maintain records of the weekly or monthly amount of tips that each such employee receives (this may consist of reports that the employees make to the employer on IRS Form 4070). The increase in the number of respondents and, accordingly, the burden hours associated with records to be kept under the proposed § 516.28(b)(1)–(2), is attributable to an expanding economy increasing the number of establishments employing individuals who receive tips since the last PRA revision of this recordkeeping requirement.

Purpose and Use: WHD and employees use employer records to determine whether covered employers have complied with various FLSA requirements. Employers use the records to document compliance with the FLSA, and in the case of this NPRM, the Department would use the records regarding employees who receive tips to determine compliance with sections 3(m)(2)(A) and 3(m)(2)(B).

Technology: The regulations prescribe no particular order or form of records, and employers may preserve records in forms of their choosing, provided that facilities are available for inspection and transcription of the records.

Minimizing Small Entity Burden: Although the FLSA recordkeeping requirements do involve small businesses, including small state and local government agencies, the Department minimizes respondent burden by requiring no specific order or form of records in responding to this information collection.

Public Comments: 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 PRA. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and money) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Department seeks public comments regarding the burdens imposed by the information collections associated with this NPRM. Commenters may send their views about this information collection to the Department in the same manner as all other comments (*e.g.*, through the regulations.gov website). All comments received will be made a matter of public record

and posted without change to <http://www.regulations.gov> and <http://www.reginfo.gov>, including any personal information provided.

As previously noted, an agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department has submitted information-collection requests under OMB control number 1235-0NEW to update them to reflect this rulemaking and provide interested parties a specific opportunity to comment under the PRA. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. Interested parties may receive a copy of the full supporting statement by sending a written request to the mail address shown in the ADDRESSES section at the beginning of this preamble. In addition to having an opportunity to file comments with the Department, comments about the paperwork implications may be addressed to OMB. Comments to 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, 725 17th Street, N.W., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. OMB will consider all written comments that the agency receives within 30 days of publication of this proposed rule. Commenters are encouraged, but not required, to send the Department a courtesy copy of any comments sent to OMB. The courtesy copy may be sent via the same channels as comments on the rule.

The Department is 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 annual burden estimates, which reflect both the existing and new responses for the recordkeeping information collection, are summarized as follows:

Type of Review: Revision of a currently approved collection.

Agency: Wage and Hour Division, Department of Labor.

Title: Records to be Kept by Employers—Fair Labor Standards Act.

OMB Control Number: 1235-0NEW.

Affected Public: Private Sector: businesses or other for-profits, farms, and not-for-profit institutions; State, Local and Tribal governments; and individuals or households.

Estimated Number of Respondents: 3,860,288 (102,994 from this rulemaking)

Estimated Number of Responses: 43,799,221 (248,032 from this rulemaking)

Estimated Burden Hours: 1,007,512 hours (24,593 from this rulemaking)

Estimated Time per Response: Various (unaffected by this rulemaking)

Frequency: Various (unaffected by this rulemaking)

Other Burden Cost: \$0

VI. Analysis Conducted in Accordance with Executive Order 12866, Regulatory Planning and Review, Executive Order 13563, Improved Regulation and Regulatory Review, and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.¹⁰ 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 the Executive Order. Because the annual effect of this proposed rule would be greater than \$100 million, this proposed rule would be economically significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected the

¹⁰ 58 FR 51735 (Sept. 30, 1993).

approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, when 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.

This proposed rule is expected to be an Executive Order 13771 deregulatory action, because it provides more flexibility to employers in structuring their employee tip pools. Details on the estimated costs and transfers, as well as qualitative discussions of cost savings of this proposed rule, can be found in the economic analysis below. The unquantified cost savings are expected to outweigh the quantified costs. Cost savings include reduced turnover of back-of-the-house employees, greater flexibility for tip pooling, and reduced effort spent ensuring that the tip pool is limited to only customarily and regularly tipped employees.

B. Economic Analysis

i. Introduction

In March 2018, Congress amended section 3(m) and sections 16(b), (c), and (e) of the FLSA to prohibit employers from keeping their employees' tips, to permit recovery of tips that an employer unlawfully keeps, and suspend the operations of the portions of the 2011 final rule that restricted tip pooling when employers do not take a tip credit. This analysis examines the economic impact associated with the Department's proposed implementation of those amendments, specifically the transfers resulting from employers that do not claim a tip credit and previously did not have a mandatory tip pool, or that only had a traditional tip pool limited to "front-of-the-house" employees (*i.e.*, servers and

bartenders) implementing a nontraditional tip pool that includes “back-of-the-house” employees (*i.e.*, janitors, chefs, dishwashers, and food-preparation workers). Thus, a transfer of tip income will occur from “front-of-the-house” employees. The Department also quantified rule familiarization costs and qualitatively discusses additional costs, cost savings, and benefits. To perform this analysis, the Department compares the impact relative to a pre-statutory baseline (*i.e.* before Congress amended the FLSA in March 2018). If the Department were to look at economic impacts relative to a post-statutory baseline, there would likely be no impact aside from rule familiarization costs, as the transfers arise from the changes put forth in the statute.

The Department is also proposing to amend its regulations to reflect guidance which provides that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. This interpretation was promulgated in a November 2018 opinion letter and subsequent FAB, and reflects WHD’s enforcement position. As explained below, the Department lacks data to quantify any potential costs, benefits, or transfers which may be associated with the implementation of this policy; therefore, the Department discusses potential costs, benefits, and transfers qualitatively. The Department welcomes comments on the impact of this proposal, including data on employers’ responses to the codification of this policy.

The economic analysis covers employees in two industries and in two occupations within those industries. The two industries are classified under the North American Industry Classification System (NAICS) as 722410 (Drinking Places (Alcoholic

Beverages)) and 722511 (Full-service Restaurants); referred to in this analysis as “restaurants and drinking places.” The two occupations are classified under Bureau of Labor Statistics (BLS) Standard Occupational Classification (SOC) codes SOC 35-3031 (Waiters and Waitresses) and SOC 35-3011 (Bartenders).¹¹ The Department considered these two occupations because they constitute a large percentage of total tipped workers and a large percentage of the workers in these occupations receive tips (see Table 1 for shares of workers in these employees who may receive tips). The Department understands that there are other occupations beyond servers and bartenders with tipped workers, such as SOC 35-9011 (Dining room and Cafeteria Attendants and Bartender Helpers), SOC 35-9031 (Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop), and others, as well as other industries that employ workers who receive tips, such as NAICS 722515 (snack and nonalcoholic beverage bars), NAICS 722513 (limited service restaurants), NAICS 721110 (hotels and motels), and NAICS 713210 (casinos); thus, the Department welcomes comments and suggestions on whether this analysis should extend to such occupations and industries.

The analysis covers ten years to ensure that it captures major costs and transfers. When summarizing the costs and transfers of the proposed rule, the Department presents the first year’s impact, as well as the 10-year annualized costs and transfers with 3 percent and 7 percent discounting.¹²

¹¹ In the Current Population Survey, these occupations correspond to Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110). The industries correspond to Restaurants and Other Food Services (Census Code 8680) and Drinking Places, Alcoholic Beverages (Census Code 8690).

¹² Discount rates are directed by OMB. *See* Circular A-4, OMB (Sept. 17, 2003).

ii. Estimated Transfers

Under the regulations proposed in this NPRM, transfers would arise when employers that already pay the full Federal minimum wage and previously did not have a mandatory tip pool or only had a traditional tip pool institute nontraditional tip pools in which tipped employees such as servers and bartenders are required to share tips with employees who do not customarily and regularly receive tips, such as cooks and dishwashers. The Department believes that including back-of-the-house workers in tip pools could help equalize income among the employees within the establishment, and could also help promote cooperation and collaboration among employees. Because the statute prohibits employers from keeping employee tips, directly-observable transfers will only occur among employees. However, because back-of-the-house workers could now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay back-of-the-house workers (as long as they do not reduce these employees' wages below the applicable minimum wage); offsets of this type are implied in the model underlying the quantitative estimates below. To the extent that wages are sticky in the short run, back-of-the-house employees are recipients of transfers, but across a longer time horizon, market adjustments increasingly allow employers to capture the transfer.

