was designed, among other things, to assist the Financial Stability Oversight Council in its assessment of systemic risk in the U.S. financial system.

Prior RFA Analysis: When the Commission adopted this rule on October 31, 2011, it published a Final Regulatory Flexibility Analysis in the adopting release, Release No. IA–3308, available at: *https://www.federalregister.gov/documents/2011/11/16/2011-28549/reporting-by-investment-advisers-to-private-funds-and-certain-commodity-pool-operators-and-commodity.* The Commission received no comments on its Initial Regulatory Flexibility Analysis published in the proposing release, Release No. IA–3145 (Jan. 26, 2011), available at: *https://www.sec.gov/rules/proposed/2011/ia-3145fr.pdf.*

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Title: Rules Implementing Amendments to the Investment Advisers Act of 1940.

Citation: 17 CFR 275.0–7, 17 CFR 275.203–1, 17 CFR 275.203A–1, 17 CFR 275.203A–2, 17 CFR 275.203A–3, 17 CFR 275.203A–5, 17 CFR 275.204–1, 17 CFR 275.204–2, 17 CFR 275.204–4, 17 CFR 275.206(4)–5, 17 CFR 275.222–1, 17 CFR 275.222–2, 17 CFR 279.1, 17 CFR 279.3, and 17 CFR 279.4.

Authority: 15 U.S.C. 77s(a), 77sss(a), 78a–37(a), 78w(a), 78bb(e)(2), 80b–3(c)(1), 80b–3A(a)(2)(B)(ii), 80b–3A(c), 80b–4, 80b–6(4), 80b–6A, and 80b–11(a).

Description: The Commission adopted new rules and rule amendments under the Advisers Act to implement provisions of the Dodd-Frank Act. These rules and rule amendments were designed to give effect to provisions of Title IV of the Dodd-Frank Act that, among other things, increase the statutory threshold for registration by investment advisers with the Commission, require advisers to hedge funds and other private funds to register with the Commission, and require reporting by certain investment advisers that are exempt from registration. In addition, the Commission adopted rule amendments, including amendments to the Commission's pay to play rule, that address a number of other changes made by the Dodd-Frank Act.

Prior RFA Analysis: When the Commission adopted these rules and rule amendments on June 22, 2011, it published a Final Regulatory Flexibility Analysis in the adopting release, Release No. IA–3221, available at: *https://www.federalregister.gov/documents/2011/07/19/2011-16318/rules-implementing-amendments-to-the-investment-advisers-act-of-1940.* The Commission received no comments on its Initial Regulatory Flexibility Analysis published in the proposing release, Release No. IA–3110 (Nov. 19, 2010), available at: *https://www.federalregister.gov/documents/2010/12/10/2010-29956/rules-implementing-amendments-to-the-investment-advisers-act-of-1940.*

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Title: Family Offices.

Citation: 17 CFR 275.202(a)(11)(G)–1.

Authority: 15 U.S.C. 80b–2(a)(11)(G) and 80b–6A.

Description: The Commission adopted a rule to define ''family offices'' that are excluded from the definition of an investment adviser under the Advisers Act and are thus not subject to regulation under the Advisers Act.

Prior RFA Analysis: When the Commission adopted this rule on June 22, 2011, it published a Final Regulatory Flexibility Analysis in the adopting release, Release No. IA–3220, available at: *https://www.federalregister.gov/documents/2011/06/29/2011-16117/family-offices.* The Commission received no comments on its Initial Regulatory Flexibility Analysis published in the proposing release, Release No. IA–3098 (Oct. 12, 2010), available at: *https://www.federalregister.gov/documents/2010/10/18/2010-26086/family-office.*

* * * * *

Title: Shareholder Approval of Executive Compensation and Golden Parachute Compensation.

Citation: 17 CFR 240.14a–21, 17 CFR 240.14a–4, 17 CFR 240.14a–6, 17 CFR 240.14a–8, 17 CFR 240.14a–101, 17 CFR 240.14c–101, 17 CFR 229.402, 17 CFR 229.1011, 17 CFR 240.13e–100, 17 CFR 240.14d–100, 17 CFR 240.14d–101, and 17 CFR 249.308.

Authority: 15 U.S.C. 77c(b), 77f, 77g, 77j, 77s(a), 78m, 78n(a), 78n–1, 78w(a), and 78mm, and Section 951 of the Dodd-Frank Act.

Description: The Commission adopted rule amendments to implement the provisions of the Dodd-Frank Act relating to shareholder approval of executive compensation and ''golden parachute'' compensation arrangements. Section 951 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 by adding Section 14A, which requires companies to conduct a separate shareholder advisory vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S–K or any successor to that item. Section 14A also requires companies to conduct a separate shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation. In addition, Section 14A requires companies soliciting votes to approve merger or acquisition transactions to provide disclosure of certain ''golden parachute'' compensation arrangements and, in certain circumstances, to conduct a separate shareholder advisory vote to approve the golden parachute compensation arrangements.

