

**PART 122—REGISTRATION OF MANUFACTURERS AND EXPORTERS**

1. The authority citation for part 122 continues to read as follows:

**Authority:** Secs. 2 and 38, Public Law 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778); E.O. 11958, 42 FR 4311, 1977 Comp. p. 79, 22 U.S.C. 2651a.

2. Section 122.2 is amended by revising paragraph (a) to read as follows:

**§ 122.2 Submission of registration statement.**

(a) *General.* The Department of State Form DS–2032 (Statement of Registration) and the transmittal letter required by paragraph (b) of this section must be submitted by an intended registrant with a payment (by check or money order) payable to the Department of State of the fee prescribed in § 122.3(a) of this subchapter. Checks and money orders must be in U.S. currency, and checks must be payable through a U.S. financial institution. In addition, the Statement of Registration and transmittal letter must be signed by a senior officer who has been empowered by the intended registrant to sign such documents. The intended registrant also shall submit documentation that demonstrates that it is incorporated or otherwise authorized to do business in the United States. The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package. Registrants may not establish new entities for the purpose of reducing registration fees.

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3. Section 122.3 is amended by revising paragraph (a) to read as follows:

**§ 122.3 Registration fees.**

(a) A person who is required to register must do so on an annual basis upon submission of a completed Form DS–2032, transmittal letter, and payment of a fee as follows:

(1) *Tier 1:* A set fee of \$2,250 per year is required for new registrants or registrants who have not submitted any applications during a 12-month period ending 90 days prior to expiration of the current registration.

(2) *Tier 2:* A set fee of \$2,750 per year is required for registrants who have submitted ten or fewer applications during a 12-month period ending 90 days prior to expiration of the current registration.

(3) *Tier 3:* The third tier is for registrants who have submitted more than ten applications during a 12-month

period ending 90 days prior to expiration of the current registration. For this tier, registrants will pay a fee of \$2,750 plus an additional fee based on the number of applications submitted. The additional fee will be determined by multiplying \$250 times the number of applications over ten submitted during a 12-month period ending 90 days prior to expiration of the current registration.

(4) For universities and other registrants exempt from income taxation pursuant to 26 U.S.C. 501(c)(3), their fee may be reduced to the Tier 1 registration fee provided proof of such status is submitted with their registration package.

(5) The fee for registrants whose total registration fee is greater than 3% of the total value of applications submitted during the 12-month period ending 90 days prior to expiration of the current registration will be reduced to 3% of such total application value or \$2,750, which ever is greater.

(6) For those renewing a registration, notice of the fee due for the next year’s registration will be sent to the Senior Officer signing the previous DS2032 at least 60 days prior to its expiration date.

(7) For purposes of this subsection, “*applications*” refers to the actions enumerated within Sections 123 through 125 of the ITAR that require DDTC to review, adjudicate and issue responses to.

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**PART 129—REGISTRATION AND LICENSING OF BROKERS**

4. The authority citation for part 129 continues to read as follows:

**Authority:** Sec. 38, Pub. L. 104–164, 110 Stat. 1437 (22 U.S.C. 2778).

5. Section 129.4 is amended by revising paragraph (a) to read as follows:

**§ 129.4 Registration statement and fees.**

(a) *General.* The Department of State Form DS–2032 (Statement of Registration) and the transmittal letter meeting the requirements of § 122.2(b) of this subchapter must be submitted by an intended registrant with a payment by check or money order payable to the Department of State of the fees prescribed in Section 122.3(a) of this subchapter. The Statement of Registration and transmittal letter must be signed by a senior officer who has been empowered by the intended registrant to sign such documents. The intended registrant shall also submit documentation that demonstrates that it is incorporated or otherwise authorized to do business in the United States. The requirement to submit a Department of

State Form DS–2032 and to submit documentation demonstrating incorporation or authorization to do business in the United States does not exclude foreign persons from the requirement to register. Foreign persons who are required to register shall provide information that is substantially similar in content as that which a U.S. person would provide under this provision (e.g., foreign business license or similar authorization to do business). The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package with payment. Registrants may not establish new entities for the purpose of reducing registration fees.

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Dated: July 3, 2008.