The analysis assumes that employers will institute nontraditional tip pools with employees who do not customarily and regularly receive tips only in situations that are beneficial to them. Accordingly, it assumes that employers will include back-of-the-house employees in their tip pools only if they believe that they can do so without losing their front-of-the-house staff. To attract and retain the tipped workers that they need,

employers must pay these workers as much as their “outside option,” or the hourly earnings that they could receive in a non-tipped job with a similar skill level requirement to their current position. For each tipped worker, the Department assumes a transfer will occur only if their total earnings, including tips, is greater than the predicted outside-option wage from a non-tipped job. This methodology was informed by comments submitted as part of the Department’s 2017 NPRM that discussed using outside options to determine potential transfer of tips.

The transfer calculation excludes any workers who are paid a direct cash wage below the full FLSA minimum wage of \$7.25, because under the amended statute and the Department’s proposed rule, employers who do take a tip credit are still subject to section 3(m)(2)(A)’s restrictions on tip pools. Some employers may begin paying their tipped workers a direct cash wage of at least the full FLSA minimum wage in order to institute a tip pool with back-of-the-house workers. This potential transfer is not quantified due to uncertainty regarding how many employers would choose to no longer use the tip credit. Choosing to no longer take a tip credit would require a change to employers’ payroll systems and methods of compensation to which employers and employees are accustomed, which could discourage employers from making this change. The Department requests comments on the prevalence of this adjustment.

The transfer calculation also excludes any workers who are paid a direct cash wage by their employers, exclusive of any tips received, that exceeds the applicable minimum wage (either the Federal or applicable State minimum wage). The Department assumes that because these employers are already paying more than required under applicable law for these workers, any reduction in compensation would result in these workers leaving

that employment. These employees will therefore not have their tips redistributed through a nontraditional tip pool. The Department requests comments and data on this assumption.

The Department does not attempt to definitively interpret individual state law; it is assumed, however, that some wait staff and bartenders work in a state that either prohibits mandatory tip pooling or imposes stricter limits on who can participate in a mandatory tip pool than are proposed in this NPRM,¹³ or in a state that is in the Tenth Circuit¹⁴ where, as a result of *Marlow v. New Food Guy, Inc.*, 861 F.3d at 1159, employers that do not take a tip credit were already permitted to institute nontraditional tip pools at the time Congress amended the FLSA. The transfer estimate excludes tipped employees in these states whom the changes proposed in this NPRM may not affect—amounting to about 43 percent of a \$0.5 billion intermediate estimate of the potential transfer amount.¹⁵ Thus, the Department first determined total transfers for all wait staff and bartenders using the methodology described above. The Department then excluded workers whom the proposed changes will not affect due to their respective state laws.

¹³ See, e.g., Minn. Stat. § 177.24, subd. 3 (“No employer may require an employee to contribute or share a gratuity received by the employee with the employer or other employees or to contribute any or all of the gratuity to a fund or pool operated for the benefit of the employer or employees.”); Mass. Gen. Laws ch. 149, § 152A(c) (“No employer or person shall cause, require or permit any wait staff employee, service employee, or service bartender to participate in a tip pool through which such employee remits any wage, tip or service charge, or any portion thereof, for distribution to any person who is not a wait staff employee, service employee, or service bartender.”)

¹⁴ The jurisdiction of the Tenth Circuit includes the six states of Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah. See About Us, The United States Court of Appeals for the Tenth Circuit, <https://www.ca10.uscourts.gov/clerk> (last visited May 9, 2019).

¹⁵ Arkansas, California, Colorado, Delaware, Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Utah, and Wyoming.

The Department welcomes comments with more information regarding the effects of this proposed rule in specific states. Finally, the Department further reduced the total transfer amount to account for the fact that an uncertain number of employers will decline to change their tip pooling practices even when it is seemingly economically beneficial for them to do so because it will require changes to practices to which employees are accustomed, as well as payroll and recordkeeping changes.

To compute potential tip transfers, the Department used individual-level microdata from the 2017 Current Population Survey (CPS), a monthly survey of about 60,000 households that is jointly sponsored by the U.S. Census Bureau and BLS. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, and then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey. These households and questions form the CPS Merged Outgoing Rotation Group (CPS-MORG) and provide more detailed information about those surveyed.¹⁶ The Department used 2017 CPS data to calculate the transfer because the CAA went into effect in March 2018. Although 2018 CPS data is available, 2017 is the most recent full year of data that is prior to the statutory change. In this analysis, 2017 wage data are inflated to \$2018 using the GDP deflator. For purposes of rule familiarization costs, the Department used the most recent year of data (2018) to reflect employers reading the rule after it is published.

¹⁶ See Current Population Survey, U.S. Census Bureau, <https://www.census.gov/programs-surveys/cps.html> (last visited August 13, 2019); CPS Merged Outgoing Rotation Groups, NBER, <http://www.nber.org/data/morg.html> (last visited August 13, 2019).

The CPS asks respondents whether they usually receive overtime pay, tips, and commissions (OTTC), which allows the Department to estimate the number of bartenders and wait staff in restaurants and drinking places who receive tips.¹⁷ CPS data are not available separately for overtime pay, tips, and commissions, but the Department assumes very few bartenders and wait staff at restaurants and drinking places receive commissions, and the number who receive overtime pay but not tips is also assumed to be minimal.¹⁸ Therefore, when bartenders and wait staff responded affirmatively to this question, the Department assumed that they receive tips.

All data tables in this analysis include estimates for the year 2017 as the baseline. Table 1 presents the estimates of the share of bartenders and wait staff in restaurants and drinking places who reported that they usually earned OTTC in 2017. Approximately 64 percent of bartenders and 55 percent of wait staff reported usually earning OTTC in 2017. These numbers include workers in all states, including states whom the changes proposed in this NPRM may not affect. These numbers also include workers who are paid a direct cash wage below the full FLSA minimum wage of \$7.25 (i.e., employers whose employers are using a tip credit). Both these populations are excluded from the transfer calculation.

¹⁷ This question is only asked of hourly employees and consequently nonhourly workers are excluded from the transfer estimate. The Department did not quantify transfers from nonhourly workers because without knowing the prevalence of tipped income among nonhourly workers, the Department cannot accurately estimate potential transfers from these workers. However, the Department believes the transfer from nonhourly workers will be small because only 13 percent of wait staff and bartenders in restaurants and drinking places are nonhourly and the Department believes nonhourly workers may have a lower probability of receiving tips.

¹⁸ According to BLS Current Population Survey data, in 2017, workers in service occupations worked an average of 35 hours per week. *See* <https://www.bls.gov/cps/aa2017/cpsaat23.htm>.

Table 1. Share of Bartenders and Waiters/Waitresses in Restaurants and Drinking Places Who Earned Overtime Pay, Tips, or Commissions

Occupation	Total Workers (Millions)	Workers Responding to Question on OTTC (Millions)	Report Earning OTTC	
			Workers (Millions)	Percent
Total	2.21	1.92	1.08	56.5%
Bartenders	0.34	0.27	0.17	63.5%
Waiters/Waitresses	1.88	1.65	0.91	55.4%

Source: CEPR, 2017 CPS-MORG

Occupations: Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110)

Industries: Restaurants and other food services (Census Code 8680) and Drinking places, alcoholic beverages (Census Code 8690)

Of the 1.08 million bartenders and wait staff who receive OTTC, only 688,000 reported the amount received in OTTC. Therefore, the Department imputed OTTC for those workers who did not report the amount received in OTTC. As shown in Table 2, 54 percent of bartenders' earnings (an average of \$276 per week) and 49 percent of waiters' and waitresses' earnings (an average of \$234 per week) were from overtime pay, tips, and commissions in 2017. For workers who reported receiving tips but did not report the amount, the ratio of OTTC to total earnings for the sample who reported their OTTC amounts (54 or 49 percent) was applied to their weekly total income to estimate weekly tips. Nonhourly workers, who are not asked the question on receipt of OTTC, are assumed to not be tipped employees.

