

**DEPARTMENT OF LABOR****Office of the Secretary****29 CFR Part 10****Wage and Hour Division****29 CFR Parts 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:** Final rule; delay of effective date.

**SUMMARY:** This action finalizes the Department of Labor's (Department) proposal to further extend the effective date of three discrete portions of the rule titled *Tip Regulations Under the Fair Labor Standards Act (FLSA)* (2020 Tip final rule), published December 30, 2020. This further delay of three portions of the rule allows the Department to complete a separate rulemaking that proposes to withdraw and re-propose two of these portions of the 2020 Tip final rule, published March 25, 2021, which includes, *inter alia*, a 60-day comment period and at least a 30-day delay between publication and the rule's effective date. It will also provide the Department additional time to conduct another rulemaking to potentially revise 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. All of the remaining portions of the 2020 Tip final rule will go into effect on April 30, 2021.

**DATES:** As of April 29, 2021, 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 December 30, 2020, at 85 FR 86756, delayed until April 30, 2021, on February 26, 2021, at 86 FR 11632, are further delayed until December 31, 2021.

**FOR FURTHER INFORMATION CONTACT:**

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is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation 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 <https://www.dol.gov/agencies/whd/contact/local-offices> for a nationwide listing of WHD district and area offices.

**SUPPLEMENTARY INFORMATION:****I. Background**

In the Consolidated Appropriations Act of 2018 (CAA), Congress added a new statutory provision at section 3(m)(2)(B) of the FLSA, which prohibits employers from keeping tips received by employees, regardless of whether the employers take a tip credit under section 3(m). Public Law 115-141, Div. S., Tit. XII, sec. 1201, 132 Stat. 348, 1148-49 (2018). The CAA also amended section 16(e)(2) of the FLSA to give the Department discretion to impose civil money penalties (CMPs) up to \$1,100<sup>1</sup> when employers unlawfully keep employees' tips. On December 30, 2020, the Department published *Tip Regulations Under the Fair Labor Standards Act (FLSA)* (2020 Tip final rule) in the **Federal Register** to address these CAA amendments. *See* 85 FR 86756. Unrelated to the CAA amendments, the 2020 Tip final rule also revises the definition of "willful" in the Department's CMP regulations, and would largely codify the Wage and Hour Division's (WHD) guidance<sup>2</sup> issued in 2018 and 2019 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 by Attorneys General for eight states and the District of Columbia (*Pennsylvania* litigants), which is pending in the United States District Court for the Eastern District of Pennsylvania

<sup>1</sup> 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, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74, sec. 701), requires that inflationary adjustments be made annually in these civil money penalties according to a specified formula.

<sup>2</sup> *See* WHD Field Assistance Bulletin 2019-2 (Feb. 15, 2019) and WHD Opinion Letter FLSA2018-27 (Nov. 8, 2018).

(*Pennsylvania* complaint or *Pennsylvania* litigation).<sup>3</sup>

**A. First Delay of the 2020 Tip Final Rule**

On February 26, 2021, after engaging in notice-and-comment rulemaking and considering the comments submitted, the Department published a final rule (Delay Rule) extending the effective date of the 2020 Tip final rule until 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. The 60-day delay of the effective date of the 2020 Tip final rule 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 review and consider, among other things, whether the 2020 Tip final rule properly implemented the CAA amendments to section 3(m) of the FLSA. In particular, the Delay Rule explained that the Department would review and consider the incorporation of the CAA's language regarding CMPs for violations of section 3(m)(2)(B) of the FLSA and whether the 2020 Tip final rule's revisions to portions of the CMP regulations on willful violations were appropriate. The Department would also review and consider whether the Department adequately considered the possible costs, benefits, and transfers between employers and employees related to the 2020 Tip final rule's revisions to the Department's dual jobs regulations, which largely codified WHD's recent guidance on the application of the tip credit to tipped employees who perform tipped and non-tipped duties, as well as whether the 2020 Tip final rule otherwise effectuates the CAA amendments to the FLSA. *See* 86 FR 11634. 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.*

**B. Proposed Partial Delay of the Effective Date for Three Portions of the 2020 Tip Final Rule**

On March 25, 2021, the Department proposed to delay the effective date of

<sup>3</sup> *Commonwealth of Pennsylvania et al. v. Scalizia et al.*, No. 2:21-cv-00258 (E.D. Pa., Jan. 19, 2021).

three portions of the 2020 Tip final rule for an additional 8 months, through December 31, 2021 (Partial Delay NPRM): the two portions addressing the assessment of CMPs; and the portion addressing the application of the FLSA tip credit to tipped employees who perform tipped and non-tipped duties. See 86 FR 15811. The first portion of the 2020 Tip final rule that the Department proposed to further delay addressed the assessment of CMPs for violations of section 3(m)(2)(B) of the FLSA, see 29 CFR 578.3(a)–(b), 578.4, 579.1, 580.2, 580.3; 580.12; and 580.18(b)(3). Notwithstanding the fact that the CAA amended section 16(e)(2) of the FLSA to grant the Secretary discretion to assess CMPs for violations of section 3(m)(2)(B) “as the Secretary determines appropriate,” the 2020 Tip final rule limited 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 second portion of the 2020 Tip final rule that the Department proposed to further delay amended the Department’s CMP regulations, see 29 CFR 578.3(c) and 579.2, to address when a violation of the FLSA is “willful.” See 85 FR 86773–74. The third portion of the 2020 Tip final rule that the Department proposed to further delay amended its “dual jobs” regulations, see 29 CFR 531.56(e),<sup>4</sup> to largely codify WHD guidance regarding when an employer can continue to take a tip credit for an employee in a tipped occupation who performs tipped and non-tipped duties. See 85 FR 86767–72.

In its Partial Delay NPRM, the Department sought comment on the proposed further delay of the effective date of these three portions of the 2020 Tip final rule. See 86 FR 15811. The Department also sought substantive comments on these three portions, and in particular, on the merits of withdrawing or retaining the portion of the rule that amended the Department’s dual jobs regulations. See *id.* The Department did not propose to delay the effective date of the remaining provisions of the 2020 Tip final rule not addressed in the Partial Delay NPRM. The remaining provisions—consisting of those portions that addressed the keeping of tips and tip pooling,<sup>5</sup>

recordkeeping,<sup>6</sup> and those portions that made 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<sup>7</sup>—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. In a separate NPRM, titled *Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal*, also published on March 25, 2021 (CMP NPRM), the Department proposed to withdraw and revise the two portions of the 2020 Tip final rule which addressed the assessment of CMPs under the FLSA: the portion which addressed the statutory provision establishing CMPs for violations of section 3(m)(2)(B) of the Act and the portion which addressed when a certain violation is “willful.” See 86 FR 15817.<sup>8</sup>

The Department explained in the Partial Delay NPRM that the proposed partial 8-month delay, until December 31, 2021, would provide the Department sufficient time to engage in a comprehensive review of three portions of the 2020 Tip final rule—the two portions of the rule which addressed the assessment of CMPs under the FLSA and the portion of the rule that addressed the application of the FLSA tip credit to tipped employees who perform tipped and non-tipped duties—and to take further action, as needed, to complete its review. See 86 FR 15815. The Department also explained that further review of these portions before they go into effect is particularly important given its concerns, which were also raised by the commenters on the Department’s Delay Rule and the *Pennsylvania* litigants, that these portions of the rule raised significant substantive and procedural issues. See *id.*

Commenters on the Department’s Delay Rule and the *Pennsylvania* litigants argued, for example, that the portion of the 2020 Tip final rule that addressed the assessment of CMPs for violations of section 3(m)(2)(B) is inconsistent with the FLSA and Congressional intent, since section 16(e)(2) of the FLSA does not require a finding of willfulness to assess a CMP

for a section 3(m)(2)(B) violation. They also posited that the 2020 Tip final rule’s revisions to the meaning of willfulness, particularly its removal of language regarding the meaning of reckless disregard, contradicted Supreme Court precedent on willfulness and Congressional intent. See 86 FR 15813–14.

The Department explained in the Partial Delay NPRM that, upon review of the comments received regarding its Delay Rule and the *Pennsylvania* complaint, it was proposing to withdraw and re-propose the two portions of the 2020 Tip final rule that addressed the assessment of CMPs. See 86 FR 15813. The Department stated that it preliminarily believed that it was necessary to delay these two portions of the 2020 Tip final rule while it completed this rulemaking to avoid codifying a limitation on the Department’s ability to assess CMPs for violations of section 3(m)(2)(B) that may lack a basis in law, to ensure that the new regulations comport with the Supreme Court precedent regarding the meaning of willfulness, and to prevent confusion and uncertainty among the regulated community regarding what constitutes a willful violation. See *id.* at 15813–14.

The Partial Delay NPRM further noted that commenters on the Department’s proposed Delay Rule, as well as the *Pennsylvania* litigants, argued that the 2020 Tip final rule’s test for when an employer can take a tip credit for a tipped employee who performs related, non-tipped duties (dual jobs test) relied on terms—“contemporaneous with” and “a reasonable time immediately before or after tipped duties”—that district courts have found to be unclear; that the rule’s use of the Occupational Information Network (O\*NET) to define “related duties” authorized employer “conduct that has been prohibited under the FLSA for decades” and unlawfully permitted employers to keep employees’ tips; and that the economic analysis of this portion of the rule failed to quantify or consider its impact on workers and disregarded evidence submitted by a commenter on the NPRM for the 2020 Tip final rule. See 86 FR 15814. Commenters on the Delay Rule and the *Pennsylvania* litigants also called into question whether the portion of the 2020 Tip final rule addressing the application of the FLSA tip credit to employees who perform tipped and non-tipped work could withstand judicial review, including whether this portion of the rule would withstand a challenge under the Administrative Procedure Act (APA) claiming that the Department’s failure to include a

<sup>4</sup> 29 CFR 516.28(b).