**John C. Rood,**

*Acting Under Secretary for Arms Control, and International Security, Department of State.*

[FR Doc. E8–17232 Filed 7–25–08; 8:45 am]

**BILLING CODE 4710–25–P**

**DEPARTMENT OF LABOR**

**Wage and Hour Division**

**29 CFR Parts 4, 531, 553, 778, 779, 780, 785, 786, and 790**

**RIN 1215–AB13**

**Updating Regulations Issued Under the Fair Labor Standards Act**

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Department of Labor.

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** In this proposed rule, the Department of Labor (Department or DOL) proposes to revise regulations issued pursuant to the Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947 (Portal Act) that have become out of date because of subsequent legislation or court decisions. These proposed revisions will conform the regulations to FLSA amendments passed in 1974, 1977, 1996, 1997, 1998, 1999, 2000, and 2007, and Portal Act amendments passed in 1996.

**DATES:** Comments must be received on or before September 11, 2008.

**ADDRESSES:** You may submit comments, identified by RIN 1215–AB13, by either one of the following methods:

- *Electronic comments, through the federal eRulemaking Portal: <http://www.regulations.gov>*

[www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

- *Mail:* Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210.

*Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and Regulatory Information Number (RIN) identified above for this rulemaking. Comments received will be posted to <http://www.regulations.gov>, including any personal information provided. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via the federal eRulemaking Portal at <http://www.regulations.gov> or to submit them by mail early. For additional information on submitting comments and the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to the federal eRulemaking Portal at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Richard M. Brennan, Director, Office of Interpretations and Regulatory Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3506, 200 Constitution Avenue, NW., Washington, DC 20210; *telephone:* (202) 693-0051 (this is not a toll-free number). Copies of this notice may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0023 (not a toll-free number). TTY/TDD callers may dial toll-free (877) 889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of regulations issued by this agency or referenced in this notice may be directed to the nearest Wage and Hour Division (WHD) District Office. Locate the nearest office by calling our toll-free help line at (866) 4USWAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the WHD's Web site for a nationwide listing of Wage and Hour District and Area Offices at: <http://www.dol.gov/esa/contacts/whd/america2.htm>.

**SUPPLEMENTARY INFORMATION:**

**I. Electronic Access and Filing Comments**

*Public Participation:* This notice is available through the **Federal Register** and the <http://www.regulations.gov> Web site. You may also access this notice via the WHD home page at <http://www.dol.gov/esa/whd/regulations/FLSA2008.htm>. To comment electronically on federal rulemakings, go to the federal eRulemaking Portal at <http://www.regulations.gov>, which will allow you to find, review, and submit comments on federal documents that are open for comment and published in the **Federal Register**. Please identify all comments submitted in electronic form by the RIN docket number (1215-AB13). Because of delays in receiving mail in the Washington, DC area, commenters should transmit their comments electronically via the federal eRulemaking Portal at <http://www.regulations.gov>, or submit them by mail early to ensure timely receipt prior to the close of the comment period. Submit one copy of your comments by only one method.

**II. Request for Comment**

The Department requests comments on all issues related to this notice of proposed rulemaking. This proposed rule, if implemented as a final rule, will enhance the Department's enforcement of, and the public's understanding of, compliance obligations under the FLSA by replacing out of date regulations. The changes will not result in additional compliance costs for regulated entities. Updating the existing outdated regulatory provisions to reflect current law may result in cost savings through the avoidance of inadvertent violations and the costs of corrective compliance measures to remedy them.

**III. Discussion of Changes**

The FLSA requires covered employers to pay their nonexempt employees a federal minimum wage and overtime premium pay of time and one-half the regular rate of pay for hours worked in excess of forty (40) in a work week. The FLSA also contains a number of exemptions from the minimum wage and overtime pay requirements.