Table 2. Portion of Income from Overtime Pay, Tips, and Commissions for Bartenders and Waiters/Waitresses in Restaurants and Drinking Places

Occupation	Those Who Report the Amount Earned in OTTC			
	Workers	Average Weekly Earnings	Average Weekly OTTC	Percent of Earnings Attributable to OTTC

Total	688,171	\$478.34	\$240.15	50%
Bartenders	105,787	\$512.29	\$275.65	54%
Waiters and waitresses	582,384	\$472.17	\$233.71	49%

Source: CEPR, 2017 CPS-MORG, inflated to \$2018 using the GDP deflator.

Occupations: Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110)

Industries: Restaurants and other food services (Census Code 8680) and Drinking places, alcoholic beverages (Census Code 8690)

1. *Outside-Option Wage Calculation*

As discussed above, to determine potential transfers of tips, the Department assumes that employers will only redistribute tips from tipped employees to employees who are not customarily and regularly tipped in a nontraditional tip pool if the tipped employee’s total earnings, including the tips the employee retains, are greater than the “outside-option wage” that the tipped employee could earn in a non-tipped job. To model a worker’s outside-option wage, the Department used robust quartile regression analysis to predict the wage that these workers would earn in a non-tipped job. Hourly wage was regressed on age, age squared, age cubed, education, gender, race, ethnicity, citizenship, marital status, veteran status, metro area status and state for a sample of non-tipped workers.¹⁹ The Department restricted the regression sample to workers earning at least the Federal minimum wage of \$7.25 per hour (inclusive of OTTC), and those who are employed. This analysis excludes states where the law prohibits non-tipped back-of-the-house employees from being included in the tip pool, and states governed by the *Marlow* decision were also excluded from the regression analysis.

¹⁹ For workers who had missing values for one or more of these explanatory variables we imputed the missing value as the average value for tipped/non-tipped workers.

In calculating the outside-option wage for tipped workers, the Department defined the comparator sample for tipped workers in two different ways: (1) All non-tipped workers (*i.e.*, workers who are either not waiters/waitresses or bartenders, or do not work in restaurants or drinking places), and (2) Non-tipped workers in a set of occupations that are likely to represent outside options. The Department determined the list of relevant occupations by exploring the similarity between the knowledge, activities, skills, and abilities required by the occupation to that of servers and bartenders. The Department searched the Occupational Information Network (O*NET) system for occupations that share important similarities with waiters and waitresses and bartenders—the occupations had to require “customer and personal service” knowledge and “service orientation” skills.²⁰ The list was further reduced by eliminating occupations that are not comparable to the waitress and bartender occupations in terms of education and training, as waiter and waitress and bartender occupations do not require formal education or training. *See* Appendix Table 1 for a list of these occupations. The transfer estimates presented in this analysis use this sample of limited occupations to predict each tipped worker’s outside-option wage, that is, the wage that the tipped worker could earn in a non-tipped job. The Department also ran the regression to predict the outside-option wage using all non-tipped workers as the outside-option sample, and found that transfers are approximately 30 percent lower in that specification.

The regression calculates a distribution of outside-option wages for each worker. The Department considered two methods: (1) using the 50th percentile and (2) using the same

²⁰ For a full list of all occupations on O*NET, *see* <https://www.onetcenter.org/taxonomy/2010/updated.html>.

percentile for each worker as they currently earn in the distribution of wages for wait staff and bartenders in restaurants and drinking places in the state where they live.²¹ The second method accounts for the fact that two workers may have the exact same characteristics (age, race, education, etc.), but one worker may have a higher or lower outside-option wage because he or she is a more or less effective employee. This method assumes that a worker's position in the wage distribution for wait staff and bartenders in restaurants and drinking places reflects their position in the wage distribution for the outside-option occupations. The Department believes this method is more appropriate than the 50th percentile method.²²

2. *Transfer Calculation*

After determining each tipped worker's outside-option wage, the Department calculated the potential transferrable tips as the lesser of the following four numbers:

1. The positive differential between a worker's current earnings (wage plus tips) and their predicted outside-option wage,
2. The positive differential between a worker's current earnings and the state minimum wage,
3. The total tips earned by the worker, or

²¹ Because of the uncertainty in the estimate of the percentile ranking of the worker's current wage, the Department used the midpoint percentile for workers in each decile. For example, workers whose current wage was estimated to be in the zero to tenth percentile range were assigned the predicted fifth percentile outside-option wage, those with wages estimated to be in the eleventh to twentieth percentile were assigned the predicted fifteenth percentile outside-option wage, etc.

²² The 50th percentile method results in a higher transfer estimate (\$173 million compared with \$107 million).

4. Zero if the worker currently earns a direct cash wage above the full applicable minimum wage.

The second number is included for cases where the outside-option wage predicted by the analysis is below the state minimum wage, because the worker will not earn less than their applicable state minimum wage. The third number is included because the maximum potential tips that can be transferred from an employee cannot be greater than their total tips. Total tips for each worker were calculated from the OTTC variable in the CPS data. For hourly-paid workers, the Department subtracted predicted overtime pay to better estimate total tips.²³ For workers who reported receiving overtime, tips, and commissions, but did not report the amount they earned, the Department applied the ratio of tipped earnings to total earnings for all waiters and waitresses and bartenders in their state (see Table 2).

The Department set the transfer to zero if the worker currently earns a direct cash wage above the full applicable minimum wage. If the employer is paying a tipped employee a direct cash wage above the required full minimum wage, this indicates the wage is set at the market clearing wage and any reduction in the wage (e.g., by requiring tips to be transferred to back-of-the-house workers) would cause the employee to quit and look for other work. Therefore, where an employer is paying a tipped employee above the full applicable minimum wage, the employer would generally not require the employee to contribute tips to a nontraditional tip pool.

²³ Predicted overtime pay is calculated as $(1.5 \times \text{base wage}) \times \text{weekly hours worked over 40}$.

To determine the annual total tip transfer, the Department first multiplied a weighted sum of weekly tip transfers for all wait staff and bartenders who work at full-service restaurants and bars in the United States by 45.2 weeks—the average weeks worked in a year for waiters and waitresses and bartenders in the 2017 CPS Annual Social and Economic Supplement. The Department then reduced this total by 43 percent to account for wait staff and bartenders who work in a state that prohibits mandatory tip pooling or imposes stricter limits on who can participate in a mandatory tip pool than the limits proposed in this NPRM or a state that is in the Tenth Circuit. Using this methodology, the total potential transfer from front-of-the-house employees associated with this proposed rule is \$213.4 million. This represents the transfers that the Department expects would occur if every employer that does not take a tip credit, and for whom it was economically beneficial, instituted tip pools that include back-of-the-house workers. In reality, even when it is seemingly economically beneficial, many employers may not change their tip pooling practices, because it would require changes to the current practice to which their employees are accustomed, as well as their payroll and recordkeeping systems.

The Department was unable to determine what proportion of the total tips estimated to be potentially transferred from these workers will realistically be transferred. The Department assumes that the likely potential transfers are somewhere between a minimum of zero and a maximum of \$213.4 million, and therefore used the midpoint as a better estimate of likely transfers. The Department accordingly estimates that transfers of tips from front-of-the-house workers will be around \$107 million in the first year that this rule is effective. Assuming these transfers occur annually, and there is no real wage

growth, this results in 10-year annualized transfers of \$107 million at both the 3 percent and 7 percent discount rates. The Department requests comments on whether the midpoint is the appropriate adjustment.

The Department acknowledges that some employers could respond to the proposed rule by decreasing back-of-the-house workers' wages, as the rule will allow employers to supplement these employees' wages with tips. Some employers may consider exchanging back-of-the-house workers' hourly wages for tips, but tips fluctuate at any given time. Thus, employers' ability to do so would be limited by market forces, such as, potentially, workers' aversion to risk and the endowment effect (workers potentially valuing their set wages more than tips of the same average amount). Because of a lack of data to quantify the extent to which this will occur, the Department has not included this possibility in the present analysis.