Prior RFA Analysis: When the Commission adopted the rule amendments on January 25, 2011, it published a Final Regulatory Flexibility Analysis in the adopting release, Release No. 33–9178, available at: *https://www.federalregister.gov/documents/2011/02/02/2011-1971/shareholder-approval-of-executive-compensation-and-golden-parachute-compensation.* The Commission received no comments on its Initial Regulatory Flexibility Analysis published in the proposing release, Release No. 33–9153 (Oct. 18, 2010), available at: *https://www.federalregister.gov/documents/2010/10/28/2010-26535/shareholder-approval-of-executive-compensation-and-golden-parachute-compensation.*

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By the Commission.

Dated: March 17, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–05928 Filed 3–24–21; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 10

Wage and Hour Division

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

RIN 1235–AA21

Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Proposed delay of effective date.

SUMMARY: On February 26, 2021, the Department of Labor (Department) published a final rule (Delay Rule) extending until April 30, 2021, the effective date of the rule titled Tip Regulations Under the Fair Labor Standards Act (2020 Tip final rule) in order to allow the Department the

opportunity to review issues of law, policy, and fact raised by the 2020 Tip final rule before it takes effect. This notice of proposed rulemaking (NPRM) proposes to further extend the effective date of three portions of the 2020 Tip final rule in order to complete a separate rulemaking, published elsewhere in this issue of the **Federal Register**, and to provide the Department additional time to consider whether to withdraw and repropose that portion of the 2020 Tip final rule addressing the application of the FLSA's tip credit provision to tipped employees who perform both tipped and non-tipped duties. The proposed 8-month delay, until December 31, 2021, would allow the Department to finalize the separate rulemaking, which would include, inter alia, a 60-day comment period and at least a 30-day delay between publication and the rule's effective date.

DATES: The amendments to 29 CFR 10.28(b)(2), 531.56(e), 578.1, 578.3, 578.4, 579.1, 579.2, 580.2, 580.3, 580.12, and 580.18, published at 85 FR 86756 (December 30, 2020), and delayed at 86 FR 11632 (February 26, 2021) until April 30, 2021, are proposed to be further delayed until December 31, 2021. Submit written comments on or before April 14, 2021.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235–AA21, by either of the following methods: *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the instructions for submitting comments. *Mail:* Address written submissions to 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:* Please submit only one copy of your comments by only one method. Commenters submitting file attachments on *https://www.regulations.gov* are advised that uploading text-recognized documents—*i.e.,* documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. 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 *https://www.regulations.gov,* including any personal information provided. The Department will post comments gathered and submitted by a third-party organization as a group under a single document ID number on *https://www.regulations.gov.* All comments must be received by 11:59 p.m. on April 14, 2021 for consideration in this proposed delay of effective date. The Department strongly recommends that commenters submit their comments electronically via *https://www.regulations.gov* to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Submit only one copy of your comments by only one method. *Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, 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 proposal may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. Background

In the Consolidated Appropriations Act of 2018 (CAA), Congress amended section 3(m) of the FLSA to prohibit employers from keeping tips received by employees, regardless of whether the employers take a tip credit under section 3(m). On December 30, 2020, the Department published the 2020 Tip final rule in the **Federal Register** to address these amendments. *See* 85 FR 86756. The 2020 Tip final rule would also codify the Wage and Hour Division's (WHD) guidance, unrelated to the CAA amendments, regarding the application of the FLSA's tip credit provision to tipped employees who perform tipped and non-tipped duties. *See id.* The original effective date of the 2020 Tip final rule was March 1, 2021. *See id.* A legal challenge to the 2020 Tip final rule was filed on January 19, 2021 and is pending in the United States District Court for the Eastern District of Pennsylvania.[1]

On February 26, 2021, after engaging in notice-and-comment rulemaking and considering the comments submitted about a proposed effective date delay (86 FR 8325 (February 5, 2021)), the Department delayed the effective date for the 2020 Tip final rule by 60 days to April 30, 2021, in order to provide the Department additional opportunity to review and consider questions of law, policy, and fact raised by the rule. *See* 86 FR 11632 (February 26, 2021). The 60-day delay of the 2020 Tip final rule's effective date was sought pursuant to the Presidential directive as expressed in the memorandum of January 20, 2021, from the Assistant to the President and Chief of Staff, titled ''Regulatory Freeze Pending Review.'' *See* 86 FR 7424. The Department explained in the Delay Rule that it would use the delay to consider, among other things, whether the 2020 Tip final rule properly implements the CAA amendments to section 3(m) of the FLSA, in particular, the incorporation of the CAA's language regarding civil money penalties (CMPs) for violations of section 3(m)(2)(B) of the FLSA; whether the 2020 Tip final rule revisions to portions of the CMP regulations on willful violations were appropriate; whether the 2020 Tip final rule adequately considered the possible costs, benefits, and transfers between employers and employees related to the codification of guidance on applying the tip credit to tipped employees who perform tipped and non-tipped duties; and whether the 2020 Tip final rule otherwise effectuates the CAA amendments to the FLSA. *See id.* The Department explained that allowing the 2020 Tip final rule to go into effect while the Department reviewed these issues could lead to confusion among workers and employers in the event that the Department proposed to revise the 2020 Tip final rule after its review; delaying the 2020 Tip final rule would avoid such confusion. *Id.*