Over the years, Congress has amended the FLSA to refine or to add to these exemptions and to clarify the minimum wage and overtime pay requirements. As part of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110-28 (May 25, 2007), Congress increased the FLSA minimum wage in three steps: to \$5.85 per hour effective July 24, 2007; to \$6.55

per hour effective July 24, 2008; and to \$7.25 per hour effective July 24, 2009. As part of the Small Business Job Protection Act of 1996, Congress amended section 4(a) of the Portal Act, 29 U.S.C. 254(a), to define circumstances under which pay is not required for employees who use their employer's vehicle for home-to-work commuting purposes. The 1996 Act also created a youth opportunity wage at \$4.25 per hour under section 6(g) of the FLSA, 29 U.S.C. 206(g). In 1997, Congress amended section 13(b)(12) of the FLSA, 29 U.S.C. 213(b)(12), to expand the exemption from overtime pay for workers on ditches, canals, and reservoirs where 90% (rather than 100%) of the water is used for agricultural purposes. In 1998, Congress added section 3(e)(5) to the FLSA, 29 U.S.C. 203(e)(5), to provide that the term "employee" does not include individuals who volunteer solely for humanitarian purposes to private non-profit food banks and who receive groceries from those food banks. In 1999, Congress added section 3(y) to the FLSA, 29 U.S.C. 203(y), to define an employee who is engaged in "fire protection activities." In 2000, Congress added section 7(e)(8) to the FLSA, 29 U.S.C. 207(e)(8), to treat stock options meeting certain criteria as an additional type of remuneration that is excludable from the computation of the regular rate. A 1974 amendment to section 13(b)(10)(B) of the FLSA, 29 U.S.C. 213(b)(10)(B), extended an overtime exemption to include any salesman primarily engaged in selling boats and eliminated the overtime exemption previously in subsection (B) for partsmen and mechanics servicing trailers or aircraft. In addition, several appellate courts interpret the overtime exemption for "any salesman, partsmen, or mechanic primarily engaged in selling and servicing automobiles" in section 13(b)(10)(A) of the FLSA, 29 U.S.C. 213(b)(10)(A), as including service advisors.

A number of courts have examined the proper interpretation of the FLSA's compensatory time provisions in section 7(o)(5) concerning public agency employers' obligation to grant employees' requests to use "comp time" within a "reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. 207(o)(5). Finally, the regulations governing the "fluctuating workweek" method of computing half-time overtime pay for salaried nonexempt employees who work variable or fluctuating hours from

week to week are in need of clarification and updating to delete outmoded examples and eliminate confusion over the effect of paying bonus supplements and premium payments to affected employees.

As discussed in more detail below, as a result of these amendments and court decisions, this proposed rule revises a number of out-of-date regulations issued under the FLSA and the Portal Act.

### 1. 2007 Amendment to the FLSA Minimum Wage

On May 25, 2007, President Bush signed into law the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Pub. L. 110–28). As part of that legislation, Congress amended the FLSA by increasing the applicable federal minimum wage under section 6(a) of the FLSA in three steps: to \$5.85 per hour effective July 24, 2007; to \$6.55 per hour effective July 24, 2008; and to \$7.25 per hour effective July 24, 2009.

This legislation did not change the definition of “wage” in section 3(m) of the FLSA for purposes of applying the tip credit formula in determining the wage paid to a qualifying tipped employee. Thus, the minimum required cash wage for a tipped employee under the FLSA remains \$2.13 per hour. The maximum allowable tip credit for federal purposes under the FLSA increases as a result of the 2007 legislation, and is determined by subtracting \$2.13 from the applicable minimum wage provided by section 6(a)(1) of the FLSA. See 29 U.S.C. 203(m).

Changes are proposed in several of the FLSA's implementing regulations that cite to the applicable minimum wage to reflect these statutory changes, including at 29 CFR 531.36, 531.37, 778.110, 778.111, 778.113, and 778.114. Additional revisions to the McNamara-O'Hara Service Contract Act regulations eliminate outdated references to the FLSA minimum wage in 29 CFR 4.159 and 4.167.

### 2. Small Business Job Protection Act of 1996

On August 20, 1996, Congress enacted the Small Business Job Protection Act of 1996 (SBJPA), Public Law No. 104–188, 100 Stat. 1755. SBJPA amended the Portal Act to define circumstances under which pay is not required for employees who use their employer's vehicle for home-to-work commuting purposes and also amended the FLSA by creating a youth opportunity wage and modifying the allowable tip credit.