The Department welcomes comments and information regarding whether and to what extent employers will choose to expand existing tip pools to include back-of-the-house employees or otherwise change their current compensation structures.

iii. Estimated Costs, Cost Savings, and Benefits

In this subsection, the Department addresses costs attributable to the proposed rule, by quantifying regulatory familiarization costs and qualitatively discussing additional recordkeeping costs. The Department qualitatively discusses benefits and cost savings associated with this proposed rule. Lastly, the Department qualitatively discusses the potential costs, transfers, and benefits associated with its proposed revision to its regulations to reflect its guidance that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties

performed contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

1. Regulatory Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses associated with reviewing the new regulation. It is not clear whether regulatory familiarization costs are a function of the number of establishments or the number of firms.²⁴ Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple restaurants, and may also require chain restaurants to familiarize themselves with the regulation at the establishment level. To be conservative, the Department used the number of establishments in its cost estimate—which is larger than the number of firms—and assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

The Department assumes that all establishments will incur some regulatory familiarization costs regardless of whether the employer decides to change its tip pooling practices as a result of the proposed rule.²⁵ There may be differences in familiarization cost by the size of establishments; however, our analysis does not compute different costs for establishments of different sizes. To estimate the total regulatory familiarization costs,

²⁴ An establishment is commonly understood as a single economic unit, such as a farm, a mine, a factory, or a store, that produces goods or services. Establishments are typically at one physical location and engaged in one, or predominantly one, type of economic activity for which a single industrial classification may be applied. An establishment is in contrast to a firm, or a company, which is a business and may consist of one or more establishments, where each establishment may participate in a different predominant economic activity. *See* BLS, “Quarterly Census of Employment and Wages: Concepts,” <https://www.bls.gov/opub/hom/cew/concepts.htm>.

²⁵ This includes establishments in states excluded from the transfer calculation.

the Department used (1) the number of establishments in the two industries, Drinking Places (Alcoholic Beverages) and Full-Service Restaurants; (2) the wage rate for the employees reviewing the rule; and (3) the number of hours that it estimates employers will spend reviewing the rule. Table 3 shows the number of establishments in the two industries. To estimate the number of potentially affected establishments, the Department used data from BLS’s Quarterly Census of Employment and Wages (QCEW) for 2018.

Table 3. Number of Establishments with Tipped Workers

Industry	Establishments
NAICS 722410 (Drinking Places (Alcoholic Beverages))	42,826
NAICS 722511 (Full-service Restaurants)	247,237
Total	290,063

Source: QCEW, 2018

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13-1141) (or a staff member in a similar position) with a mean wage of \$32.65 per hour in 2018 will review the rule.²⁶ Given the change proposed, the Department assumes that it will take on average about 15 minutes to review the final rule. The Department has selected a small time estimate because it is an average for both establishments making changes to their compensation structure and those who are not (and consequently will have negligible or no regulatory familiarization costs). Further, the change effected by

²⁶ A Compensation/Benefits Specialist ensures company compliance with federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. *See* BLS, “13-1141 Compensation, Benefits, and Job Analysis Specialists,” <https://www.bls.gov/oes/current/oes131141.htm> (last visited August 14, 2019).

this regulation is unlikely to cause major burdens or costs. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is \$53.22; thus, the average cost per establishment is \$13.30 for 15 minutes of review time. The number of establishments in the selected industries was 290,063 in 2018. Therefore, regulatory familiarization costs in Year 1 are estimated to be \$3.86 million ($\$13.30 \times 290,063$ establishments), which amounts to a 10-year annualized cost of \$452,422 at a discount rate of 3 percent or \$549,471 at a discount rate of 7 percent. Regulatory familiarization costs in future years are assumed to be de minimis.

2. *Other Costs*

The Department also assumes that there will be a minimal increase in recordkeeping costs associated with this proposed rule. Under the Department's current regulations, employers are only required to keep records of which employees receive tips and how much each employee receives if the employer takes a tip credit. If this rule is finalized as proposed, employers that do not take a tip credit but collect tips to institute a mandatory tip pool must keep records showing which employees are included in the tip pool, and the amount of tips they receive, as reported by employees to the employer. As such records are already required under IRS Form 4070, there will be minimal recordkeeping costs for employers that pay the full Federal minimum wage in direct cash wages and choose to institute a nontraditional tip pool.

Employers may incur some training costs associated with familiarizing first line managers and staff with the proposed rule; however, the Department believes these costs will be de minimis. The Department welcomes data on these costs.

3. *Benefits*

Section 3(m)'s tip credit provision allows an employer to meet a portion of its Federal minimum wage obligation from the tips customers give employees. If an employer takes a tip credit, section 3(m)(2)(A) applies, along with its requirement that only employees who customarily and regularly receive tips be included in any mandatory tip pool. When an employer does not take a tip credit, however, the proposed rule would allow the employer to act in a manner currently prohibited by regulation—that is, by distributing tips to employees who are employed in occupations in which they do not customarily and regularly receive tips (*e.g.*, cooks or dishwashers) through a tip pool. The proposed rule, therefore, provides employers greater flexibility in determining their pay policies for tipped and non-tipped workers.

Full-service restaurants commonly have a tip pool. One study suggests that tip pooling contributes to increased service quality, along with enhanced interaction and cooperation between coworkers, especially when team members rely on input or task completion from each other.²⁷ Another study indicates that tip pooling may foster customer-focused service, promote employee camaraderie, and increase productivity.²⁸ Additionally, under the proposed changes, the employer will be able to distribute customer tips to back-of-the-house employees like cooks and dishwashers, possibly resulting in increased earnings for those employees. The Department believes that allowing employers to expand tip

²⁷ Samuel Estreicher & Jonathan Nash, *The Law and Economics of Tipping: The Laborer's Perspective*, Am. Law & Econ. Ass'n Annual Meetings. (2004), <https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1068&context=alea>.

²⁸ Ofer H. Azar, *The Implications of Tipping for Economics and Management*, 30 (10) Int'l J. Soc. Econ., 1084–94 (2003), <http://individual.utoronto.ca/diep/c/azar2003.pdf>.

pools beyond customarily and regularly tipped workers like servers and bartenders could help incentivize back-of-the-house workers, which may improve the customer's experience.

4. Cost Savings

The cost savings associated with this rule would result from the increased earnings for back-of-the-house employees. Higher earnings for these employees could result in reduced turnover, which reduces hiring and training costs for employers. This proposed rule would also give employers greater flexibility for tip pooling, and could reduce effort spent ensuring that the tip pool is limited to only customarily and regularly tipped employees. The Department believes that the cost savings would outweigh any increased rule-familiarization and recordkeeping costs.

This rule may also reduce deadweight loss. Deadweight loss is the loss of economic efficiency that occurs when the perfectly competitive equilibrium in a market for a good or service is not achieved. Minimum wages may prevent the market from reaching equilibrium and thus result in fewer hours worked than would otherwise be efficient. Allowing nontraditional tip pools may cause a shift in the labor demand and/or supply curves for wait staff and bartenders. This could result in the market moving closer to the competitive market equilibrium. The Department did not quantify the potential reduction in deadweight loss because of uncertainty (e.g., what are the appropriate demand and supply elasticities).

5. *Costs, Benefits, and Potential Transfers Associated with Revision to Dual Jobs Regulation*

The Department proposes to amend its regulations to reflect its recent guidance removing the limit on the amount of time that an employee for whom an employer takes a tip credit can perform related, non-tipped duties has potential benefits. Under the previous guidance, in order to ensure they were in compliance, employers may have tracked how tipped employees were spending their time, which could be difficult and costly. Removing the time requirement will eliminate this monitoring cost. Additionally, the revisions add clarity by providing a reference list of applicable related duties through O*NET. Although employers will reference this list of duties to ensure that their employees' non-tipped duties are related to their tipped occupations, this would likely be less of a burden than constantly monitoring their employee's time.