II. Proposed Second Delay of Effective Date for Three Portions of the 2020 Tip Final Rule

In this NPRM, the Department is proposing to delay the effective date of three portions of the 2020 Tip final rule for an additional 8 months, through December 31, 2021. Specifically, the Department is proposing to delay the two portions of the 2020 Tip final rule which address the assessment of CMPs, and to delay the portion of the 2020 Tip final rule that addresses the application of the FLSA tip credit to tipped employees who perform tipped and non-tipped duties. These three portions of the 2020 Tip final rule encompass those parts of the rule that are being challenged under the Administrative Procedure Act (APA) in the January 19, 2021 complaint pending in the United

[1] *Commonwealth of Pennsylvania et al.* v. *Scalia et al.,* No. 2:21–cv–00258 (E.D. Pa., Jan. 19, 2021).

States District Court for the Eastern District of Pennsylvania (''*Pennsylvania* complaint'').[2] The Department seeks comment on its proposed further delay of the effective date of these three portions of the 2020 Tip final rule. To further aid its review, the Department also seeks comments on these three portions of the 2020 Tip final rule, and in particular, on the merits of withdrawing or retaining the portion of the rule that amends the Department's dual jobs regulations to address the application of the FLSA tip credit to tipped employees who perform both tipped and non-tipped duties.

In another NPRM published elsewhere in this issue of the **Federal Register** the Department is proposing to withdraw and revise the two portions of the 2020 Tip final rule which address the assessment of CMPs under the FLSA: The regulations which address the statutory provision establishing CMPs for violations of section 3(m)(2)(B) of the Act, §§ 578.3(a)–(b), 578.4, 579.1, 580.2, 580.3, and 580.12, and 580.18(b)(3), and the portion of its CMP regulations which address when a certain violation is ''willful,'' §§ 578.3(c) and 579.2.[3]

The Department is not proposing to further extend the remaining provisions of the 2020 Tip final rule not addressed in this NPRM. The remainder of the 2020 Tip final rule—consisting of those portions addressing the keeping of tips and tip pooling,[4] recordkeeping,[5] and those portions making other minor changes to update the regulations to reflect the new statutory language and citations added by the CAA amendments and clarify other references consistent with the statutory text[6]—will become effective upon the expiration of the first effective date extension, which extended the effective date of the 2020 Tip final rule through April 30, 2021.

III. Basis for Proposed Second Delay

The Department is proposing this second delay of the effective date for three portions of the 2020 Tip final rule so that it has sufficient time to engage in a comprehensive review of these parts of the 2020 tip final rule, and to take further action as needed to complete its review. The Department believes that review of these three portions of the 2020 Tip final rule before they go into effect is particularly important given that the *Pennsylvania* litigants and individuals who submitted comments on the Department's Delay Rule raised significant substantive and procedural concerns regarding these three portions of the 2020 Tip final rule. The Department has proposed to withdraw and repropose two portions of the 2020 Tip final rule relating to CMPs to better align them with the FLSA and Supreme Court caselaw. Allowing these provisions to go into effect could lead to practices the Department ultimately determines to be inconsistent with the FLSA and judicial opinions. In addition to causing confusion, this could result in increased compliance costs, and potentially disruptive changes in employment practices in the event that the Department withdraws and revises these portions of the 2020 Tip final rule.

The first portion of the 2020 Tip final rule that the Department is proposing to further delay addresses the assessment of CMPs for violations of section 3(m)(2)(B) of the FLSA, which prohibits employers, including managers and supervisors, from ''keeping'' tips. The CAA amended section 16(e)(2) of the FLSA to provide for the assessment of CMPs for violations of section 3(m)(2)(B) ''as the Secretary determines appropriate[.]'' Notwithstanding this statutory grant of discretion, the 2020 Tip final rule would limit the Secretary's ability to assess CMPs for violations of 3(m)(2)(B) to those instances where the violation is ''repeated'' or ''willful.'' *See, e.g.,* 85 FR 86772–73. The *Pennsylvania* litigants argue that this portion of the 2020 Tip final rule addressing CMP assessments for violations of section 3(m)(2)(B) is inconsistent with the plain language of the statute and Congressional intent, noting that, unlike in the case of CMPs for minimum wage and overtime violations, ''Congress did not make the imposition of civil money penalties for violations of section 3(m)(2)(B) of the Act contingent upon a finding of willfulness.'' [7] Stakeholders who submitted comments in support of the Department's proposal to delay the effective date of the 2020 Tip final rule for 60 days expressed this same concern, similarly noting that section 16(e)(2) of the FLSA does not require a finding of willfulness to assess a CMP for a violation of section 3(m)(2)(B). *See, e.g.,* National Employment Law Project (NELP); National Women's Law Center (NWLC); NETWORK Lobby for Catholic Social Justice. Upon review of the *Pennsylvania* complaint and the comments received regarding its Delay Rule, the Department is concerned that the 2020 Tip Final rule unlawfully circumscribes its discretion to issue CMPs for section 3(m)(2)(B) violations. Accordingly, as explained in the NPRM published separately in this edition of the **Federal Register**, the Department is proposing to withdraw and repropose this part of the 2020 Tip final rule. To avoid codifying a limitation on the Department's ability to assess CMPs that may lack a basis in law, the Department believes that it may be necessary to delay that portion of the 2020 Tip final rule regarding CMPs for section 3(m)(2)(B) while it completes this rulemaking.