### A. Employee Commuting Flexibility Act of 1996

Sections 2101 through 2103 of Title II of SBJPA, entitled the “Employee Commuting Flexibility Act of 1996,” amended section 4(a) of the Portal Act, 29 U.S.C. 254(a). The amendment, effective upon enactment, provides that

The use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

#### *Employee Commuting Flexibility Act of 1996, Section 2102, 29 U.S.C. 254(a).*

The House Committee Report states that the purpose of the amendment is to clarify how the Portal Act applies to “employee use of employer-provided vehicles for commuting at the beginning and end of the workday.” H.R. Rep. No. 104–585, at 6 (1996). It states that such travel time is to be considered noncompensable if the use of the vehicle is “conducted under an agreement between the employer and the employee or the employee's representative.” *Id.* The agreement may be a formal written agreement, a collective bargaining agreement, or an understanding based on established industry or company practices. *Id.* In addition, “the work sites must be located within the normal commuting area of the employer's establishment.” *Id.* at 4–5. Activities that are merely incidental to the use of the vehicle for commuting at the start or end of the day are similarly noncompensable, such as communication between the employee and employer to obtain assignments or instructions, or to report work progress or completion. *Id.* at 5.

This statutory amendment to the Portal Act affects certain regulations in 29 CFR parts 785 and 790 issued pursuant to the FLSA and the Portal Act. Current section 785.9(a) explains the statutory provisions that eliminate from working time certain “preliminary” and “postliminary” activities performed prior to or subsequent to the workday. To incorporate this amendment, this proposed rule adds to that section the new provision that activities that are incidental to the use of an employer-provided vehicle for commuting are not considered principal activities, and are not compensable, when they meet the conditions of the amendment. Current § 785.34 discusses the effect of section

4 of the Portal Act on determining whether time spent in travel is working time. This proposed rule adds a reference to the statutory conditions under which commuting in an employer-provided vehicle will not be considered part of the employee's principal activities and will not be compensable. The proposed rule also revises §§ 785.50 and 790.3 to incorporate the 1996 amendment into the quotation of section 4 of the Portal Act.

### B. Youth Opportunity Wage

Section 2105 of the SBJPA amended the FLSA by adding section 6(g), which provides that “[a]ny employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than \$4.25 an hour.” 29 U.S.C. 206(g)(1). This subminimum wage “shall only apply to an employee who has not attained the age of 20 years.” 29 U.S.C. 206(g)(4). The amendment also protects current workers by prohibiting employers from taking action to displace employees, including reducing hours, wages, or employment benefits, for the purpose of hiring workers at the opportunity wage. It also states that any employer violating this subsection shall be considered to have violated the anti-discrimination provisions of section 15(a)(3) of the FLSA. 29 U.S.C. 206(g)(3).

In this proposed rule, the Department adds a new subpart G to 29 CFR part 786—which will be renamed Miscellaneous Exemptions and Exclusions From Coverage—to set forth the provisions of this new youth opportunity wage.

### C. Minimum Wage Increase Act of 1996

Section 2105 of Title II of the SBJPA, entitled the “Minimum Wage Increase Act of 1996,” amended section 3(m) of the FLSA, 29 U.S.C. 203(m), by providing that

In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employer's employer shall be an amount equal to—

(1) The cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph; and

(2) An additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 6(a)(1).

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2

sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Public Law No. 104-188, § 2105(b) (1996). Prior to the 1996 amendments, section 3(m) of the FLSA required an employer to pay its tipped employees a cash wage equal to 50 percent of the minimum wage (then \$4.25 an hour). See Public Law No. 101-157, § 5 (1989); Public Law No. 93-259, § 13(e) (1974); 29 CFR 531.50. As amended, section 3(m)(1) provides that an employer's minimum cash wage obligation to its tipped employees is the minimum cash wage required on August 20, 1996, the date of the SBJPA enactment. Thus, section 3(m)(1) established an employer's cash wage obligations to tipped employees at the pre-SBJPA amount: 50 percent of the then-minimum wage of \$4.25 per hour, or \$2.13 per hour. See 29 U.S.C. § 203(m)(1).