The removal of the twenty percent time limit may result in tipped workers such as wait staff and bartenders performing more of these non-tipped duties such as “cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses.” Consequently, employment of workers currently performing these duties, such as dishwashers and cooks, may fall, possibly resulting in a transfer of employment-related producer surplus from those non-tipped workers to tipped workers who work longer hours. However, tipped workers might lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage. For example, assume that prior to this change, a restaurant server spends 12 minutes each hour of their shift (i.e., 20 percent) performing related, non-tipped duties (e.g., clearing tables, washing dishes, etc.), and 48 minutes providing direct customer service. Assume the server earns \$12 per hour in tips (i.e.,

\$0.25 per minute of customer service work). With no 20 percent limit on the performance of related, non-tipped duties, an employee might spend more than 12 minutes per hour performing related, non-tipped duties, as long as they still receive enough tips to earn at least \$7.25 per hour for the shift. Thus, if an employee now spends 20 minutes performing non-tipped work (i.e., 33 percent of their shift) and 40 minutes interacting with customers, they would be expected to lose \$2 per hour in tips, a decrease accounting for eight fewer minutes per hour spent performing tip-generating work (i.e., 8 minutes x \$0.25 per minute). Similarly, employers that had been paying the full minimum wage to tipped employees performing related, non-tipped duties could potentially pay the lower direct cash wage for this time and could pass these reduced labor cost savings on to consumers. As mentioned above, the Department lacks data to quantify this potential reduction in tips. For instance, data does not exist on the amount of time that tipped employees currently spend on tipped duties or related, nontipped duties. Absent such a baseline, the Department cannot quantify how time spent by tipped employees on related, nontipped duties would change as a result of this proposed rule. The Department welcomes feedback on how employers would adjust employees' schedules as a result of this recent guidance.

iv. Summary of Transfers and Costs

Below the Department provides a summary table of the quantified transfers and costs for the RIA. Transfer costs in years two through ten are assumed to be the same as in Year 1.

Table 4. Summary of Transfers and Costs Calculations (2018 Dollars)

	Potential Tip Transfers (Millions)	Regulatory Familiarization Costs (Millions)
Year 1		
Preferred Estimate	\$106.7	\$3.9
Lower-Bound	\$0.0	N/A
Upper-Bound	\$213.4	N/A
10-year Annualized Transfers (Preferred Est.)		
3% Discount Rate	\$106.7	\$0.5
7% Discount Rate	\$106.7	\$0.5

v. Additional Potential Impacts of This Rulemaking

The Department believes that by implementing section 3(m)(2)(B) and providing clarification on tip pooling, this proposal could affect the number of employers who choose to implement tip pools or otherwise affect their practices. Because of the lack of data to determine how employers would behave, the Department welcomes comments that provide insight into employers' decisions to implement tip pools, and how these decisions affect both employers and employees.

C. Analysis of Regulatory Alternatives

In developing this NPRM, the Department considered a regulatory alternative that would be less restrictive than what is currently proposed and one that would be more restrictive. For the less-restrictive option, the Department considered excluding employers that do not take a tip credit from the requirement to keep records of the weekly or monthly amount of tips received by each employee as reported by the employee to the employer.²⁹ The Department concluded, however, that requiring all employers with tip

²⁹ Current § 516.28(a) requires employers that take a tip credit under the FLSA to keep records of the weekly or monthly amount of tips received by employees.

pools to keep records of the weekly or monthly amount of tips received by employees would ensure uniformity among these employers and help the Department administer section 3(m)(2)(B).

For a more restrictive alternative, the Department considered requiring employers that collect cash tips for a mandatory tip pool to fully distribute the tips on a daily basis. The Department concluded, however, that this requirement would be unnecessarily onerous for employers. The Department's proposal for full distribution of cash and credit-card tips on the regular payday or, in certain cases, as soon as practicable afterward, would be simpler for employers to follow. It would align the policy for cash tips with the current policy for credit-card tips and allow employers to pay tips the same day they otherwise pay their employees. The Department believes that the current proposal will ensure that employers do not operate tip pools in such a manner that they "keep" tips.

VII. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121 (1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined the regulatory requirements of the proposed rule to determine whether they would have a significant economic impact on a substantial number of small entities.

In its analysis, the Department used the Small Business Administration size standards, which determine whether a business qualifies for small-business status.³⁰ According to the 2017 standards, Full-service Restaurants (NAICS 722511) and Drinking Places (Alcoholic Beverages) (NAICS 722410) have a size standard of \$7.5 million in annual revenue.³¹ The Department used this number to estimate the number of small entities. Any establishments with annual sales revenue less than this amount were considered small entities.

The Department used the U.S. Census Bureau's 2012 Economic Census to obtain the number of establishments (operating the entire year) and annual sales/receipts for the two industries in the analysis: Full-service Restaurants and Drinking Places (Alcoholic Beverages).³² From annual receipts/sales, the Department can estimate how many establishments fall under the size standard. Table 5 shows the number of private, year-round establishments in the two industries by revenue.³³

The annual cost per establishment is the regulatory familiarization cost of \$13.30 per establishment calculated in section V.B.iii.1. The Department applied this cost to all sizes of establishments since each establishment would incur this cost regardless of the number

³⁰ SBA, Summary of Size Standards by Industry Sector, 2017, www.sba.gov/document/support--table-size-standards.

³¹ *Id.*, Subsector 722.

³² U.S. Census Bureau, 2012 Economic Census, Accommodation and Food Services: Subject Series - Estab & Firm Size: Summary Statistics by Sales Size of Establishments for the U.S.: 2012. <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

³³ The small-business size standard for the two industries is \$7.5 million in annual revenue. However, the final size category reported in the table is \$5 million–\$9 million. This is a data limitation because the 2012 Economic Census reported this category of \$5 million–\$9 million and not \$5 million–\$7.5 million. Thus, the total number of firms shown may be slightly higher than the actual number of small entities.

of affected workers. Finally, the impact of this provision was calculated as the ratio of annual cost per establishment to average sales receipts per establishment. As shown, the annual cost per establishment is less than 0.03 percent of average annual sales for establishments in all small entity size classes. The impact of this proposed rule on small establishments will be de minimis. The Department certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Table 5. Costs to Small Entities

Annual Revenue/Sales/Receipts	Number of Establishments [a]	Average Annual Sales per Establishment (\$) [b]	Annual Cost per Establishment (\$) [c]	Annual Cost per Establishment as Percent of Sales/Receipts
722511 Full-service Restaurants				
< \$100,000	10,211	\$68,356	\$13.30	0.02%
\$100,000 to \$499,999	28,651	\$193,823	\$13.30	0.01%
\$250,000 to \$499,999	39,554	\$405,727	\$13.30	0.00%
\$500,000 to \$999,999	46,793	\$792,561	\$13.30	0.00%
\$1,000,000 to \$2,499,999	45,173	\$1,729,025	\$13.30	0.00%
\$2,500,000 to \$4,999,999	17,039	\$3,750,831	\$13.30	0.00%
\$5,000,000 to \$9,999,999	3,531	\$7,128,700	\$13.30	0.00%
722410 Drinking Places (Alcoholic Beverages)				
< \$100,000	4,622	\$69,775	\$13.30	0.02%
\$100,000 to \$249,999	11,610	\$188,975	\$13.30	0.01%
\$250,000 to \$499,999	9,059	\$387,358	\$13.30	0.00%
\$500,000 to \$999,999	5,138	\$762,365	\$13.30	0.00%
\$1,000,000 to \$2,499,999	3,386	\$1,665,727	\$13.30	0.00%
\$2,500,000 to \$4,999,999	755	\$3,708,103	\$13.30	0.00%
\$5,000,000 to \$9,999,999	164	\$7,318,368	\$13.30	0.00%

[a] Limited to establishments operated for the entire year.

[b] Inflated to 2018 using the GDP deflator.

[c] The annual cost per establishment is the regulatory familiarization cost per establishment calculated in section V.B.iii.1.