<sup>5</sup> 29 CFR 531.50, 531.51, 531.52, 531.55, 531.56(a), 531.56(c)–(d), 531.59, and 531.60.

<sup>6</sup> In the CMP NPRM, the Department also sought comment on whether to revise one other portion of the 2020 Tip final rule that addresses the meaning of “managers and supervisors” under section 3(m)(2)(B) of the FLSA and asked questions about how it might improve the recordkeeping requirements in the 2020 Tip final rule in a future rulemaking. See 86 FR 15817, 15818.

<sup>4</sup> See also 29 CFR 10.28(b)(2) (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”).

<sup>5</sup> 29 CFR 10.28(c), (e)–(f); 531.50 through 531.52, 531.54.

quantitative economic analysis for this portion of the rule was arbitrary and capricious. *See id.*

The Department stated in the Partial Delay NPRM that, following its review of the comments submitted on the proposed Delay Rule and the *Pennsylvania* complaint, it was concerned that the 2020 Tip final rule did not accurately identify when a tipped employee who is performing non-tipped duties is still engaged in a tipped occupation. *See* 86 FR 15814–15. Accordingly, the Department believed that it might be prudent to delay the effective date of this portion of the 2020 Tip final rule so that it could consider whether to engage in further rulemaking on this issue before it codifies such a test for the first time into its regulations. *See id.* The Department also stated that it preliminarily believed that it would be disruptive to 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, and that delaying the effective date of this portion of the rule while the Department conducted its review would address these concerns. *See id.* at 15815.

## II. Comments and Decision

### A. Introduction

The Department's Partial Delay NPRM sought comment on the proposed further delay of the effective date of three portions of the 2020 Tip final rule: The two portions that addressed the assessment of CMPs; and the portion of the rule that revised the Department's regulations to address the application of the FLSA tip credit to tipped employees who perform tipped and non-tipped duties. *See* 86 FR 15811. The Department also sought substantive 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 amended the Department's dual jobs regulations. *See id.*

A total of 22 organizations timely commented on the Partial Delay NPRM (86 FR 15811, Mar. 25, 2021) during the 20-day comment period that ended on April 14, 2021. Comments may be viewed on [www.regulations.gov](http://www.regulations.gov), document ID WHD-2019-0004-0497. The Department received comments from a broad array of stakeholders, including the Attorneys General for eight states and the District of Columbia who filed the *Pennsylvania* complaint, a law firm, industry groups, non-profit organizations, and advocacy organizations. Seventeen commenters

supported the Department's proposal to further delay the effective date of three portions of the 2020 Tip final rule. Five commenters opposed the proposed partial delay.<sup>9</sup> In advocating for the proposed partial delay or opposing the proposed partial delay, all 22 commenters discussed the substance of the 2020 Tip final rule. Commenters who supported the proposed partial delay based their support, in significant part, on legal and policy concerns with the three portions of the 2020 Tip final rule, as well as concerns with the rule's economic analysis of the dual jobs portion of the rule. Commenters who opposed the proposed delay generally expressed support for the legal, policy, and factual conclusions made by the Department in the 2020 Tip final rule, including in the three portions that the Department proposed to delay.

### B. Comments in Support of the Partial Delay

Seventeen commenters supported the Department's proposal to delay the effective date of three portions of the 2020 Tip final rule for an additional 8 months, including nine Attorneys General (AGs), the National Employment Law Project (NELP), National Women's Law Center (NWLC), Restaurant Opportunities Centers United (ROC United), Women's Law Project (WLP), Center for Law and Social Policy (CLASP), Kentucky Equal Justice Center (KEJC), One Fair Wage (OFW), Oxfam America, Northwest Workers' Justice Project (NWJP), National Urban League (NUL), Loyola College of Law's Workplace Justice Project (WJP), Shriver Center on Poverty Law, Work Safe, Justice at Work, and the North Carolina Justice Center (NCJC). The Center for Workplace Compliance (CWC) supported the Department's proposal "to the extent that it allows most provisions of the rule to go into effect on April 30."

The advocacy organizations that submitted comments in favor of the Partial Delay NPRM urged the Department to finalize the delay as proposed in order to evaluate the questions of law, policy, and fact raised by the portions of the 2020 Tip final rule proposed to be delayed. In its comments supporting the Partial Delay NPRM, NELP argued that the delay was

<sup>9</sup> The Department received three comments that are outside the scope of this rulemaking. An individual submitted a comment regarding issues unrelated to the Department of Labor or the FLSA. *See* WHD-2019-0004-0510. One organization submitted a duplicate of its comment. *See* WHD-2019-0004-0511; WHD-2019-0004-0526. The record also contains a document that was submitted by a WHD official to test the *Regulations.gov* comment system. *See* WHD-2019-0004-0497.

"critical" and that allowing these portions of the rule to go into effect "could create irreparable harm that would result from decreased wages for workers already struggling during a pandemic." NELP and the AGs also argued that the Partial Delay is important to give the Department time to fully consider the allegations in the *Pennsylvania* complaint that these portions of the rule lack a foundation in or are otherwise inconsistent with applicable law. NELP stated that allowing these three portions of the rule to go into effect would cause confusion and additional compliance costs if they are ultimately invalidated after judicial review. The Economic Policy Institute (EPI) also supported delaying the effective date of all three portions of the rule and stated that the Department should re-propose the dual jobs portion of the rule to establish a standard that is "no less protective" than the Department's "longstanding 80/20 Rule."<sup>10</sup>

### 1. Comments Regarding the Portions of the 2020 Tip Final Rule That Address CMPs for Violations of Section 3(m)(2)(B) and Willful Violations of the FLSA

As noted above, a number of commenters supported further delaying the two CMP portions of the 2020 Tip final rule to give the Department time to consider the allegations raised in the *Pennsylvania* complaint and to complete further rulemaking. The AGs and many of the employee advocacy organizations stated that they supported further delay of the first portion of the 2020 Tip final rule related to CMPs which limits the assessment of CMPs to willful and repeated violations of section 3(m)(2)(B) because the rule is in conflict with the plain statutory language of the FLSA providing the Secretary with discretion to assess those CMPs. *See* CLASP, KEJC, NCJC, NUL, NWJP, NWLC, OFW, Oxfam America, ROC United, WJP, and WLP. The AGs also argued that the second portion of the CMP regulations defining a "willful" violation under the FLSA for which CMPs can be assessed unlawfully limits the definition of willfulness because it conflicts with Supreme Court caselaw. A number of commenters, including the AGs, stated they would submit substantive comments regarding the assessment of CMPs in response to the CMP NPRM published on March 25, 2021, in which the Department has

<sup>10</sup> As noted in the 2020 Tip final rule, the Department's 80/20 guidance became known as the "80/20 rule," even though it was not promulgated as a regulation. *See* 85 FR 86761.

proposed withdrawing and repropounding those two portions of the rule.

## 2. Comments Regarding the Portion of the 2020 Tip Final Rule That Address Changes to the Dual Jobs Regulations at § 531.56(e)

A number of advocacy organizations stated that they supported the Department's proposal to further delay the effective date for the 2020 Tip final rule's dual jobs test for determining when an employee is engaged in a tipped occupation, because it departs from the former Department guidance of using a 20 percent limitation on related, non-tipped duties, and would permit employers to continue paying tipped employees as little as \$2.13 an hour for extensive periods of time where these employees are not earning tips. See CLASP, KEJC, NWJP, NWLC, NUL, OFW, Oxfam America, ROC United, and WLP. Pointing to the Department's acknowledgment in the 2019 tip NPRM that tipped employees might have a reduction in tipped income if they are allowed to perform more non-tipped work while still being compensated as little as \$2.13 an hour, the groups observed that the 2020 Tip final rule test could also have a significant, negative impact on non-tipped employees' wages. They explained that if tipped employees are permitted to do more non-tipped work at a lower rate of pay than non-tipped employees, it may result in lowering wages for non-tipped employees. These commenters argued that the 2020 Tip final rule's dual jobs test could also result in a reduction in the number of employees hired to perform non-tipped occupations, such as "cleaners, maintenance, prep, and back-office workers." NWLC stated, "[w]ith the regulatory barriers to abuse of the tip credit—and tipped employees—all but removed, millions of working people could be required to do more work for less pay."