Subsection (2) of the 1996 amendments bases an employer's maximum allowable tip credit on a specific formula in relation to the applicable minimum wage, stating that an employer may take a tip credit equal to the difference between the required minimum cash wage specified in paragraph 3(m)(1) (\$2.13) and the minimum wage (now \$5.85). Thus, the maximum tip credit that an employer currently is permitted to claim is \$5.85 minus \$2.13, or \$3.72 per hour. (Effective July 24, 2008, the minimum wage required by the FLSA will increase to \$6.55 an hour, resulting in a maximum federal tip credit limited to \$4.42 an hour. Effective July 24, 2009, the minimum wage required by section 6(a)(1) of the FLSA will increase to \$7.25 an hour, resulting in a maximum federal tip credit limited to \$5.12 an hour.)

This 1996 amendment affects certain regulations in 29 CFR part 531. Current § 531.50(a) quotes section 3(m) of the FLSA as it appeared before the 1996 amendments. To incorporate the 1996 amendment, this proposed rule replaces the old statutory language with the current statutory provision. Current §§ 531.56(d), 531.59, and 531.60 refer to the pre-1996 statutory language setting the tip credit at 50 percent of the minimum wage. The proposed rule deletes or changes these references to reflect the current statutory requirements (tip credit equaling the difference between the minimum wage

required by section 6(a)(1) of the FLSA and the \$2.13 required cash wage). Additional changes related to tipped employees are discussed in this preamble at sections 7B and 8, *infra*.

### 3. Agricultural Workers on Water Storage/Irrigation Projects

Section 105 of The Departments of Labor, Health, and Human Services, Education, and Related Agencies Appropriations Act, Public Law No. 105-78, 111 Stat. 1467 (Nov. 13, 1997), amended section 13(b)(12) of the FLSA, 29 U.S.C. 213(b)(12), which provides an overtime exemption for agricultural employees and employees employed in connection with the operation or maintenance of certain waterways used for supply and storing of water for agricultural purposes. The 1997 amendment deleted "water for agricultural purposes" and substituted "water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year." Thus, this amendment makes the exemption from overtime pay requirements applicable to workers on water storage and irrigation projects where at least 90 percent of the water is used for agricultural purposes, rather than where the water is used exclusively for agricultural purposes.

In this proposed rule, the Department updates the regulations in 29 CFR part 780, Subpart E to incorporate the statutory amendment. Thus, proposed § 780.400 correctly quotes the statute, including the amendment. Section 780.401 provides an updated general explanatory statement of the history of the exemption. Section 780.406 deletes the last sentence of the current rule, which refers to the 1966 amendments, as no longer necessary. Finally, § 780.408 is updated to describe the "at least 90 percent" requirement for using the water for agricultural purposes.

### 4. Certain Volunteers at Private Non-Profit Food Banks

Section 1 of the Amy Somers Volunteers at Food Banks Act, Public Law No. 105-221, 112 Stat. 1248 (Aug. 7, 1998), amended section 3(e) of the FLSA, 29 U.S.C. 203(e), by adding section (5) to provide that the term "employee" does not include individuals volunteering solely for humanitarian purposes at private non-profit food banks and who receive groceries from those food banks given in recognition of such individual's needs and not in exchange for such individual's services. 29 U.S.C. 203(e)(5). This proposed rule renames 29 CFR part 786 to "Miscellaneous Exemptions and Exclusions From

Coverage" and adds Subpart H to set forth this exclusion from FLSA coverage.

### 5. Employees Engaged in Fire Protection Activities

In 1999, Congress amended section 3 of the FLSA, 29 U.S.C. 203, by adding section (y) to define "an employee in fire protection activities." This amendment states that an "employee in fire protection activities" means

an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous material worker, who—(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

Public Law No. 106-151, 113 Stat. 1731 (1999); 29 U.S.C. 203(y). Such employees may be covered by the partial overtime exemption allowed by § 7(k) or the overtime exemption for public agencies with fewer than five employees in fire protection activities pursuant to § 13(b)(20). 29 U.S.C. 207(k); 213(b)(20).