VIII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to 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. This rulemaking is not expected to affect state, local, or tribal governments. While this rulemaking would affect employers in the private sector, it is not expected to result in expenditures greater than \$100 million in any one year. See section V.B for an assessment of anticipated costs and benefits to the private sector.

IX. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed 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.

X. Executive Order 13175, Indian Tribal Governments

This 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.

List of Subjects in 29 CFR Part 10

Administrative practice and procedure, Construction industry, Government procurement, Law enforcement, Reporting and recordkeeping requirements, Wages

List of Subjects in 29 CFR Part 516

Minimum wages, Reporting and recordkeeping requirements, Wages

List of Subjects in 29 CFR Part 531

Wages

List of Subjects in 29 CFR Part 578

Penalties, Wages

List of Subjects in 29 CFR Part 579

Child labor, Penalties

List of Subjects in 29 CFR Part 580

Administrative practice and procedure, Child labor, Penalties, Wages

For the reasons set forth above, the Department proposes to amend Title 29, Parts 10, 516, 531, 578, 579, and 580 of the Code of Federal Regulations as follows:

PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

1. The authority citation for Part 10 is revised to read as follows:

AUTHORITY: 4 U.S.C. 301; section 4, E.O 13658, 79 FR 9851; Secretary of Labor’s Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

2. Amend § 10.28 by revising paragraphs (b)(2), (c), (e), and (f) to read as follows:

§ 10.28 Tipped employees.

* * * * *

(b) ***

(2)(i) In some situations an employee is employed in a dual job, as for example, where a maintenance person in a hotel also works as a server. In such a situation the employee, if he or she customarily and regularly receives more than \$30 a month in tips for his or

her work as a server, is a tipped employee only with respect to his or her employment as a server. The employee is employed in two occupations, and no tip credit can be taken for his or her hours of employment in the occupation of maintenance person.

(ii) Such a situation is distinguishable from that of an employee who spends time performing duties that are related to his or her tip-producing occupation but not themselves directed toward producing tips. For example, a server may spend part of his or her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. Likewise, a counter attendant may also prepare his or her own short orders or may, as part of a group of counter attendants, take a turn as a short order cook for the group. An employer may take a tip credit for any amount of time that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

(iii) *“Related” duties defined.* In addition to the examples described in (e)(ii), a non-tipped duty is related to a tip-producing occupation if the duty is listed as a task in the description of the tip-producing occupation in the Occupational Information Network (O*NET) at www.onetonline. Occupations not listed in O*NET may qualify as tipped occupations. For those occupations, duties usually and customarily performed by employees are related duties as long as they are included in the list of duties performed in similar O*NET occupations.

(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. 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.

* * * * *

(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 mandatory tip pools. 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 tip

pooling arrangement; and that the tip credit shall not apply to any worker who has not been informed of these requirements in this section.

PART 516—RECORDS TO BE KEPT BY EMPLOYERS

3. Revise the authority section for Part 516 to read:

AUTHORITY: Sec. 11, 52 Stat. 1066, as amended, 29 U.S.C. 211. Section 516.28 also issued under 29 U.S.C. 203(m), as amended by sec. 2105(b), Pub. L. 104–188, 110 Stat. 1755; sec. 8102(a), Pub. L. 110–28, 121 Stat. 112; and sec. 1201, Div. S., Tit. XII, Pub. L. 115-141, 132 Stat. 348. Section 516.33 also issued under 52 Stat. 1060, as amended; 29 U.S.C. 201 et seq. Section 516.34 also issued under Sec. 7, 103 Stat. 944, 29 U.S.C. 207(q).

4. Amend § 516.28 by revising the section heading and paragraph (b) to read as follows:

§ 516.28 Tipped employees and employer-administered tip pools.

* * * * *

(b) With respect to employees who receive tips but for whom a tip credit is not taken under section 3(m)(2)(A), any employer that collects tips received by employees to operate a mandatory tip-pooling or tip-sharing arrangement shall maintain and preserve payroll or other records containing the information and data required in § 516.2(a) and, in addition, the following:

(1) A symbol, letter, or other notation placed on the pay records identifying each employee who receive tips.

(2) Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070).

PART 531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT
OF 1938

5. Revise the authority citation for Part 531 to read as follows:

AUTHORITY: 29 U.S.C. 203(m) and (t), as amended by sec. 3(m), Pub. L. 75-718, 52 Stat. 1060; sec. 2, Pub. L. 87-30, 75 Stat. 65; sec. 101, sec. 602, Pub. L. 89-601, 80 Stat. 830; sec. 29(B), Pub. L. 93-259, 88 Stat. 55 sec. 3, sec. 15(c), Pub. L. 95-151, 91 Stat. 1245; sec. 2105(b), Pub. L. 104-188, 110 Stat. 1755; sec. 8102, Pub. L. 110-28, 121 Stat. 112; and sec. 1201, Div. S., Tit. XII, Pub. L. 115-141, 132 Stat. 348.

6. Amend § 531.50 by:

- a. Revising paragraph (a) introductory text and adding paragraph (a)(3);
- b. Redesignating paragraph (b) as paragraph (c); and
- c. Adding a new paragraph (b).

The revisions and additions read as follows:

§ 531.50 Statutory provisions with respect to tipped employees.

(a) With respect to tipped employees, section 3(m)(2)(A) provides that, in determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

* * *

(3) Section 3(m)(2)(A) also provides that an employer that takes a tip credit against its minimum wage obligations to its tipped employees must inform those employees of the provisions of that subsection, and that the employees must retain all of their tips, although

the employer may require those employees to participate in a tip pool with other tipped employees that customarily and regularly receive tips.

(b) Section 3(m)(2)(B) provides that an employer may not keep tips received by its employees for any purposes, including allowing managers and supervisors to keep any portion of employees' tips, regardless of whether the employer takes a tip credit under section 3(m)(2)(A).

* * * * *

7. Revise the first sentence of § 531.51 to read as follows:

§ 531.51 Conditions for taking tip credits in making wage payments.

The wage credit permitted on account of tips under section 3(m)(2)(A) may be taken only with respect to wage payments made under the Act to those employees whose occupations in the workweeks for which such payments are made are those of “tipped employees” as defined in section 3(t). * * *

8. Revise § 531.52 to read as follows:

§ 531.52 General restrictions on an employer's use of its employees' tips.

(a) 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 charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. An employer that takes a tip credit against its minimum wage obligations is prohibited from using an employee's tips for any reason other than that which is statutorily permitted in section 3(m)(2)(A): As a credit against its minimum wage obligations to the employee, or in furtherance of a tip pool limited to employees who customarily and regularly receive tips. Only tips actually received by an

employee as money belonging to the employee may be counted in determining whether the person is a “tipped employee” within the meaning of the Act and in applying the provisions of section 3(m)(2)(A) which govern wage credits for tips.

(b) Section 3(m)(2)(B) of the Act provides that an employer may not keep tips received by its employees for any purposes, regardless of whether the employer takes a tip credit.

(1) An employer may exert control over an employee’s tips only to distribute tips to the employee who received them, require employees to share tips with other employees in compliance with § 531.54, or, where the employer facilitates tip pooling by collecting and redistributing employees’ tips, distribute tips to employees in a tip pool in compliance with § 531.54.

(2) An employer may not allow managers and supervisors to keep any portion of an employee’s tips, regardless of whether the employer takes a tip credit. For purposes of section 3(m)(2)(B), the term “manager” or “supervisor” shall mean any employee whose duties match those of an executive employee as described in § 541.100(a)(2) through (4) or § 541.101.

9. Revise § 531.54 to read as follows:

§ 531.54 Tip pooling.

(a) *Monies counted as tips.* Where employees practice tip splitting, as where waiters give a portion of their tips to the busser, both the amounts retained by the waiters and those given the bussers are considered tips of the individuals who retain them, in applying the provisions of sections 3(m)(2)(A) and 3(t). Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which

they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act. Section 3(m)(2)(A) does not impose a maximum contribution percentage on mandatory tip pools.