Employee advocacy groups also asserted that although the Department had justified the change to the dual jobs regulations in the 2020 Tip final rule by explaining that the new test was easier to administer than its previous 80/20 guidance and would provide needed clarity, the Department's assertion is not borne out by the facts. As NELP stated, "[t]o the contrary, the 80/20 rule has been consistently used and accepted by courts and the Department itself over a 30-year period." Other employee advocacy groups asserted that the new dual jobs test uses ambiguous measures such as "contemporaneous with" and "a reasonable time", which could lead to litigation over those terms. They also noted that the vast majority of courts

considering the Department's 2018–19 guidance, which uses these same terms, declined to accord deference to the guidance, in part because of this ambiguity. Similarly, the AGs argued in their comment supporting the additional delay of the effective date for the dual jobs portion of the rule that the 2020 Tip final rule will increase litigation because it "implements a vague standard that contains no limitation on the non-tipped duties a tipped employee may be required to perform and still be paid the sub-minimum wage rate." As evidence of the vagueness of the standards, the AGs point to the language in the 2020 Tip final rule which "states that 'contemporaneous' 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.'" The AGs also argue that the 2020 Tip final rule nowhere provides an explanation of what it means to be performing related duties "for a reasonable time." The AGs conclude that the additional extension for the effective date of this portion of the rule is necessary to give the Department time to consider and review this issue and to complete the rulemaking process if it decides to withdraw or revise the dual jobs provision.

The AGs also argued that the Department's use of O\*NET as a guide to determine which tasks are related or not related to a tipped occupation is flawed because O\*NET, which is compiled from employee surveys of tasks that they perform in the occupation in which they are employed, "seeks to describe the work as it is, not as it should be, and does not account for FLSA violations in industries known to have high violation rates, such as the restaurant industry." Thus, according to the AGs, the use of O\*NET "sanction[s] conduct that has been prohibited under the FLSA for decades."

The employee advocacy groups also posited that the 2020 Tip final rule's dual jobs provision conflicts with the new statutory provision in section 3(m)(2)(B) of the FLSA prohibiting employers from "keeping" tips, because it allows employers to take a tip credit for a greater amount of time than the Department's previous 80/20 guidance. These groups encouraged the Department to abandon the 2020 Tip final rule's dual jobs test and use a rule that minimizes, rather than maximizes, employers' use of tips to satisfy their minimum wage obligations. These groups urged the Department to propose a new standard that is stronger even

than its previous 80/20 guidance to prevent abuse of the tip credit and to protect low-wage tipped workers. These groups also urged the Department to consider the allegations raised in the *Pennsylvania* complaint related to the 2020 Tip final rule's dual jobs provision and noted that the arguments raised in the complaint, particularly that the rule "contradicts the text and purpose of the [FLSA]" and "violated rulemaking process requirements, including failing to analyze the impact the rule would have on tipped workers," should be seriously considered and addressed in any future rulemaking. See CLASP; see also KEJC, NWJP, NWLC, NUL, OFW, Oxfam America, ROC United, and WLP.

In its comment supporting the Partial Delay NPRM, EPI stated that the 2020 Tip final rule's revision to the dual jobs regulations created a "less protective" standard for tipped wages, replacing a firm 20 percent limitation on the amount of related non-tipped duties that tipped employees could perform while being paid the tipped wage of \$2.13 per hour with "vague and much less protective" language. EPI criticized the dual jobs portion of the 2020 Tip final rule as permitting "tipped workers to be paid the subminimum tipped wage while performing an unlimited amount of non-tipped duties, as long as those non-tipped duties are performed 'contemporaneously with tipped duties or for a reasonable time immediately before or after performing the tipped duties.'" EPI noted that because these new regulatory terms, such as "reasonable time," are not defined, they create an "ambiguity that would [be] difficult to enforce" and would create "an immense loophole that would be costly to workers." EPI also encouraged the Department to create a rule that is "stronger" than the previous 80/20 guidance "that further clarifies, and limits, the amount of non-tipped work for which an employer can claim a tip credit." EPI suggested that the Department could, among other things, consider tightening the definitions of related and unrelated duties, propose to adopt standards such as those adopted in states such as New York that, for example, bar an employer from taking a tip credit on any day during which they spend more than 20 percent of their time in a non-tipped occupation, and/or promulgate enhanced notice and recordkeeping requirements.

With respect to the economic analysis conducted on the dual jobs portion of the 2020 Tip final rule, EPI suggested that it was flawed because it did not sufficiently estimate the economic impact on workers—as EPI did in a comment it submitted in the 2020 Tip

rulemaking, which concluded that the rule “would allow employers to capture more than \$700 million annually from workers.” The AGs and NELP also argued in their comments in support of the Partial Delay NPRM that the Department’s failure to quantitatively estimate the impact of the dual jobs portion of the 2020 Tip final rule or to consider the estimates of the rule’s impact submitted by EPI and other groups in the course of that rulemaking is evidence that the rulemaking was arbitrary and capricious under the APA.

In its comments supporting the Partial Delay, NELP also stated that a delayed effective date of the dual jobs portion of the rule would give the Department the opportunity to consider how the rule “improperly narrows the protections of the FLSA for tipped workers in a variety of fast-growing industries including delivery, limousine and taxi, airport workers, parking, carwash, valet, personal services and retail, in addition to restaurants and hospitality.” Similarly, ROC United stated that the recent pandemic had restructured the nature of tipped employment in ways that should be taken into consideration in any future rulemaking. ROC United urged the Department to consider in its review of the dual jobs portion of the 2020 Tip final rule that restaurant workers’ jobs had changed during the pandemic “to include significant additional tipped duties for non-tipped occupations, and significant additional non-tipped duties for tipped occupations,” and that the expanded use of contactless service interactions and purchases during the pandemic, including app-based delivery, had “dramatically reduced[ly] customarily tipped interactions and increas[ed] tipping in non-tipped circumstances.”

### C. Comments in Opposition of the Partial Delay

Five organizations submitted comments that expressed opposition to the Partial Delay NPRM. The National Federation of Independent Businesses (NFIB) opposed the Department’s proposed delay in the two portions of the 2020 Tip final rule regarding the assessment of CMPs. CWC stated that it was “pleased to support DOL’s proposal to the extent that it allows most provisions of the rule to go into effect,” though it “question[ed] the need to further delay the implementation of important provisions of the final rule.” CWC directed the Department to the prior comments it submitted on the NPRM for the 2020 Tip final rule and the Partial Delay NPRM. The National

Retail Federation (NRF),<sup>11</sup> the National Restaurant Association (NRA), and Littler Mendelson’s Workplace Policy Institute (WPI) opposed the proposed delay of the dual jobs portion of the rule. The NRA also indicated that it would address the two portions of the 2020 Tip final rule regarding the assessment of CMPs in a subsequent comment on the CMP NPRM. All five organizations expressed general support for the 2020 Tip final rule. The NRA and NFIB also noted that the COVID–19 pandemic has posed serious challenges for restaurants and other small businesses, which the Department should take into account in formulating its regulations.

#### 1. Comments Regarding the Portion of the 2020 Tip Final Rule That Address CMPs for Violations of Section 3(m)(2)(B)

NFIB stated that the Department should allow the portion of the 2020 Tip final rule that addressed the assessment of CMPs for violations of section 3(m)(2)(B) to go into effect on April 30, 2021.<sup>12</sup> It argued that the 2020 Tip final rule appropriately limited the Department’s ability to assess CMPs for violations of section 3(m)(2)(B) to those instances where the violation is repeated or willful, since section 16(e)(2) of the FLSA confers “wide discretion” upon the Department. In the alternative, NFIB requested that the Department maintain the 2020 Tip final rule’s limits on the assessment of CMPs for violations of section 3(m)(2)(B) for employers with fewer than 100 employees, citing the particular challenges of small businesses to comply with Federal regulations. CWC did not specifically oppose the proposed delay to the portion of the 2020 Tip final rule addressing the assessment of CMPs for section 3(m)(2)(B) violations; however, in its prior comments on the NPRMs for the 2020 Tip final rule and the Delay Rule, CWC stated that this portion of the 2020

<sup>11</sup> NRF and the National Council of Chain Restaurants (NCCR), a division of NRF, submitted a comment together.

<sup>12</sup> NFIB’s comment addresses both the Partial Delay NPRM and the separate NPRM that the Department published on March 25, 2021. In addition to expressing its opposition to the delay of the portions of the 2020 Tip final rule addressing CMPs, NFIB’s comment also opposes any further recordkeeping requirements and supports allowing tipped managers and supervisors to keep their own tips received directly from customers. The Department is not proposing to delay these portions of the 2020 Tip final rule; accordingly, NFIB’s comments regarding these matters are outside the scope of this rulemaking. The Department will consider NFIB’s comments regarding these matters in the separate rulemaking, the comment period for which closes on May 24, 2021. See 86 FR 15817.

Tip final rule addressing the Secretary’s ability to assess CMPs for violations of section 3(m)(2)(B), as well as the identically-worded proposal in the NPRM for the 2020 Tip final rule, were consistent with the statute.<sup>13</sup>

#### 2. Comments Regarding the Portion of the 2020 Tip Final Rule Addressing CMPs for Willful Violations of the FLSA

NFIB also opposed the proposed delay to the portion of the 2020 Tip final rule that addressed CMPs for willful violations of the FLSA. According to NFIB, “the definitions of ‘repeatedly’<sup>14</sup> and ‘willfully’ set forth in” in the 2020 Tip final rule’s revisions to the Department’s CMP regulations “are reasonable and practical.” In the alternative, NFIB requested that the Department maintain the 2020 Tip final rule’s revisions to the definition of willfulness for employers with fewer than 100 employers.<sup>15</sup> In its prior comments, CWC expressed support for the 2020 Tip final rule’s revisions to the definition of “willful” in its CMP regulations.<sup>16</sup>

#### 3. Comments Regarding the Portion of the 2020 Tip Final Rule Addressing Changes to the Dual Jobs Regulations at § 531.56(e)

In their comments opposing the Department’s proposed delay to the dual jobs portion of the 2020 Tip final rule, the NRA and WPI argued that the 2020 Tip final rule dual jobs test is “a step in the right direction” and “faithful to the FLSA’s text” insofar as the revised

<sup>13</sup> As noted above, WPI, the NRA, and NRF expressed general support for the 2020 Tip final rule.