The second portion of the 2020 Tip final rule that the Department is proposing to further delay addresses those parts of the Department's FLSA regulations which address when a violation of that Act is ''willful.'' The Department's definition of a ''willful'' violation in §§ 578.3(c) and 579.2 of its regulations is based on the Supreme Court's opinion in *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128, 133 (1988), which held that a violation is willful if the employer ''knew or showed reckless disregard'' for whether its conduct was prohibited by the FLSA. Among the concerns raised by the *Pennsylvania* litigants regarding this portion of the 2020 Tip final rule is the rule's removal of language regarding the meaning of ''reckless disregard'' from these regulations.[8] According to the *Pennsylvania* litigants, this and other changes to these regulations ''contradict the Supreme Court's long-established

[2] *See Commonwealth of Pennsylvania et al.* v. *Scalia et al.,* No. 2:21–cv–00258, pp. 42–43 (E.D. Pa., Jan. 19, 2021).

[3] The sections of the 2020 Tip final rule related to CMPs that the Department is proposing to withdraw and revise are in §§ 578.3, 578.4, 579.1, 579.2, 580.2, 580.3, 580.12 and 580.18 of part 29; the third portion of the 2020 Tip final rule that the Department is continuing to consider are those regulations related to the tip credit's application to tipped employees who perform tipped and non-tipped duties, §§ 10.28(b) and 531.56(e) of part 29. The Department is not proposing to withdraw and repropose the 2020 Tip final rule's changes to the Department's CMP regulation at § 578.1, which only generally references tip CMPs. To avoid confusion for the regulated community, however, the Department is delaying the effective date of the entire portion of its CMP regulations addressed in the 2020 Tip final rule. The Department's 2018 Field Assistance Bulletin explains the interim procedures that the Department is following in assessing tip CMPs. *See* Field Assistance Bulletin 2018–3 (Apr. 6, 2018).

[4] 29 CFR 10.28(c), (e)–(f); 531.50 through 531.52, 531.54.

[5] 29 CFR 516.28(b).

[6] 29 CFR 531.50, 531.51, 531.52, 531.55, 531.56(a), 531.56(c)–(d), 531.59, and 531.60.

[7] *See Commonwealth of Pennsylvania et al.* v. *Scalia et al.,* No. 2:21–cv–00258, p. 98 (E.D. Pa., Jan. 19, 2021).

[8] *See Commonwealth of Pennsylvania et al.* v. *Scalia et al.,* No. 2:21–cv–00258, pp. 23–24; *see also* p. 94 (E.D. Pa., Jan. 19, 2021) (''The Final Rule also removes an employer's failure to inquire further into whether its conduct was in compliance with the Act from the Department's description of willfulness.'')

definition of willfulness.'' [9] In its comment on the proposed Delay Rule, NELP similarly argued that the 2020 Tip final rule's revisions addressing when a violation is ''willful'' ''do[ ] not comport with Congress's intent or with longstanding U.S. Supreme Court precedent and its progeny,'' including *McLaughlin* v. *Richland Shoe.*[10] Following its review of the *Pennsylvania* complaint and comments on the proposed Delay Rule, the Department is proposing in an NPRM published separately in this edition of the **Federal Register** to withdraw and repropose this part of the 2020 Tip final rule to make changes to the portion of the rule regarding the meaning of ''willfulness'' under the Department's CMP regulations; these changes include reinserting language addressing the meaning of reckless disregard. The Department believes that delaying the effective date of the portion of the 2020 Tip final rule while it completes rulemaking on this issue is necessary to ensure that the new regulations comport with the Supreme Court's decision in *Richland Shoe* and will prevent confusion and uncertainty among the regulated community regarding what constitutes a ''willful'' violation.