This proposed rule makes several revisions to 29 CFR part 553, Subpart C, to incorporate this amendment. In the first sentence of proposed § 553.210(a), the statutory amendment language is substituted for the current four-part regulatory definition of the term "any employee \* \* \* in fire protection activities." The proposed rule also deletes the last sentence of current section 553.210(a) stating that, "[t]he term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection services," and it deletes the cross-reference to section 553.215. The "integral part" test for the public agency employees is no longer needed because the new statutory standards define when such rescue and ambulance personnel qualify as employees in fire protection activities. Section 553.215(a) of the current rule discusses ambulance and rescue service employees who are employees of a public agency other than a fire protection or law enforcement agency. The section 3(y) amendment, however, specifically states that one of the requirements to be an "employee in fire protection activities" is that the employee is employed by a fire department of a municipality, county, fire district, or State. The proposed rule, therefore, deletes section 553.215(a)

because it permits non-fire department public agencies to treat their ambulance and rescue service employees as employees engaged in fire protection activities, contrary to the new statutory conditions. This proposed rule also deletes §§ 553.215(b) (stating that rescue service employees of hospitals and nursing homes cannot qualify for the exemption) and 553.215(c) (stating that ambulance and rescue service employees of private organizations do not come within the exemption) as unnecessary in light of the clear statutory requirement for employment by a fire department. Finally, in §§ 553.221, 553.222, 553.223, and 553.226, the Department is substituting “employee in fire protection activities” or “employees in fire protection activities,” respectively, wherever the terms “firefighter” or “firefighters” appeared.

The Department reexamined the other regulations in part 553, Subpart C, in light of the section 3(y) amendment to assess whether any other changes were appropriate. Current § 553.210 characterizes as exempt work related incidental activities such as equipment maintenance, lecturing and fire prevention inspections. Current § 553.210 also recognizes that employees can come within the exemption whether their status is “trainee,” “probationary,” or “permanent,” and regardless of their particular specialty or job title or assignment to certain support activities. The Department believes that these provisions are consistent with statutory intent and remain the appropriate interpretation of the new statutory definition and, thus, makes no further changes to section 553.210.

Current section 553.212 recognizes that exempt employees may engage in some nonexempt work, such as firefighters who work for forest conservation agencies and who plant trees and perform other conservation activities unrelated to their firefighting duties during slack times. The Department reexamined this regulation, particularly in light of the court’s decision in *McGavock v. City of Water Valley*, 452 F.3d 423 (5th Cir. 2006). That court noted that the Department had not updated its regulations since the passage of section 3(y). It found that the regulation at § 553.210, defining an employee in fire protection activities, was supplanted by the amendment. It also concluded that the 20% tolerance for nonexempt work in § 553.212 simply put a gloss on the pre-existing regulatory definition. Therefore, the court concluded that §§ 553.210 and 553.212 were “obsolete and without

effect.” 452 F.3d at 428. *See also Huff v. DeKalb County, Ga.*, 516 F.3d 1273, 1278 (11th Cir. 2008) (agreeing that new section 3(y) is a streamlined definition that made existing provisions in §§ 553.210 and 553.212 obsolete). Congress stated in section 3(y) that an employee must be “engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk” in order to qualify as an employee in fire protection activities. 29 U.S.C. 203(y). Congress thus defined emergency medical response work as exempt work, when performed by an employee who meets the other tests in section 3(y). This proposed rule therefore deletes § 553.212 as unnecessary in light of the court decisions and statutory amendment.

#### 6. Stock Options Excluded From the Computation of the Regular Rate

The Worker Economic Opportunity Act, Public Law No. 106–202, 114 Stat. 308, enacted by Congress on May 18, 2000, amended §§ 7(e) and 7(h) of the FLSA. 29 U.S.C. 207(e), (h). In § 7(e), a new subsection (8) adds “[a]ny value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program” meeting particular criteria to the types of remuneration that are excluded from the computation of the regular rate. In § 7(h), the amendment clarifies that the amounts excluded under § 7(e) may not be counted toward the employer’s minimum wage requirement under section 6, and that extra compensation excluded pursuant to the new subsection (8) may not be counted toward overtime pay under § 7.

The proposed rule incorporates the amendments made by the Worker Economic Opportunity Act by adding to the regulatory provisions which simply quote the statute in section 778.200(a) and (b). Section 778.208 also is revised simply to update from “seven” to “eight” the number of types of remuneration excluded in computing the regular rate.