<sup>14</sup> The 2020 Tip final rule added a reference to violations of section 3(m)(2)(B) to the existing definition of “repeated” in the Department’s CMP regulations but did not make any revisions to the definition of “repeated.” In the CMP NPRM, the Department has proposed removing the reference to 3(m)(2)(B) violations from the definition of repeated but has not proposed any revisions to the definition. See 85 FR 86756, 86792 (Dec. 30, 2020); 86 FR 15817, 15827–28 (March 25, 2021); 29 CFR 578.3(b) (defining “repeated”).

<sup>15</sup> Additionally, NFIB stated that the Department should “preserve the requirement in 29 CFR 578.4 that, in determining the amount of a CMP, the Department ‘shall consider the seriousness of the violations and the size of the employer’s business[.]’” The Department has proposed delaying for 8 months the revisions to § 578.4 made by the 2020 Tip final rule, and proposed additional revisions to this section in its separate NPRM dated March 25, 2021 (CMP NPRM) to preserve the Department’s authority to assess CMPs for violations of section 3(m)(2)(B). However, it has not proposed to revise the language in § 578.4 providing that the Department “shall consider the seriousness of the violations and the size of the employer’s business” in determining “the amount of penalty to be assessed.” See 86 FR 15817, 15828.

<sup>16</sup> As noted above, the NRA, NRF, and WPI also expressed general support for the 2020 Tip final rule.

dual jobs regulations eliminated the 20 percent limitation on the amount of time a tipped employee can perform related non-tipped duties and still be paid a direct cash wage of no less than \$2.13 per hour. In support of this position, the NRA and WPI argued that, since the FLSA permits employers to take a tip credit for a “tipped employee,” defined as an employee engaged in a tipped “occupation,” the FLSA does not provide any basis for distinguishing between tipped workers’ tipped duties and non-tipped duties. See 29 U.S.C. 203(m), (t).

Commenters who opposed the proposed delay in the 2020 Tip final rule’s revisions to § 531.56(e) also argued that the 2020 Tip final rule dual job test will be easier for employers to administer than the Department’s previous 80/20 guidance. In its prior comment on the Delay Rule, CWC stated that the revisions to dual jobs test would make compliance easier for employers; WPI likewise stated that the revised dual jobs test’s use of O\*NET to define related non-tipped duties would make compliance simpler. Additionally, WPI and the NRA stated that the revisions to the dual jobs test will lead to less litigation.

The NRA also stated that there is no need to reconsider the dual jobs portion of the 2020 Tip final rule, as “the Department already took years to consider every angle.” According to the NRA, neither the *Pennsylvania* complaint nor the concerns with the rule’s economic analysis raised by commenters such as EPI are grounds for delaying any part of the 2020 Tip final rule. Regarding the *Pennsylvania* complaint, the NRA emphasized that no court has ruled on any aspect of the complaint and that there has not been any briefing. Regarding the economic analysis, the NRA argued that EPI’s criticism of the 2020 Tip final rule “rest[s] on the flawed premise” that the 2020 Tip final rule eliminated a “quantitative cap” on the amount of related non-tipped duties a tipped worker can perform, since the Department had already “abandoned” the quantitative cap in 2018 when it issued Opinion Letter FLSA 2018–27. Therefore, “EPI’s baseline is simply incorrect.”

Commenters who opposed the proposed delay of the dual jobs portion of the 2020 Tip final rule also expressed concern that delaying this portion of the rule would be disruptive to employers. NRF stated that its members had already undertaken “efforts to implement the final rule in their operations nationwide.” The NRA stated that “since at least November 2018,” when

the Department issued its current guidance, “employers had already been adjusting.” WPI made a somewhat different argument: It noted that some courts have continued to apply the Department’s prior 80/20 guidance on related duties, rather than the Department’s current guidance, and stated that allowing the 2020 Tip final rule’s revisions to the dual jobs regulations to go into effect would bring clarity to employers.

Although WPI opposed the proposed delay in the dual jobs portion of the 2020 Tip final rule, it included some recommendations for the Department to consider in the event that it ultimately proposes to withdraw and revise this portion of the rule. WPI stated that any alternative should include “concrete guidance on where the lines are to be drawn,” adding that, in its view, “there has been no clear definition of what duties are ‘tipped’ as opposed to merely ‘related’ or ‘non-tipped.’” WPI further stated that any “quantitative limit” on duties that a tipped employee can perform “must precisely identify which duties fall on either side of the line,” recognize that occupations can evolve over time, and draw upon O\*NET as a resource.

#### *D. Discussion of Comments and Rationale for Finalizing the Partial Delay of the 2020 Tip Final Rule*

In the Partial Delay NPRM, the Department stated that, in accordance with its review of questions of law, policy, and fact raised by the 2020 Tip final rule, most of the 2020 Tip final rule will go into effect upon the expiration of the first effective date extension, April 30, 2021. However, the Department proposed delaying three portions of the 2020 Tip final rule for an additional 8 months—the two portions of the 2020 Tip final rule that addressed the assessment of CMPs and the portion that revised the Department’s dual jobs regulations—in order to engage in a comprehensive review of the issues of law, fact, and policy raised by these three portions of the 2020 Tip final rule and to take further action, as needed, to complete its review.

After reviewing the comments received, the Department believes that these three portions of the 2020 Tip final rule should be further delayed until after the Department has completed its comprehensive review of these portions of the rule. Pursuant to this review, the Department has already initiated a separate rulemaking proposing to withdraw and re-propose the two portions of the rule addressing the assessment of CMPs. The Department intends to complete the

CMP NPRM before the expiration of this Partial Delay. The Department also intends to initiate another rulemaking to potentially revise the portion of the 2020 Tip final rule related to the revision of its dual jobs regulations. Delaying these three portions of the 2020 Tip final rule until after the Department completes its review of these portions of the rule will allow the Department to reconsider legal, policy, and factual conclusions on which these three portions of the rule were based, and about which commenters who supported the Partial Delay NPRM have raised concerns. Delaying these three portions of the 2020 Tip final rule until after the Department completes its comprehensive review of these portions of the rule will also prevent harm to the Department, workers, and employers. In particular, delaying these three portions of the 2020 Tip final rule until after the Department completes its review will allow the Department to avoid codifying changes to its regulations that it may ultimately determine to lack a basis in law and that may not survive judicial scrutiny. It will also prevent changes to employment practices that may be contrary to the FLSA and harmful to workers, and which may need to be reversed in the event the Department withdraws and revises these portions of the 2020 Tip final rule, causing disruption to employers. And it will prevent confusion and uncertainty among workers and the regulated community while the Department continues to review these portions of the 2020 Tip final rule.

#### 1. CMPs for Violating Section 3(m)(2)(B)

The first portion of the 2020 Tip final rule that the Department has proposed 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. As discussed above, the CAA amended section 16(e)(2) of the FLSA to grant the Secretary discretion to assess CMPs for “each such violation” of section 3(m)(2)(B) “as the Secretary determines appropriate.” See 29 U.S.C. 216(e)(2). Unlike the statutory provisions in section 16(e)(2) regarding CMPs for minimum wage and overtime violations, the statute does not limit the assessment of CMPs to repeated or willful violations of section 3(m)(2)(B). In the 2020 Tip final rule, the Department incorporated CMPs for violations of section 3(m)(2)(B) into the Department’s existing CMP regulations at 29 CFR parts 578, 579, and 580. The 2020 Tip final rule codifies in its regulations the Department’s post CAA



enforcement policy, *see* FAB No. 2018–3, pursuant to which it assesses CMPs only for repeated or willful violations of section 3(m)(2)(B).

However, in light of the comments submitted in support of the Department's Delay Rule and the *Pennsylvania* complaint, the Department became concerned that the 2020 Tip final rule inappropriately and unlawfully circumscribed its authority to issue CMPs for section 3(m)(2)(B) violations. Accordingly, in the CMP NPRM published simultaneously with the Partial Delay NPRM, the Department proposed to withdraw this portion of the 2020 Tip final rule and proposed revisions to parts 578, 579, and 580 of its regulations to eliminate the restriction on the Department's ability to assess CMPs only for repeated and willful violations of section 3(m)(2)(B). 86 FR 15817. In the Partial Delay NPRM, the Department proposed delaying this portion of the rule until after the Department completes its review, explaining that this delay would avoid codifying a limitation on the Department's authority to assess CMPs that may lack a basis in law. *See* 86 FR 15821–22.