The third portion of the 2020 Tip final rule that the Department is proposing to further delay addresses the amendment of its ''dual jobs'' regulation to address when an employer can continue to take an FLSA tip credit for an employee who is engaged in a tipped occupation and performs both tipped and non-tipped duties, *see* § 531.56(e).[11] The *Pennsylvania* litigants and commenters on the Department's proposal to delay the 2020 Tip final rule for 60 days raised significant substantive and procedural concerns regarding this portion of the 2020 Tip final rule. Regarding the economic analysis, the *Pennsylvania* litigants argue that the Department ''failed to consider or quantify the effect'' that this portion of the rule ''would have on workers and their families'' and ''disregarded'' the data and analysis provided by a commenter on the NPRM for the 2020 Tip final rule, the Economic Policy Institute (EPI).[12] In its comment regarding the Delay Rule, EPI stated that the final rule's response to its analysis and its qualitative discussion of benefits and transfers associated with this portion of the rule ''is not sufficient and delaying the effective date of the rule is highly appropriate to give the Department time to reassess the rule.'' This concern strongly suggests that the Department should revisit the economic analysis regarding the portion of the 2020 Tip final rule addressing the application of the FLSA tip credit to tipped employees who perform tipped and non-tipped work, and calls into question whether this portion of the rule would withstand a challenge under the Administrative Procedure Act claiming that the Department's failure to include a quantitative economic analysis for this portion of the rule was arbitrary and capricious.

Regarding the substance of this portion of the rule, the *Pennsylvania* litigants argue that the 2020 Tip final rule's new test for when an employer can take a tip credit for a tipped employee who performs non-tipped, related duties—limiting the tip credit to non-tipped related duties performed ''contemporaneously with'' or for a ''reasonable time before or after tipped duties—relies on ''ill-defined'' terms and fails to ''provide any guidance as to when—or whether—a worker could be deemed a dual employee during a shift or how long before or after a shift constitutes a reasonable time.'' [13] District courts have also found these terms in the Department's current guidance, which the 2020 Tip final rule largely codified, to be unclear and have refused to follow it.[14] Additionally, the *Pennsylvania* litigants challenged the 2020 Tip final rule's use of the Occupational Information Network (O*NET) to define ''related duties,'' which, according to their complaint, authorizes employers to engage in ''conduct that has been prohibited under the FLSA for decades.'' [15] Commenters who supported the proposed Delay Rule argued that the 2020 Tip final rule's new test for when an employer can take a tip credit for a tipped employee who performs non-tipped, related duties ''does not comply with the CAA Amendments,'' since it ''permits employers to take tips that belong to employees.'' *See* NELP; *see also* NWLC; National Employment Lawyers Association (NELA). These commenters also asserted that most courts that have considered the Department's current guidance on this issue, which the 2020 Tip final rule largely codified, have not afforded it any deference.[16]

These arguments by the *Pennsylvania* litigants and commenters on the proposed Delay Rule further call into question whether this portion of the rulemaking can withstand judicial review, as well as whether the 2020 Tip final rule accurately identifies when a tipped employee who is performing non-tipped duties is still engaged in a tipped occupation under the auspices of

[9] *Id.*

[10] NELP specifically argued that the 2020 Tip final rule's revisions to the regulations regarding the meaning of ''willfulness'' ''make[ ] it easier for employers to either ignore compliance advice from the Department, or to fail to pursue inquiry regarding compliance with minimum wage and overtime protections.''

[11] *See also* § 10.28(b) (incorporating the same guidance on when an employer can continue to take an FLSA tip credit for an employee who is engaged in a tipped occupation and performs both tipped and non-tipped duties in the Department's regulations relating to Executive Order 13658, ''Establishing a Minimum Wage for Contractors'').

[12] *See Commonwealth of Pennsylvania et al.* v. *Scalia et al.,* No. 2:21–cv–00258, pp. 103, 109 (E.D. Pa., Jan. 19, 2021)

[13] *Id.* at 128, 131; *see also id.* at p. 129 (''The Department never provides a precise definition of 'contemporaneous,' simply stating that it means 'during the same time as'' before making the caveat that it ''does not necessarily mean that the employee must perform tipped and non-tipped duties at the exact same moment in time.' '')

[14] The preamble to the 2020 Tip final rule lists many of these decisions. *See* 85 FR 86770–71. In *Belt* v. *P.F. Chang's China Bistro, Inc.,* 401 F. Supp. 3d 512, 533 (E.D. Pa. 2019), for example, the district court held that the dual jobs guidance was unreasonable because ''the temporal limitations it imposes on untipped related work conflict with'' certain language (''occasionally,'' ''part of [the] time'') that remains in ''the text of the Dual Jobs regulation.'' *See also Berger* v. *Perry's Steakhouse of Ill., LLC,* 430 F. Supp. 3d 397, 411–12 (N.D. Ill. 2019) (same). Another district court stated that 2018 DOL guidance ''inserts new uncertainty and ambiguity into the analysis'' and noted that the Department ''fails to explain how long a 'reasonable time' would be, or what is meant by performing non-tipped work 'contemporaneously' with tipped work.'' *Flores* v. *HMS Host Corp.,* No. 18–3312, 2019 WL 5454647 (D. Md. Oct. 23, 2019).