(b) *Meaning of “keep.”* Section 3(m)(2)(B)’s prohibition against keeping tips applies regardless of whether an employer takes a tip credit. Section 3(m)(2)(B) expressly prohibits employers from requiring employees to share tips with managers or supervisors, as defined in § 531.52(b)(2), or employers, as defined in 29 U.S.C. 203(d). An employer does not violate section 3(m)(2)(B)’s prohibition against keeping tips if it requires employees to share tips with other employees who are eligible to receive tips.

(1) *Full and prompt distribution of tips.* An employer that facilitates tip pooling by collecting and redistributing employees’ tips does not violate section 3(m)(2)(B)’s prohibition against keeping tips if it fully distributes any tips the employer collects no later than the regular payday for the workweek in which the tips were collected, or when the pay period covers more than a single workweek, the regular payday for the period in which the workweek ends. To the extent that it is not possible for an employer to ascertain the amount of tips that have been received or how tips should be distributed prior to processing payroll, tips must be distributed to employees as soon as practicable after the regular payday.

(c) *Employers that take a section 3(m)(2)(A) tip credit.* When an employer takes a tip credit pursuant to section 3(m)(2)(A):

(1) The employer may require an employee for whom the employer takes a tip credit to contribute tips to a tip pool only if it is limited to employees who customarily and regularly receive tips; and

(2) The 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.

(d) *Employers that do not take a section 3(m)(2)(A) tip credit.* An employer that pays its tipped employees the full minimum wage and does not take a tip credit may impose a tip pooling arrangement that includes dishwashers, cooks, or other employees in the establishment who are not employed in an occupation in which employees customarily and regularly receives tips. An employer may not participate in such a tip pool, and may not include supervisors and managers in the pool.

10. Revise § 531.55(a) to read as follows:

§ 531.55 Examples of amounts not received as tips.

(a) 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 employees, cannot be counted as a tip received in applying the provisions of sections 3(m)(2)(A) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.

* * * * *

11. Amend § 531.56 by revising the second and third sentences in paragraph (a), and paragraphs (d) and (e) to read as follows:

§ 531.56 “More than \$30 a month in tips.”

(a) *In general.* * * * An employee employed in an occupation in which the tips he receives meet this minimum standard is a “tipped employee” for whom the wage credit

provided by section 3(m)(2)(A) may be taken in computing the compensation due him under the Act for employment in such occupation, whether he is employed in it full time or part time. An employee employed full time or part time in an occupation in which he does not receive more than \$30 a month in tips customarily and regularly is not a “tipped employee” within the meaning of the Act and must receive the full compensation required by its provisions in cash or allowable facilities without any deduction for tips received under the provisions of section 3(m)(2)(A).

* * * * *

(d) *Significance of minimum monthly tip receipts.* More than \$30 a month in tips customarily and regularly received by the employee is a minimum standard that must be met before any wage credit for tips is determined under section 3(m)(2)(A). It does not govern or limit the determination of the appropriate amount of wage credit under section 3(m)(2)(A) that may be taken for tips under section 6(a)(1) (tip credit equals the difference between the minimum wage required by section 6(a)(1) and the cash wage paid (at least \$2.13 per hour)).

(e) *Dual jobs.* (1) In some situations an employee is employed in a dual job, as for example, where a maintenance person in a hotel also works as a server. In such a situation the employee, if he or she customarily and regularly receives more than \$30 a month in tips for his or her work as a server, is a tipped employee only with respect to his or her employment as a server. The employee is employed in two occupations, and no tip credit can be taken for his or her hours of employment in the occupation of maintenance person.

(2) Such a situation is distinguishable from that of an employee who spends time performing duties that are related to his or her tip-producing occupation but not themselves directed toward producing tips. For example, a server may spend part of his or her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. Likewise, a counter attendant may also prepare his or her own short orders or may, as part of a group of counter attendants, take a turn as a short order cook for the group. An employer may take a tip credit for any amount of time that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

(3) *“Related” duties defined.* In addition to the examples described in (e)(2), a non-tipped duty is related to a tip-producing occupation if the duty is listed as a task in the description of the tip-producing occupation in the Occupational Information Network (O*NET) at www.onetonline. Occupations not listed in O*NET may qualify as tipped occupations. For those occupations, duties usually and customarily performed by employees are related duties as long as they are included in the list of duties performed in similar O*NET occupations.

12. Revise § 531.59 to read as follows:

§ 531.59 The tip wage credit.

(a) In determining compliance with the wage payment requirements of the Act, under the provisions of section 3(m)(2)(A) the amount paid to a tipped employee by an employer is increased on account of tips by an amount equal to the formula set forth in the statute (minimum wage required by section 6(a)(1) of the Act minus cash wage paid (at least \$2.13)), provided that the employer satisfies all the requirements of section

3(m)(2)(A). This tip credit is in addition to any credit for board, lodging, or other facilities which may be allowable under section 3(m).

(b) As indicated in § 531.51, the tip credit may be taken only for hours worked by the employee in an occupation in which the employee qualifies as a “tipped employee.” Pursuant to section 3(m)(2)(A), 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 of the provisions of section 3(m)(2)(A) of the Act, *i.e.*: The amount of the cash wage that is to be paid to the tipped employee by the employer; the additional amount by which the wages of the tipped employee are 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 tip pooling arrangement limited to employees who customarily and regularly receive tips; and that the tip credit shall not apply to any employee who has not been informed of these requirements in this section. The credit allowed on account of tips may be less than that permitted by statute (minimum wage required by section 6(a)(1) minus the cash wage paid (at least \$2.13)); it cannot be more. In order for the employer to claim the maximum tip credit, the employer must demonstrate that the employee received at least that amount in actual tips. If the employee received less than the maximum tip credit amount in tips, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips. With the exception of tips contributed to a tip pool limited to employees who customarily and regularly receive tips as described in § 531.54, section 3(m)(2)(A) also requires

employers that take a tip credit to permit employees to retain all tips received by the employee.

13. Revise § 531.60 to read as follows:

§ 531.60 Overtime payments.

When overtime is worked by a tipped employee who is subject to the overtime pay provisions of the Act, the employee's regular rate of pay is determined by dividing the employee's total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. (*See* part 778 of this chapter for a detailed discussion of overtime compensation under the Act.) In accordance with section 3(m)(2)(A), a tipped employee's regular rate of pay includes the amount of tip credit taken by the employer per hour (not in excess of the minimum wage required by section 6(a)(1) minus the cash wage paid (at least \$2.13)), the reasonable cost or fair value of any facilities furnished to the employee by the employer, as authorized under section 3(m) and this part 531, and the cash wages including commissions and certain bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the Act.

PART 578—[AMENDED]

14. The heading of Part 578 is revised to read as follows:

**PART 578—TIP RETENTION, MINIMUM WAGE, AND OVERTIME
VIOLATIONS—CIVIL MONEY PENALTIES**

15. The authority citation for Part 578 is revised to read as follows:

AUTHORITY: 29 U.S.C. 216(e), as amended by sec. 9, Pub. L. 101-157, 103 Stat. 938, sec. 3103, Pub. L. 101-508, 104 Stat. 1388-29, sec. 302(a), Pub. L. 110-233, 122 Stat. 920, and sec. 1201, Div. S., Tit. XII, Pub. L. 115-141, 132 Stat. 348; Pub. L. 101-410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by sec. 31001(s), Pub. L. 104-134, 110 Stat. 1321-358, 1321-373, and sec. 701, Pub. L. 114-74, 129 Stat 584.

16. Revise § 578.1 to read as follows:

§ 578.1 What does this part cover?