After reviewing the comments on the Partial Delay NPRM, the Department believes that there are strong grounds for engaging in further review of the portion of the 2020 Tip final rule that addressed the assessment of CMPs for violations of section 3(m)(2)(B) before it goes into effect. In the Partial Delay NPRM and the CMP NPRM, the Department identified serious legal and policy concerns with this portion of the rule, namely, that it may inappropriately and unlawfully circumscribe the Department's discretion to assess CMPs when employers unlawfully keep employees' tips. These concerns are reflected in comments submitted from the AGs and the numerous employee advocacy organizations that supported further delay of this portion of the 2020 Tip final rule. These commenters argued that this portion of the 2020 Tip final rule, by limiting the assessment of CMPs to willful and repeated violations of section 3(m)(2)(B), is in conflict with the plain statutory language of the FLSA providing that the Secretary may assess CMPs under this section "as the Secretary determines appropriate," and thus explicitly provides the Secretary with discretion to assess those CMPs. *See, e.g.,* NWLC; ROC United; OFW; CLASP. As the AGs explained in their comment, the *Pennsylvania* complaint alleges that "[t]he Department's decision to require a willful violation of Section 203(m)(2)(B) to impose civil money

penalties is contrary to the plain text of the statute," and "flouts congressional intent." The NRA argues in its comment that the *Pennsylvania* complaint does not justify a further delay in the rule because the court has not yet ruled on the litigants' claims. However, the Department believes that the AGs' argument regarding the statutory text and legislative intent is sufficiently persuasive to finalize the additional delay of this portion of the rule, particularly where any harm from the delay is, on balance, offset by the need for additional consideration to avoid the possibility of codifying into the Department's regulations provisions that may not survive judicial scrutiny.

To the extent that NFIB, as well as the CWC, NRF, and the NRA, dispute that this portion of the 2020 Tip final rule raises serious legal and policy concerns that merit further consideration by the Department, the Department disagrees. Citing the "wide discretion" that FLSA section 16(e)(2) affords the Department in determining whether to assess CMPs for 3(m)(2)(B) violations, NFIB argued that it is appropriate for the Department to impose the same limits on the assessment of CMPs for 3(m)(2)(B) violations as its imposes for CMPs for section 6 and 7 violations. However, section 16(e)(2) explicitly limits the Department's ability to assess CMPs for section 6 and 7 violations to those that are "repeated and willful"; the Department's existing CMP regulations in 29 CFR parts 578, 579, and 580 reflect this statutory limitation. Section 16(e)(2) contains no such limitation on the assessment of CMPs for violations of section 3(m)(2)(B); to the contrary, it explicitly provides the Secretary discretion to assess CMPs for violations of section 3(m)(2)(B) "as the Secretary determines appropriate."

The Department had concluded in the 2020 Tip final rule that a desire for consistent enforcement procedures justified limiting the Department's assessment of CMPs for violations of 3(m)(2)(B) to the same extent as other FLSA CMPs. *See* 85 FR 86773. However, in light of the comments it has received in support of the Partial Delay NPRM, the Department has serious concerns that codifying such a limit on the assessment of CMPs for violations of section 3(m)(2)(B) in its regulations may fail to preserve what NFIB has appropriately characterized as the Department's "wide discretion" under the statute. The Department is therefore finalizing the delay of this portion of the rule as proposed. Delaying the effective date of this portion of the 2020 Tip final rule will provide the Department sufficient time to complete its

comprehensive review of this portion of the rule, in particular, to allow the Department to consider the legal and policy conclusions on which this portion of the rule is based, and regarding which the AGs and advocacy organizations have raised serious concerns. This delay will also permit the Department to conduct notice and comment rulemaking regarding its separate CMP NPRM, in which the Department has proposed withdrawing and repropounding the portion of the rule addressing the assessment of CMPs for violations of section 3(m)(2)(B), before this portion of the rule goes into effect.

The Department thus finalizes its proposed delay of the portion of the 2020 Tip final rule addressing the assessment of CMPs for violations of section 3(m)(2)(B). The Department notes that, upon review of the comments it receives on the CMP NPRM, which proposed to withdraw and re-propose this portion of the rule, it may determine that it is not appropriate to withdraw or amend this portion of the 2020 Tip final rule. The Department will make that determination in the context of the CMP NPRM.

## 2. CMPs for Willful Violations

The second portion of the 2020 Tip final rule that the Department proposed to further delay made revisions to those parts of the Department's FLSA regulations at §§ 578.3(c) and 579.2 which address when a violation of the FLSA is "willful." As discussed above, section 16(e)(2) of the FLSA authorizes the Department to assess a CMP against "any person who repeatedly or willfully violates" sections 6 and 7 of the FLSA, the Act's minimum wage and overtime requirements. 29 U.S.C. 216(e)(2). The regulations interpreting these statutory terms are intended to implement 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. The regulations provide that WHD shall take into account "[a]ll of the facts and circumstances surrounding the violation" when determining whether a violation is willful. *See* 29 CFR 578.3(c)(1), 579.2. From 1992 until the Department issued the 2020 Tip final rule, the Department's CMP regulations at §§ 578.3(c)(2) and 579.2 provided that "an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of [WHD] to the effect that the conduct in question is not lawful." Sections

578.3(c)(3) and 579.2 also provided that “an employer’s conduct shall be deemed to be in reckless disregard of the requirements of the Act, among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.” However, courts of appeals considering those regulations concluded that there is an “incongruity” between, on the one hand, the regulatory provisions deeming two specific circumstances to be willful, and on the other hand, “the *Richland Shoe* standard on which the regulation is based.” *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 680–81 (1st Cir. 1998); see also *Rhea Lana, Inc. v. Dep’t of Labor*, 824 F.3d 1023, 1030–32 (D.C. Cir. 2016).

The 2020 Tip final rule revised the “willful” portions of the Department’s CMP regulations to attempt to address these courts of appeals decisions. The 2020 Tip final rule revised § 578.3(c)(2) and the corresponding language in § 579.2 to state that, in considering all of the facts and circumstances, an employer’s receipt of advice from WHD that its conduct was unlawful “can be sufficient” to show that the violation is willful but is “not automatically dispositive.” However, the 2020 Tip final rule also deleted § 578.3(c)(3) and the corresponding language in § 579.2 addressing the meaning of reckless disregard.<sup>17</sup> The 2020 Tip final rule explained that an employer who should have inquired further but did not do so adequately is a specific scenario that courts have already determined is equivalent to reckless disregard, rather than a fact that could impact a determination of willfulness. 85 FR 86774. The 2020 Tip final rule stated that because such a scenario was not a “fact” or “circumstance” that the Department should consider when determining reckless disregard, it was not appropriate to include it in the regulations. *Id.* Accordingly, the 2020 Tip final rule stated that revising § 578.3(c)(3) in the same manner as § 578.3(c)(2) “did not seem helpful” and deleted that provision. *Id.*

In the Partial Delay NPRM, the Department proposed to further delay the effective date of this portion of the 2020 Tip final rule while it completes its review of this portion of the rule to ensure that the new regulations comport

with the Supreme Court’s decision in *Richland Shoe* and to prevent confusion and uncertainty among the regulated community regarding what constitutes a “willful” violation. As the Department noted in the Partial Delay NPRM, the *Pennsylvania* litigants argued that this portion of the 2020 Tip final rule is contrary to law because it “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,” “contradict[ing] the Supreme Court’s long-established definition of willfulness.” See Delay NPRM (citing *Commonwealth of Pennsylvania et al. v. Scalia et al.*, No. 2:21-cv-00258, pp. 23–24, 94 (E.D. Pa., Jan. 19, 2021). The Department proposed that delaying the portion of the 2020 Tip final rule addressing the assessment of CMPs for willful violations until after the Department completes its review of this portion of the rule would avoid codifying into the Department’s regulations provisions that, absent reconsideration by the Department, may not survive judicial scrutiny.

In its CMP NPRM, the Department stated that it continued to believe that revisions to its 1992 regulations addressing the meaning of willfulness were needed in order to address the courts of appeals decisions discussed above. However, the Department asked for comment on whether modifications to this portion of the 2020 Tip final rule were needed to clarify that multiple circumstances, not just the circumstance identified, can be sufficient to show that a violation was knowing and thus willful. See 86 FR 15822. The Department also asked for comment on whether the 2020 Tip final rule inappropriately deleted the language at § 578.3(c)(3) and the corresponding language at § 579.2 addressing reckless disregard. Accordingly, the CMP NPRM proposed withdrawing and repropounding the portion of the 2020 Tip final rule addressing the meaning of willfulness; the CMP NPRM also proposed language addressing the meaning of reckless disregard.

After reviewing the comments on the Partial Delay NPRM, the Department has decided to finalize the delay of the portion of the 2020 Tip final rule addressing the meaning of willfulness as proposed. As with the portion of the 2020 Tip final rule addressing CMPs for violations of section 3(m)(2)(B), the Department has identified multiple serious concerns with this portion of the rule. These include the Department’s concern that removing § 578.3(c)(3) and the corresponding language in § 579.2 could inadvertently suggest that an

employer’s failure to inquire further into the lawfulness of its conduct when it should have does not constitute reckless disregard, and therefore, willfulness; its concern that the 2020 Tip final rule’s revisions to § 578.3(c)(2) and the corresponding language in § 579.2 erroneously suggested that only an employer’s receipt of advice from WHD, and no other circumstances, can demonstrate that a violation of the FLSA was knowing; and its concern that further revisions are needed to align these regulations with relevant Supreme Court precedent. Comments from the AGs and employee advocacy organizations confirmed and reinforced these concerns. Regarding the deletion of language regarding reckless disregard, for instance, the AGs noted that “[c]urrently, a violation is considered willful when the Department provides advice to an employer that it chooses not to follow or when an employer fails to inquire adequately into its legal obligations in some circumstances. However, if the 2020 Final Tip Rule takes effect, these actions would no longer be considered willful and subject to civil money penalties.” Numerous advocacy organizations also asserted that these changes weaken worker protections under the FLSA. See, e.g., NELP; Oxfam America; Justice at Work.