[15] *See Commonwealth of Pennsylvania et al.* v. *Scalia et al.,* No. 2:21–cv–00258, p. 115 (E.D. Pa., Jan. 19, 2021) (''Because it seeks to describe the work world as it is, not as it should be, O*NET cannot and does not account for FLSA violations in industries known to have high violation rates like the restaurant industry; therefore, using it to determine related duties will sanction conduct that has been prohibited under the FLSA for decades.''); *id.* at p. 117 (''O*NET tasks for waiters and waitresses include 'cleaning duties, such as sweeping and mopping floors, vacuuming carpet, tidying up server station, taking out trash, or checking and cleaning bathrooms'—when from 1988 until 2018, the Department's Field Operations Handbook specified as an example, 'maintenance work (*e.g.,* cleaning bathrooms and washing windows) [is] not related to the tipped occupation of a server; such jobs are non-tipped occupations.' ''). Some district courts have levied this same criticism against the use of O*NET to perform this test. *See, e.g., O'Neal* v. *Denn-Ohio, LLC,* No. 19–280, 2020 WL 210801 at *7 (N.D. Ohio Jan. 14, 2020) (declining to defer to the 2018 guidance in part because O*NET relies in part on data obtained by asking employees which tasks their employers assign them to perform, which ''would allow employers to ''re-write the regulation without going through the normal rule-making process,'' and is therefore unreasonable).

[16] In support of this assertion, commenters cited a variety of cases, including *Belt* v. *P.F. Chang's China Bistro, Inc.,* 401 F. Supp. 3d 512, 533 (E.D. Pa. 2019), *Spencer* v. *Macado's, Inc.,* 399 F. Supp. 3d 545, 553 (W.D. Va. 2019), and *Cope* v. *Let's Eat Out, Inc.,* 354 F. Supp. 3d 976, 986 (W.D. Mo. 2019). *See* NELP; *see also* NETWORK, Restaurant Opportunities Center United, NELA (cross-referencing NELP's citations to these cases).

the statute, such that an employer can continue to take a tip credit for the time the tipped employee spends on such non-tipped work. The Department's test for determining when a tipped employee can continue to be paid with a tip credit when he or she is not performing tip-generating work has always been contained in subregulatory guidance. Given the serious concerns noted with this portion of the rulemaking, the Department believes that delaying the effective date of this portion of the 2020 Tip final rule so that it can fully consider the merits of these claims and to consider whether to engage in further rulemaking on this issue may be prudent before it codifies such a test for the first time into its regulations. For example, employers have already adjusted their practices to accommodate the Department's 2019 guidance addressing when they can continue to take a tip credit for tipped employees who perform non-tipped work that is related to their tipped occupation. It would be disruptive to these employers to adjust their practices to accommodate the new test articulated in the 2020 Tip final rule, and then have to readjust if that test does not survive judicial scrutiny or if the Department decides to propose a new test. Delaying the effective date while the Department undertakes its review, instead of allowing these portions of the rule to be implemented, addresses this concern and before employers change their practices to accommodate a new test that ultimately may not survive judicial scrutiny.

The Department's ongoing review of these three portions of the 2020 Tip final rule has identified similar concerns to those noted above, including potential legal issues and the sufficiency of the economic analysis for the third portion of the rule. Accordingly, the Department believes that this proposed delay may best inform the Department's comprehensive review of these parts of the 2020 Tip final rule and consideration of alternate paths, and provide it a meaningful opportunity to do so, which is of paramount importance given the pending challenge to these parts of the rule in the *Pennsylvania* litigation.

The Department believes that the proposed delay of these three portions of the 2020 Tip final rule through December 31, 2021, is reasonable given the numerous issues of fact, law, and policy raised by these portions of the 2020 Tip final rule. In light of the claims raised in the *Pennsylvania* litigation and the comments received on the Delay NPRM, which highlight very serious concerns with the substance of the dual jobs portion of the 2020 Tip final rule and the process through which it was promulgated, as well as the two portions of the 2020 Tip final rule addressing CMPs, the Department believes additional action may be needed and it proposes to delay implementation of these portions of the rule until it determines an appropriate method to determine when a tipped employee is engaged in a tipped occupation and to conduct a rulemaking to ensure that the two CMP portions of the rule are consistent with the FLSA and Supreme Court precedent interpreting what constitutes a ''willful'' violation under that Act. As explained above, allowing these provisions to go into effect could lead to practices the Department ultimately determines to be inconsistent with the FLSA and judicial opinions. In addition to causing confusion, this could result in increased compliance costs, and potentially disruptive changes in employment practices in the event that the Department withdraws and revises these three portions of the 2020 Tip final rule. Further, the three portions of the 2020 Tip final rule that the Department is proposing to delay also encompass those parts of the rule that are being challenged in the *Pennsylvania* lawsuit.