Section 9 of the Fair Labor Standards Amendments of 1989 amended section 16(e) of the Act to provide that any person who repeatedly or willfully violates the minimum wage (section 6) or overtime provisions (section 7) of the Act shall be subject to a civil money penalty not to exceed \$1,000 for each such violation. In 2001, WHD adjusted this penalty for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134, section 31001(s)). *See* 66 FR 63503 (Dec. 7, 2001). The Genetic Information Nondiscrimination Act of 2008 amended section 16(e) of the Act to reflect this increase. *See* Pub. L. 110-233, sec. 302(a), 122 Stat. 920. Section 1201(b)(3) of the Consolidated Appropriations Act, 2018, amended section 16(e) to add that any person who violates section 3(m)(2)(B) of the Act shall be subject to a civil money penalty not to exceed \$1,100. The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134, section 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 (Pub. L. 114-74, section 701), requires that inflationary adjustments be annually made in these civil money penalties according to a specified cost-of-living formula. This

part defines terms necessary for administration of the civil money penalty provisions, describes the violations for which a penalty may be imposed, and describes criteria for determining the amount of penalty to be assessed. The procedural requirements for assessing and contesting such penalties are contained in part 580 of this chapter.

17. Revise § 578.3 to read as follows

§ 578.3 What types of violations may result in a penalty being assessed?

(a)(1) A penalty of up to \$1,100 may be assessed against any person who repeatedly or willfully violates section 3(m)(2)(B) of the Act.

(2) A penalty of up to \$1,964 per violation may be assessed against any person who repeatedly or willfully violates section 6 (minimum wage) or section 7 (overtime) of the Act. The amount of the penalties stated in paragraphs (a)(1) and (2) of this section will be determined by applying the criteria in § 578.4.

(b) *Repeated violations.* An employer's violation of section 3(m)(2)(B), section 6, or section 7 of the Act shall be deemed to be "repeated" for purposes of this section:

(1) Where the employer has previously violated section 3(m)(2)(B), section 6, or section 7 of the Act, provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act; or

(2) Where a court or other tribunal has made a finding that an employer has previously violated section 3(m)(2)(B), section 6, or section 7 of the Act, unless an appeal therefrom which has been timely filed is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by such appellate tribunal.

(c) *Willful violations.* (1) An employer’s violation of section 3(m)(2)(B), section 6, or section 7 of the Act shall be deemed to be “willful” for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, the employer’s receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful is a relevant fact and circumstance when determining if the employer’s conduct is knowing.

(3) For purposes of this section, whether the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry is a relevant fact and circumstance when determining if the employer’s conduct is in reckless disregard of the requirements of the Act.

18. Revise § 578.4(a) to read as follows:

§ 578.4 Determination of penalty.

(a) In determining the amount of penalty to be assessed for any repeated or willful violation of section 3(m)(2)(B), section 6, or section 7 of the Act, the Administrator shall consider the seriousness of the violations and the size of the employer’s business.

* * * * *

PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

19. The authority citation for Part 579 is revised to read as follows:

AUTHORITY: 29 U.S.C. 203(m), (l), 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No.

01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 Note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–7, 129 Stat 584.

20. Amend § 579.1 by

- a. Revising paragraph (a) introductory text;
- b. Redesignating paragraph (a)(2) as paragraph (a)(2)(i); and
- c. Adding paragraph (a)(2)(ii).

The revisions and additions read as follows:

§ 579.1 Purpose and scope.

(a) Section 16(e), added to the Fair Labor Standards Act of 1938, as amended, by the Fair Labor Standards Amendments of 1974, and as further amended by the Fair Labor Standards Amendments of 1989, the Omnibus Budget Reconciliation Act of 1990, the Compactor and Balers Safety Standards Modernization Act of 1996, the Genetic Information Nondiscrimination Act of 2008, and the Consolidated Appropriations Act of 2018, provides for the imposition of civil money penalties in the following manner:

** * * *

(2) ***

(ii) Any person who repeatedly or willfully violates section 203(m)(2)(B) of the FLSA, relating to the retention of tips, shall be subject to a civil penalty not to exceed \$1,100 for each such violation.

* * * * *

21. Amend § 579.2 by revising the definition of “Willful violations” to read as follows:

* * * * *

Willful violations under this section has several components. An employer's violation of section 12 or section 13(c) of the Act relating to child labor or any regulation issued pursuant to such sections, shall be deemed to be *willful* for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful. In addition, for purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful is a relevant fact and circumstance when determining if the employer's conduct is knowing. For purposes of this section, whether the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry is a relevant fact and circumstance when determining if the employer's conduct is in reckless disregard of the requirements of the Act.

PART 580—CIVIL MONEY PENALTIES—PROCEDURES FOR ASSESSING AND CONTESTING PENALTIES

22. The authority citation for part 580 continues to read as follows:

AUTHORITY: 29 U.S.C. 9a, 203, 209, 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 5 U.S.C. 500, 503, 551, 559; 103 Stat. 938.

23. Revise the first sentence of § 580.2 to read as follows:

§ 580.2 Applicability of procedures and rules.

The procedures and rules contained in this part prescribe the administrative process for assessment of civil money penalties for any violation of the child labor provisions at section 12 of the Act and any regulation thereunder as set forth in part 579, and for assessment of civil money penalties for any repeated or willful violation of the tip retention provisions of section 3(m)(2)(B), the minimum wage provisions of section 6, or the overtime provisions of section 7 of the Act or the regulations thereunder set forth in 29 CFR subtitle B, chapter V. * * *

24. Revise the first sentence of § 580.3 to read as follows:

§ 580.3 Written notice of determination required.

Whenever the Administrator determines that there has been a violation by any person of section 12 of the Act relating to child labor or any regulation issued under that section, or determines that there has been a repeated or willful violation by any person of section 3(m)(2)(B), section 6, or section 7 of the Act, and determines that imposition of a civil money penalty for such violation is appropriate, the Administrator shall issue and serve a notice of such penalty on such person in person or by certified mail. * * *

25. Amend § 580.12 by revising the first sentence of paragraph (b) of to read as follows:

§ 580.12 Decision and Order of Administrative Law Judge.

* * * * *

(b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent has committed a violation of section 12, or a repeated or willful violation of section 3(m)(2)(B), section 6, or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. * * *

* * * * *

26. Amend § 580.18 by revising the third sentence in paragraph (b)(3) to read as follows:

§ 580.18 Collection and recovery of penalty.

* * * * *

(b) * * *

(3) * * * A willful violation of sections 3(m)(2)(B), 6, 7, or 12 of the Act may subject the offender to the penalties provided in section 16(a) of the Act, enforced by the Department of Justice in criminal proceedings in the United States courts. * * *

The following appendix will not appear in the Code of Federal Regulations

Appendix Table 1: List of Occupations Included in the Outside-Option Regression Sample

Amusement and Recreation Attendants
Bus Drivers, School or Special Client
Bus Drivers, Transit and Intercity
Cashiers
Childcare Workers
Concierges
Door-To-Door Sales Workers, News and Street Vendors, and Related Workers
Driver/Sales Workers
Flight Attendants
Funeral Attendants
Hairdressers, Hairstylists, and Cosmetologists
Home Health Aides
Hotel, Motel, and Resort Desk Clerks
Insurance Sales Agents
Library Assistants, Clerical
Maids and Housekeeping Cleaners
Manicurists and Pedicurists
Massage Therapists
Nursing Assistants
Occupational Therapy Aides
Office Clerks, General
Orderlies
Parking Lot Attendants
Parts Salespersons

Personal Care Aides
Pharmacy Aides
Pharmacy Technicians
Postal Service Clerks
Real Estate Sales Agents
Receptionists and Information Clerks
Recreation Workers
Residential Advisors
Retail Salespersons
Sales Agents, Financial Services
Sales Representatives, Wholesale and Manufacturing, Except Technical and Scientific Products
Secretaries and Administrative Assistants, Except Legal, Medical, and Executive
Social and Human Service Assistants
Statement Clerks
Stock Clerks, Sales Floor
Subway and Streetcar Operators
Taxi Drivers and Chauffeurs
Telemarketers
Telephone Operators
Tellers
Tour Guides and Escorts
Travel Agents
Travel Guides

Signed in Washington, D.C. this 19th day of September, 2019.

Cheryl M. Stanton,

Administrator, Wage and Hour Division

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