NFIB opposed the proposed delay in the portion of the 2020 Tip final rule addressing the assessment of CMPs for willful violations, which it characterized as “reasonable” and “practical.” CWC also expressed support for this portion of the rule in its prior comments. In its comment on the Delay Rule, for instance, CWC commended the Department for bringing its regulations regarding the meaning of willfulness “more closely” in line with appellate court precedent, specifically *Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1st Cir. 1998). As noted above, the NRA contended that the *Pennsylvania* litigants’ legal challenge does not support delaying the 2020 Tip final rule, as no court has ruled on any aspect of the complaint, and NRF expressed general opposition to delaying the rule. As explained above, however, the Department has serious concerns that this portion of the 2020 Tip final rule does not align with the Supreme Court’s decision in *Richland Shoe*. Additionally, comments from the AGs and advocacy groups illustrate, at a minimum, that the 2020 Tip final rule’s revisions to these CMP provisions have caused confusion about the Department’s changes to those provisions. Accordingly, the

<sup>17</sup> As noted above, § 578.3(c)(3) and the corresponding language in § 579.2 had provided, “[A]n employer’s conduct shall be deemed to be in reckless disregard, among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.”



Department concludes that the portion of the 2020 Tip final rule addressing the assessment of CMPs for willful violations raises serious legal and policy concerns that merit further review by the Department.

By delaying the effective date of this portion of the 2020 Tip final rule to allow sufficient time to undertake a comprehensive review of this portion of the rule, the Department will be able to evaluate the concerns discussed above before it goes into effect. The notice-and-comment process associated with the Department's CMP NPRM, in which it has proposed withdrawing and re-proposing this portion of the rule, will be integral to this review. The Department also believes that delaying this portion of the rule while it undertakes its review will prevent confusion and uncertainty among employers and workers regarding the definition of willfulness. As the comments from the AGs and advocacy organizations demonstrate, such confusion is likely to be caused, in particular, by the 2020 Tip final rule's removal of language regarding the meaning of reckless disregard from § 578.3(c) and § 579.2.

The Department thus finalizes the proposed delay in the portion of the 2020 Tip final rule addressing the meaning of willfulness. The Department notes that, upon review of the comments it receives on the CMP NPRM, which proposes to withdraw and re-propose this portion of the rule, it may determine that it is not appropriate to withdraw or amend this portion of the 2020 Tip final rule. The Department will make that determination in the context of the CMP NPRM.

### 3. Dual Jobs Regulations

The third portion of the 2020 Tip final rule that the Department proposed to further delay involves the amendment of its "dual jobs" regulations to address when an employer can continue to take a tip credit for an employee who is engaged in a tipped occupation and performs both tipped and non-tipped duties, *see* § 531.56(e).<sup>18</sup> For many years, the Department's subregulatory guidance addressing this issue permitted employers to continue to take a tip credit for the time a tipped employee performed non-tipped duties related to his or her tipped occupation

unless the time spent in such duties exceeded 20 percent of the employee's workweek (80/20 guidance). In 2018 and 2019, the Department changed its subregulatory guidance to provide that employers could continue to take a tip credit for any non-tipped work that a tipped employee performed which was related to his or her tipped occupation, provided that work was performed "contemporaneously with" or "for a reasonable time immediately before or after" his or her tipped work. The Department's guidance provided that employers could use O\*NET, which is a database of worker attributes and job characteristics compiled by the Employment and Training Administration, to determine whether a duty was related or not related to the tipped occupation. *See* WHD Field Assistance Bulletin (FAB) 2019–2 (Feb. 15, 2019) and WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018) (2018–19 guidance). In 2019, the Department proposed to amend its existing dual jobs regulations at § 531.56(e)<sup>19</sup> to incorporate this guidance. *See* 84 FR 53956. The 2020 Tip final rule largely codified the 2018–19 guidance; the primary difference between the 2018–19 guidance and the 2020 Tip final rule is that the final rule only used O\*NET as a guide for determining related duties, rather than as a definitive source. *See* 85 FR 86S756, 86790.

As the Department explained in the Partial Delay NPRM, a number of district courts have found that the test in the 2018–2019 guidance for when an employer can take a tip credit for a tipped employee who performs related non-tipped duties—limiting the tip credit to non-tipped related duties performed "contemporaneously with" or for a "reasonable time immediately before or after" performing tipped duties—is unclear or have otherwise refused to follow the test set forth in that guidance.<sup>20</sup> Additionally, the

<sup>19</sup> *See also* 29 CFR 10.28(b)(2).

<sup>20</sup> The preamble to the 2020 Tip final rule lists many of these decisions. *See* 85 FR 86770–71. For example, a district court stated that the 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). District courts have also found that the Department's guidance contradicts the limitations ("occasionally," "part of [the] time," and "takes a turn") that remain in the Dual Jobs regulation. For example, in *Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512, 533 (E.D. Pa. 2019), the district court held that the dual jobs guidance was unreasonable because "the temporal limitations it imposes on untipped related work conflict with those 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.

*Pennsylvania* complaint challenges the dual jobs test in the 2020 Tip final rule, which largely codifies this guidance, under the APA. The *Pennsylvania* litigants who brought the complaint argue that the 2020 Tip final rule's dual jobs test—which also limits the tip credit to non-tipped related duties performed "contemporaneously with" or for a "reasonable time immediately before or after" performing 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." 86 FR 15811.<sup>21</sup> Additionally, the *Pennsylvania* litigants challenged the 2020 Tip final rule's use of O\*NET as a resource to determine "related duties," which, according to their complaint, authorizes employers to engage in "conduct that has been prohibited under the FLSA for decades."<sup>22</sup> Given the concerns noted with this portion of the rule, the Department asked for comment on whether it should further delay the dual jobs portion of the 2020 Tip final rule to consider concerns raised in the *Pennsylvania* litigation as well as other aspects of that portion of the rulemaking, such as the validity of the economic analysis, and asked for

2019) (same); *Roberson v. Tex. Roadhouse Mgmt. Corp.*, No. 19–628, 2020 WL 7265860 (W.D. Ky. Dec. 10, 2020) (same).

<sup>21</sup> *See Commonwealth of Pennsylvania et al. v. Scalia et al.*, No. 2:21-cv-00258, p. 128, 131 (E.D. Pa., Jan. 19, 2021); *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.")

<sup>22</sup> *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 similar 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).

<sup>18</sup> *See also* 29 CFR 10.28(b)(2) (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").

comments generally addressing the merits of the 2020 Tip final rule dual jobs test. The Department asked whether further delaying the effective date of this portion of the 2020 Tip final rule so that it could fully consider the merits of these claims and consider whether to engage in further rulemaking on this issue might be prudent before it codified such a test into its regulations for the first time. The Department noted that it would be disruptive to employers to adjust their practices to accommodate the dual jobs 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 dual jobs test. The Department proposed that delaying the effective date while the Department undertakes its review, instead of allowing this portion of the 2020 Tip final rule to be implemented, addresses this concern before employers change their practices to accommodate a dual jobs test that ultimately may not survive judicial scrutiny or that the Department may change.

After carefully considering the comments received, the Department has concluded that the dual jobs portion of the 2020 Tip final rule raises legal and policy concerns that warrant further delay of the effective date of this portion of the rule while the Department considers these issues and conducts another rulemaking to potentially revise that portion of the rule. The Department received a number of significant comments in support of further extension of the effective date of the dual jobs portion of the rule. These comments raised concerns similar to those raised in the *Pennsylvania* litigation: that the new dual jobs test sets too lax a standard and will depress tipped employees' wages and possibly eliminate non-tipped jobs, that the new test does not reflect the statutory definition of a tipped employee, that the terms used in the new test are so amorphous that they will lead to extensive litigation, that O\*NET is not an appropriate tool to determine related duties, and that the Department's economic analysis for this portion of the rule did not sufficiently identify the economic impact of this new test on employees and employers.

The Department shares the concerns of the commenters who supported the Partial Delay NPRM that, by removing the limit on the amount of time a tipped employee can perform related non-tipped duties, the new test articulated in the 2020 Tip final rule may not accurately identify when a tipped employee who is performing non-tipped duties is still engaged in a tipped

occupation under the FLSA. The Department is also concerned that the 2020 Tip final rule's dual jobs regulations may be contrary to the prohibition on keeping tips in section 3(m)(2)(B) of the statute because it increases employers' ability to use tips to satisfy their minimum wage obligations.

The NRA and WPI comments support permitting the dual jobs portion of the 2020 Tip final rule to go into effect, arguing that it would be inappropriate to revert back to the Department's previous 80/20 guidance because the FLSA only refers to employees being employed in a "tipped occupation" and therefore does not create any distinction between the tipped and non-tipped duties of a tipped employee.<sup>23</sup> The Department is not proposing in this Partial Delay rulemaking to revert back to its 80/20 guidance. It notes, however, that the NRA and WPI reading of the statute is inconsistent with the position taken by the Department in the 2020 Tip final rule, which determines whether an employee is engaged in a tipped occupation based on the employees' duties.<sup>24</sup> Particularly because this portion of the rule is being challenged under the APA and may not survive judicial scrutiny, the Department believes it should further delay the effective date of this portion of the rule. This will ensure that it has the opportunity to thoroughly consider commenters' concerns that the dual jobs portion of the 2020 Tip final rule is contrary to the FLSA, and propose and complete a new rulemaking on this issue, before the rule goes into effect.