The Department has considered allowing these three portions of the rule to take effect pending its review and the assessment of potential new rulemaking; however, the Department believes that the concerns discussed above call into question fundamental aspects of the rulemaking to such a degree that the best approach is to propose to delay these three portions of the rulemaking rather than allow them to take effect without seeking additional public input. Relatedly, the Department preliminarily believes that delaying the effective date for these three portions of the rule will prevent confusion and uncertainty among the regulated community while the Department conducts its review.

Therefore, the Department believes that the prudent and reasonable approach is to propose to delay the effective date, and thus the implementation of these three portions of the 2020 Tip final rule while it undertakes its review. While the Department acknowledges that the proposed delay is significant, based on its initial review and given the concerns described above, it is clear that a significant amount of time is necessary to consider all aspects of these portions of the rulemaking. This proposed delay will allow the Department sufficient time to conduct rulemaking on two portions of the 2020 Tip final rule, and evaluate commenters' concerns and consider whether to propose withdrawing and reproposing the third portion of the rule. The Department seeks public comment on the proposed delay, including whether it should delay the effective date for these portions of the 2020 Tip final rule and whether the proposed period of delay is an appropriate length of time or whether other lengths of time may be more appropriate. The Department specifically seeks comment on whether, rather than delaying implementation as proposed herein, the Department should allow these portions of the rule to take effect while it conducts its review and considers any new proposal(s) to amend the regulations in question. The Department also invites the public to share any relevant knowledge and specific facts about any benefits, costs, or other impacts of this proposal on the regulated community, workers, and other relevant stakeholders. Lastly, the Department solicits comment on any other potential consequences of not delaying the effective date of these portions of the 2020 Tip final rule.

In sum, this NPRM seeks comment on the Department's proposal to further delay the effective date for three portions of the 2020 Tip final rule, to December 31, 2021, in order to complete the rulemaking published elsewhere in this issue of the **Federal Register**, and to further review and consider one additional portion of the 2020 Tip final rule. This NPRM also seeks comment on the substance of these three portions of the 2020 Tip final rule, and in particular, its amendment of the Department's dual jobs regulation to address the application of the FLSA's tip credit to tipped employees who perform both tipped and non-tipped duties. The remainder of the 2020 Tip final rule will become effective upon the expiration of the first effective date extension, which extended the effective date of the 2020 Tip final rule through April 30, 2021.

IV. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[17] Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to

[17] *See* 58 FR 51735, 51741 (Oct. 4, 1993).

result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect 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) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. OIRA has determined that this proposed delay is not economically significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, 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 obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and 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. The analysis below outlines the impacts that the Department anticipates may result from this proposed delay and was prepared pursuant to the above-mentioned executive orders.

In this NPRM, the Department proposes to further extend the effective date of three portions of the 2020 Tip final rule in order to complete a separate rulemaking, published elsewhere in this issue of the **Federal Register**. This delay will provide the Department additional time to consider whether to withdraw and repropose the portion of the 2020 Tip final rule addressing the application of the FLSA's tip credit provision to tipped employees who perform both tipped and non-tipped duties. The remainder of the 2020 Tip final rule, including portions addressing the keeping of tips and tip pooling,[18] recordkeeping,[19] and other minor changes[20] will become effective upon the expiration of the first effective date extension, which extended the effective date of the 2020 Tip final rule to April 30, 2021. *See* 86 FR 11632.

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 to suspend the operations of the portions of the 2011 final rule that restricted tip pooling when employers do not take a tip credit. In the economic analysis of the 2020 Tip final rule, the Department quantified transfer payments that could occur when employers institute non-traditional tip pools. Because these transfers have already been quantified, and the provision regarding tip pooling will go into effect on April 30, 2021, this proposed delay will not have any impact on these quantified transfers.

The Department acknowledges that the industries that may be affected by the proposed delay are those that were acknowledged to have tipped workers in the 2020 Tip final rule. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos), 721110 (Hotels and Motels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-service Restaurants), 722513 (Limited Service Restaurants), and 722515 (Snack and Nonalcoholic Beverage Bars). The 2017 data from the Statistics of US Businesses (SUSB) reports that these industries have 503,915 private firms and 661,198 private establishments.[21]

Part of the reason for proposing an additional delay of the effective date is for the Department to consider withdrawing or retaining the portion of the rule that amends the Department's dual jobs regulations to address the application of the FLSA tip credit to tipped employees who perform both tipped and non-tipped duties. In the 2020 Tip final rule, the Department amended its dual jobs regulation to largely codify WHD's recent guidance regarding when an employer can take a tip credit for hours that a tipped employee performs non-tipped duties related to his or her occupation, which replaced the 20 percent limitation on related non-tipped duties with an updated related duties test. The Department provided a qualitative analysis of this change, and stated that the removal of a 20 percent cap on tasks that are not directly tied to receipt of a tip may result in tipped workers such as wait staff and bartenders performing more non-tipped related duties.[22] The Department acknowledged that one outcome could be that employment of workers currently performing these duties may fall while 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 the minimum wage. The Department also stated that eliminating the cost to scrutinize employees' time to demonstrate compliance with the 20 percent approach would result in costs savings to employers.