A number of commenters encouraged the Department to allow the dual jobs portion of the 2020 Tip final rule to go into effect because the new test, which eliminates the 20 percent limitation on related duties and uses O\*NET as a resource for determining which duties are related to the tipped occupation, makes compliance easier for employers. WPI and the NRA, for example, stated that the revisions to § 531.56(e) created a standard that is not as susceptible to litigation as the previous 80/20 guidance. On the other hand, a number of commenters who supported the

further delay argued that the 2020 Tip final rule contained a number of amorphous terms, such as "contemporaneous" and "reasonable time", that may not be sufficiently defined, a defect that could lead to extensive litigation over the scope of those terms. The Department agrees that it should at a minimum consider the argument that these terms are not adequately defined. The Department also agrees with the commenters that it should further delay the rule so that it can review the numerous court decisions which declined to defer to the Department's 2018–2019 guidance, which was the basis for the dual jobs test included in the 2020 Tip final rule, to determine whether those decisions identify any weaknesses in the 2020 Tip final rule dual jobs test. The Department also shares the concerns of the commenters that O\*NET may not be an appropriate tool to identify duties related to tipped occupations. As the commenters pointed out, since O\*NET compiles lists of duties that correspond to various occupations and is generated through employee surveys, it reflects the duties that tipped employees are performing, rather than the duties they should be performing.<sup>25</sup>

The Department also shares commenters' concerns with the process by which the Department promulgated the dual jobs portion of the 2020 Tip final rule, specifically, that the economic analysis may not have adequately estimated the impact of this portion of the rule. In particular, the Department is concerned that its analysis of the economic impact of the dual jobs portion of the 2020 Tip final rule failed to adequately address EPI's comment on the rule, and that alleged flaws in its economic analysis call into question whether this portion of the rule was the product of reasoned decision making. The NRA argued in its comment opposing an additional delay of the effective date that EPI's economic analysis of the dual jobs portion of the 2020 Tip final rule was flawed because it used the wrong baseline.<sup>26</sup> However,

<sup>25</sup> As noted above, the NRA's comment opposing the further delay stated as a general matter that the *Pennsylvania* complaint does not support a delay of the 2020 Tip final rule. However, the Department believes that the concerns raised by commenters with both the substance of the dual jobs portion of the rule and the process by which it was promulgated—which mirror those raised in the *Pennsylvania* complaint—are sufficiently persuasive to warrant further delaying this portion of the rule.

<sup>26</sup> The NRA comment also asserts that the Department "agreed not to assert such a limitation in pending and future investigations in response to litigation filed against the Department of Labor in federal court in Texas." In support, the NRA comment cites a Notice of Dismissal, filed in

<sup>23</sup> NRF also expressed general support for the 2020 Tip final rule's related non-tipped duties test, characterizing it as a "balanced approach."

<sup>24</sup> Specifically, revised § 531.56(e) distinguishes between tipped employees' tipped duties, for which employers can take a tip credit; non-tipped duties related to a tipped employee's occupation, which employers can take a tip credit for when they are performed contemporaneously or for a reasonable amount of time immediately before or after performing tipped duties; and non-tipped duties that are not part of a tipped employee's occupation, for which employers cannot take a tip credit.

the Department believes that the criticisms raised by EPI are sufficiently serious to warrant further review, even if the Department ultimately concludes that it used the correct baseline. Given the Department's concern that its economic analysis of the dual jobs portion of the 2020 Tip final rule may not be sufficient, the Department also shares EPI's concern, reiterated by numerous advocacy organizations, that allowing this portion of the rule to go into effect without further consideration of the economic analysis could potentially lead to a loss of income for workers in tipped industries, many of whom are continuing to struggle with the economic impact of the COVID-19 pandemic.<sup>27</sup> Further delay of this portion of the rule would also allow the Department to consider any changes from the COVID-19 pandemic to tipped work that should inform its ongoing consideration of the dual jobs portion of the rule.

In sum, the Department believes that the proposed delay of the dual jobs portions of the 2020 Tip final rule through December 31, 2021, is reasonable given the numerous issues of law, policy, and fact raised by the comments, which reflect 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. While an 8-month delay is significant, the Department believes that allowing this portion of the rule to go into effect may lead to harm to the Department, workers, and employers if the rule is ultimately invalidated. The Department appreciates the NRA's comment that there is no need to

reconsider the dual jobs portion of the 2020 Tip final rule because the Department has already conducted a rulemaking to consider this issue and that it would be disruptive to employers to further delay implementation of the new rule. The NRA argues that employers have already implemented the dual jobs portion of the 2020 Tip final rule because they changed their practices to follow the Department's 2018-2019 dual jobs guidance. However, as WPI acknowledged, a number of courts have declined to follow the Department's 2018-19 guidance and have decided instead to adopt the Department's prior 80/20 guidance. Therefore, some employers have not applied the 2020 Tip final rule dual jobs test. Also, as explained above, the 2020 Tip final rule was based on the 2018-19 guidance but is not identical to it. As also noted above, the Department believes that the concerns raised by the commenters that the dual jobs test lacks legal sufficiency should be explored before the dual jobs test is codified for the first time into the Department's regulations and that it would be more disruptive to employers if the rule went into effect only to be invalidated in the *Pennsylvania* litigation. The Department also believes that it is significant that a number of commenters, including EPI, NELP, and WPI have urged the Department to consider whether the dual jobs test could be strengthened, both in terms of employee protection and in workability. The Department will consider the specific recommendations made by commenters such as WPI and EPI as part of its ongoing review of the dual jobs portion of the 2020 Tip final rule.

In sum, after considering the comments submitted, the Department believes that further delay is essential to inform the Department's comprehensive review of the dual jobs portion of the 2020 Tip final rule, including conducting a rulemaking to potentially revise that portion of the rule.

#### 4. Length of the Proposed Delay

In the Partial Delay NPRM, the Department proposed delaying the effective date of three portions of the 2020 Tip final rule—the two portions relating to the assessment of CMPs and the portion that revised the Department's dual jobs regulations—for an additional 8 months, through December 31, 2021. See 86 FR 15812. The Department proposed that this additional delay would provide it with sufficient time to consider all aspects of these three portions of the rule, conduct rulemaking on two portions of the 2020 Tip final rule through the CMP NPRM,

evaluate commenters' concerns, and consider whether to propose withdrawing and repropounding the third portion of the rule addressing dual jobs. The Department also noted that the CMP NPRM includes a 60-day comment period and that a final CMP rule would have at least a 30-day delay between publication in the **Federal Register** and its effective date.<sup>28</sup> The Department solicited comments on whether the proposed period of delay is an appropriate length of time.

The Department received one comment specifically addressing the length of the proposed delay. The AGs stated that the length of the delay was appropriate because it gives the Department sufficient time "to complete the rulemaking process and will avoid multiple rulemakings and delays," to "consider and review" all the issues raised by the portion of the 2020 Tip final rule addressing the Department's dual jobs regulations, and "to complete the rulemaking process should it decide to withdraw or revise" the portion of the 2020 Tip final rule addressing dual jobs. As noted above, seventeen advocacy organizations supported the Partial Delay NPRM and five organizations opposed it.

After carefully reviewing the comments received, and based on its extensive rulemaking experience, the Department concludes that the proposed 8-month delay provides it with sufficient time to complete its comprehensive review of these three portions of the 2020 Tip final rule, which will allow the Department to complete the CMP rulemaking as well as a separate rulemaking to potentially revise the dual jobs portions of the 2020 Tip final rule. Accordingly, the Department finalizes the proposed 8-month delay in these three portions of the 2020 Tip final rule.

#### 5. Effective Date of This Partial Delay

This rule delaying the effective date of the two portions of the 2020 Tip final rule addressing the assessment of CMPs and the portion of the 2020 Tip final rule addressing the Department's dual jobs regulations is effective immediately.<sup>29</sup> Section 553(d) of the APA, 5 U.S.C. 553(d), provides that publication of a substantive rule must be made no less than 30 days before its

<sup>28</sup> The APA generally requires agencies to publish substantive rules "not less than 30 days before [their] effective date." 5 U.S.C. 553(d).

<sup>29</sup> The amendments made 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, revised at 85 FR 86756 (December 30, 2020), and delayed at 86 FR 11632 (February 26, 2021) until April 30, 2021, are further delayed until December 31, 2021.