As discussed above, the *Pennsylvania* litigants and individuals who submitted comments on the Department's Delay Rule raised significant concerns regarding the economic analysis of the portion of the 2020 Tip final rule that amends the dual jobs regulation. *See, e.g.,* EPI; Results for America; Restaurant Opportunities Centers United. The proposed effective date delay will allow the Department to better consider this portion of the 2020 Tip final rule, and determine if there is a clearer way to address the application of the FLSA tip credit to tipped employees who perform both tipped and non-tipped duties. In the event that there would have been transfers or cost savings associated with the change, these effects will be delayed. The delay will also provide the Department more time to quantify any impact associated with a change to the dual jobs regulation.

The Department does not believe that the proposed delay in the CMP portions of the 2020 Tip final rule will have an impact on costs or transfers, as these provisions only apply when an employer violates the FLSA.

The Department welcomes any comments and data on possible costs or benefits associated with this proposed delay.

V. Regulatory Flexibility Act (RFA) 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, Public Law 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

[18] 29 CFR 10.28(c), (e)–(f); 531.50 through 531.52, 531.54.

[19] 29 CFR 516.28(b).

[20] 29 CFR 531.50, 531.51, 531.52, 531.55, 531.56(a), 531.56(c)–(d), 531.59, and 531.60.

[21] Statistics of U.S. Businesses 2017, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2016 SUSB Annual Data Tables by Establishment Industry.

[22] Examples of such duties are cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses.

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 this proposed rule to determine whether it would have a significant economic impact on a substantial number of small entities. The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB).[23] The Department limited this analysis to a few industries that were acknowledged to have tipped workers in the 2020 Tip final rule. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos), 721110 (Hotels and Motels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-service Restaurants), 722513 (Limited Service Restaurants), and 722515 (Snack and Nonalcoholic Beverage Bars). The SUSB reports that these industries have 503,915 private firms and 661,198 private establishments. Of these, 501,322 firms and 554,088 establishments have fewer than 500 employees.

The Department has not quantified any costs, transfers, or benefits associated with this delay, and therefore certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. The Department welcomes any comments and data on this Regulatory Flexibility Act Analysis, including the costs and benefits of this proposed rule on small entities.

VI. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) [24] requires agencies to prepare a written statement for rules with a Federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $165 million ($100 million in 1995 dollars adjusted for inflation) or more in at least one year.[25] This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative. This proposed rule is not expected to result in increased expenditures by the private sector or by state, local, and tribal governments of $165 million or more in any one year.

VII. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed rescission 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.

VIII. 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.

Signed this 22nd day of March, 2021.

Jessica Looman,

Principal Deputy Administrator, Wage and Hour Division.

[FR Doc. 2021–06244 Filed 3–23–21; 4:15 pm]

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DEPARTMENT OF LABOR

Wage and Hour Division

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

RIN 1235–AA21

Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this notice of proposed rulemaking (NPRM), the Department proposes to withdraw and repropose two portions of the Tip Regulations Under the Fair Labor Standards Act (FLSA) (2020 Tip final rule) and seeks comment on whether to revise one other portion of the 2020 Tip final rule relating to the statutory amendments to the FLSA made by the Consolidated Appropriations Act of 2018 (CAA). The Department also asks questions about how it might improve the recordkeeping requirements in the 2020 Tip final rule in a future rulemaking. This rulemaking is related to a second NPRM, published elsewhere in this issue of the **Federal Register**, which proposes to further extend the effective date of three portions of the 2020 Tip final rule in order to complete this rulemaking involving two of those portions and provide the Department additional time to consider whether to withdraw and repropose a third portion of the 2020 Tip final rule concerning the use of the tip credit when employees perform both tipped and non-tipped work.

DATES: Portions of the final rule published on December 30, 2020 (85 FR 86756), and delayed February 26, 2021, at 86 FR 11632, are proposed to be withdrawn. Comments must be received on or before May 24, 2021.

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 *https://www.regulations.gov. Mail:* Address written submissions to 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. *Instructions:* This NPRM is available through the **Federal Register** and the *https://www.regulations.gov* website. You may also access this document via the Wage and Hour Division's (WHD) website at *https://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). Commenters submitting file attachments on *www.regulations.gov* are advised that uploading text-recognized documents—*i.e.,* documents in a native file format or documents which have undergone

[23] Statistics of U.S. Businesses 2017, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2016 SUSB Annual Data Tables by Establishment Industry.

[24] *See* 2 U.S.C. 1501.

[25] Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.