*Restaurant Law Center v. Acosta*, No. 1:18-cv-00567-RP (W.D. Tex. Nov. 30, 2018), a case that challenged a prior, now superseded, interpretation reflected then in Section 30d00(f). The Department disagrees that the November 30, 2018, Notice of Dismissal limits its ability to reconsider this portion of the December 30, 2020 Tip final rule. Under the terms of that dismissal, the parties stipulated that Opinion Letter FLSA 2018-27 "resolve[d] the case or controversy underlying the Complaint," and that WHD would "instruct its staff, as a matter of enforcement policy, not to enforce the superseded interpretation" in the Department's prior guidance "with respect to work performed prior to the issuance of the Opinion Letter." Notice of Dismissal, *Restaurant Law Center v. Acosta*, No. 1:18-cv-00567-RP (W.D. Tex. Nov. 30, 2018). The Department did not agree in that prior litigation to constrain either its ability to reconsider its guidance or engage in future rulemaking on this issue. *Id.*

<sup>27</sup> Numerous commenters, both those who supported and those who opposed the Partial Delay NPRM, noted that the COVID-19 pandemic has had a particularly serious impact on the restaurant industry and tipped workers. See, e.g., OFW (noting that "in the midst of the COVID-19 economic crisis" tipped workers "have already seen their tips plummet"); NRA ("It is important to highlight the fact that the restaurant industry has been uniquely hurt by the pandemic. No industry has lost more jobs or more revenue.").

effective date except, among other exceptions, “as otherwise provided by the agency for good cause found.” The Department finds that it has good cause to make this rule effective immediately upon publication because allowing for a 30-day delay between publication and the effective date of this rule would result in the three portions of the 2020 Tip final rule that this rule delays taking effect before the delay begins. Such an outcome would undermine the purpose for which this rule is being promulgated and result in additional confusion for regulated entities. Moreover, this rulemaking institutes an 8-month delay of portions of the 2020 Tip final rule, rather than itself imposing any new compliance obligations on employers; therefore, the Department finds that a lapse between publication and the effective date of this rule delaying the Tip final rule’s effective date is unnecessary. Because allowing for a 30-day period between publication and the effective date of this rulemaking is both unnecessary and would fundamentally undermine the purpose for which this rule is being promulgated, this final rule delaying the effective date of three portions of the 2020 Tip final rule is effective immediately upon publication in the **Federal Register**.

### III. 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. This final rule does not contain a collection of information subject to OMB approval under the Paperwork Reduction Act.

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

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.<sup>30</sup> Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as a regulatory action that is likely to 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 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 delay and was prepared pursuant to the above-mentioned executive orders.

In this rule, the Department will further extend the effective date of three portions of the 2020 Tip final rule in order to engage in a comprehensive review of the issues of law, fact, and policy raised by these three portions of the 2020 Tip final rule and to take further action, as needed, to complete its review. This delay will provide the Department additional time to complete the CMP rulemaking and as well as an additional rulemaking on the portion of the 2020 Tip final rule that addressed 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 that addressed the keeping of tips and tip pooling,<sup>31</sup> recordkeeping,<sup>32</sup> and other minor changes<sup>33</sup> 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 delay will not have any impact on these quantified transfers.

The Department expects that the industries that may be affected by the 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.<sup>34</sup> The Department acknowledges that there are other industries with tipped workers that would have been affected by the 2020 Tip final rule.

Part of the reason for an additional delay of the effective date is for the Department to conduct rulemaking on this portion of the rule that amended 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 regulations 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 limitation

<sup>31</sup> 29 CFR 10.28(c), (e)–(f); 531.50–.52, 531.54.

<sup>32</sup> 29 CFR 516.28(b).

<sup>33</sup> 29 CFR 531.50, 531.51, 531.52, 531.55, 531.56(a), 531.56(c)–(d), 531.59, and 531.60.

<sup>34</sup> 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.

<sup>30</sup> *See* 58 FR 51735, 51741 (Oct. 4, 1993).

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 related non-tipped duties.<sup>35</sup> The Department acknowledged that one outcome could be that employment of workers currently performing these duties may fall, and that 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 full minimum wage. The Department also stated that eliminating the cost to scrutinize employees' time to demonstrate compliance with the 20 percent limitation would result in costs savings to employers. In the event that the 2020 Tip final rule's revisions to the dual jobs regulations would have led to cost savings for employers, transfers between employees and employers, or transfers among employees, these effects will be delayed by this rule. These effects may also change after the Department conducts rulemaking on the dual jobs portion of the 2020 Tip final rule.

The effective date delay will allow the Department to better consider this provision 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. The delay will also provide the Department time to quantify any impact associated with such a change, if warranted, in the dual jobs rulemaking.

Echoing their comment on the NPRM for the 2020 Tip final rule, EPI asserted in their comment on this delay that the removal of the 20 percent limitation would result in transfers from workers to employers of more than \$700 million annually.<sup>36</sup> They also note that this figure was calculated pre-COVID-19, and that the impact on workers would be worse during the pandemic. ROC United also acknowledged that the situation for tipped workers has changed during the pandemic, partly due to "the rise in contactless service interactions and purchases, along with growth in app based delivery." They recommend that the Department's analysis take into consideration changes to workforce and employment practices as a result of the COVID-19 pandemic. The Department agrees that more time is

needed to evaluate the Department's dual jobs regulations, including how the changes brought about by COVID-19 would impact the proposal.

Sixteen commenters agreed with EPI's analysis of the impact of the changes to the dual jobs regulations, and many asserted that the rule would harm women and people of color, both of whom are disproportionately represented in the tipped workforce. The NRA disagreed with this analysis, arguing that EPI's criticism of the 2020 Tip final rule "rests on a flawed premise—*i.e.*, that current law reflects such a quantitative cap." They asserted that the baseline for any analysis of the 2020 Tip final rule should have been the guidance issued by WHD in 2018 and 2019, which rejects a quantitative limit on related non-tipped duties. The Department acknowledges that the baseline for both EPI's analysis and the 2020 Tip final rule measured the change from before the 2018-19 guidance was issued. The Department used this baseline in the 2020 Tip final rule in order to be transparent about the economic impact that would occur as a result of the 2018-19 guidance and the 2020 Tip final rule's changes to the dual jobs regulations, which largely codified that guidance. However, the Department believes that the criticisms raised by EPI are sufficiently serious to warrant further review, even if the Department ultimately concludes that it used the correct baseline.

Commenters raised serious concerns with the economic analysis of the dual jobs portion of the rule, asserting that the Department did not sufficiently consider the costs, benefits, and potential transfers of this portion of the rule. For example, the AGs and NELP said that the Department's reluctance to quantitatively estimate the impact of the dual jobs portion of the rule and consider the estimates of the rule's impact submitted by EPI and other groups in the course of that rulemaking is evidence that the rulemaking was arbitrary and capricious under the APA. The Department will consider these concerns with the 2020 Tip final rule's economic analysis, including whether the baseline for the economic analysis of the dual jobs portion of the 2020 Tip final rule was appropriate, in its comprehensive review of the dual jobs portion of the 2020 Tip final rule.

The Department does not believe that the 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.

## 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 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 rule to determine whether it will 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).<sup>37</sup> The Department limited this analysis to the 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 rule will not have a significant economic impact on a substantial number of small entities.

## VI. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA)<sup>38</sup> 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

<sup>35</sup> Examples of such duties are cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses.

<sup>36</sup> Heidi Shierholz and Margaret Poydock, "EPI Comments on the Department of Labor's Proposed Rule Regarding Tip Regulations," comments submitted on behalf of Economic Policy Institute to U.S. Department of Labor, December 10, 2019.

<sup>37</sup> 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.

<sup>38</sup> See 2 U.S.C. 1501.

at least one year.<sup>39</sup> 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 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 delay in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The rule will 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 rule will 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 23rd day of April, 2021.

**Jessica Looman,**

*Principal Deputy Administrator, Wage and Hour Division.*

[FR Doc. 2021-08927 Filed 4-28-21; 8:45 am]

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG-2021-0170]

RIN 1625-AA00

#### Safety Zone; Sabine River, Orange, TX

**AGENCY:** Coast Guard, Department of Homeland Security (DHS).

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for certain navigable waters of the Sabine River, extending the entire width of the river, adjacent to the public boat ramp located in Orange, TX. The safety zone is necessary to protect persons and vessels from hazards associated with a high-speed boat race competition in Orange, TX. This regulation prohibits persons and vessels from being in the safety zone unless authorized by the Captain of the Port Marine Safety Unit Port Arthur or a designated representative.

**DATES:** This rule is effective from 8:30 a.m. through 6 p.m. on May 22, 2021 and May 23, 2021.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2021-0170 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Mr. Scott Whalen, Marine Safety Unit Port Arthur, U.S. Coast Guard; telephone 409-719-5086, email [Scott.K.Whalen@uscg.mil](mailto:Scott.K.Whalen@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

##### II. Background Information and Regulatory History

On March 18, 2021, the City of Orange, TX notified the Coast Guard that it will be sponsoring high speed boat races from 8:30 a.m. to 6 p.m. on May 22 and 23, 2021, adjacent to the public boat ramp in Orange, TX. The Captain of the Port Port Arthur (COTP) has determined that potential hazards associated with high speed boat races would be a safety concern for spectator craft and vessels in the vicinity of these race events. In response, on April 6, 2021, the Coast Guard published a notice of proposed rulemaking (NPRM) titled "Safety Zone; Sabine River, Orange, TX" (86 FR 17755). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this fireworks display. During the comment period that ended April 21, we received no comments.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for

making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with hazards associated with high speed boat races.

##### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Port Arthur (COTP) has determined that potential hazards associated with high speed boat races will be a safety concern for spectator craft and vessels in the vicinity of these race events. The purpose of this rule is to ensure safety of vessels and the navigable waters in the safety zone before, during, and after the scheduled event.

##### IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published April 6, 2021. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a safety zone from 8:30 a.m. to 6 p.m. on May 22 and 23, 2021. The safety zone will cover all navigable waters of the Sabine River, extending the entire width of the river, adjacent to the public boat ramp located in Orange, TX bounded to the north by the Orange Public Wharf and latitude 30°05'50" N and to the south at latitude 30°05'33" N. The duration of the safety zone is intended to protect participants, spectators, and other persons and vessels, in the navigable waters of the Sabine River during high-speed boat races and will include breaks and opportunity for vessels to transit through the regulated area. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

##### V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

###### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits.

<sup>39</sup> 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.