#### 7. Fair Labor Standards Act Amendments of 1974

##### A. Service Advisors Working for Automobile Dealerships and Boat Salespersons

On April 7, 1974, Congress enacted an amendment to section 13(b)(10)(B) of the FLSA, 29 U.S.C. 213(b)(10)(B). Public Law No. 93–259, 88 Stat. 55 (1974). This amendment added an

overtime exemption for salespersons primarily engaged in selling boats (in addition to the pre-existing exemption for sellers of trailers or aircraft). This amendment also eliminated the overtime exemption for partsmen and mechanics servicing trailers or aircraft. This proposed rule revises 29 CFR part 779, Subpart D—Exemptions for Certain Retail or Service Establishments, so that the regulations implementing section 13(b)(10)(B) conform to this 1974 amendment. Section 779.371(a) is revised to reflect the amendment’s addition of boat salespersons to the exemption. Proposed § 779.372(a) now clarifies that salespersons primarily engaged in selling trailers, boats, or aircraft, but not partsmen or mechanics for such vehicles, are covered by the exemption; portions of § 779.372(b) and (c) also are changed accordingly.

Section 13(b)(10)(A) of the FLSA provides that “any salesman, partsman, or mechanic engaged in selling or servicing automobiles, trucks or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers” shall be exempt from the overtime requirements of the Act. 29 U.S.C. 213(b)(10)(A). The current regulation at 29 CFR 779.372(c)(4) states that an employee described as a service manager, service writer, service advisor, or service salesman, is not exempt under section 13(b)(10)(A).

Uniform appellate and district court decisions, however, hold that service advisors are exempt under section 13(b)(10)(A) because they are “salesmen” who are primarily engaged in “servicing” automobiles. *See, e.g., Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 452 (4th Cir. 2004) (The current regulatory interpretation of this exemption is “an impermissibly restrictive construction of the statute.”); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1097 (5th Cir. 1973) (Service advisors are “functionally similar to the mechanics and partsmen who service the automobiles. All three work as an integrated unit, performing the services necessary \* \* \* with the service salesman coordinating these specialties.”); *Brennan v. North Brothers Ford, Inc.*, 1975 WL 1074 at \*3 (E.D. Mich. 1975) (unpublished) (“The spirit of 13(b)(10) is best fulfilled by recognizing the functional similarity of service salesmen to partsmen and mechanics which are both expressly exempted.”), *aff’d sub. nom. Dunlop v. North Brothers Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (Table).

Based upon the court decisions, the Wage and Hour Division has adopted an enforcement position since 1987 that Wage and Hour “will no longer deny the [overtime] exemption for such employees,” and that the regulation would be revised. See Wage and Hour Division Field Operations Handbook (FOH) section 24L04(k). Therefore, this proposed rule changes § 779.372(c), entitled “Salesman, partsman, or mechanic,” to follow the courts’ consistent holdings that employees performing the duties typical of service advisors are within the section 13(b)(10)(A) exemption. Section 779.372(c)(1) is revised to include such an employee as a salesman primarily engaged in servicing automobiles. Section 779.372(c)(4) is rewritten to clarify that such employees qualify for the exemption.

#### B. Tipped Employees

Section 3(m) of the FLSA defines the term “wage” and includes conditions for taking tip credits when making wage payments to qualifying tipped employees under the FLSA. The Department’s tip credit regulations were promulgated in 1967, one year after hotels and restaurants were brought under the FLSA. Section 13(e) of the Fair Labor Standards Act Amendments of 1974 amended the last sentence of section 3(m) by providing that an employer could not take a tip credit unless:

(1) [its] employee has been informed by the employer of the provisions of this subsection and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

*Public Law No. 93–259, § 13(e), 88 Stat. 55.*

Prior notice by the employer to employees of the employer’s intent to avail itself of the tip credit is a statutory requirement pursuant to the 1974 amendments. Courts have disallowed the use of the tip credit for lack of notice even “where the employee has actually received and retained base wages and tips that together amply satisfy the minimum wage requirements,” remarking that “[i]f the penalty for omitting notice appears harsh, it is also true that notice is not difficult for the employer to provide.” *Reich v. Chez Robert, Inc.*, 28 F.3d 401, 404 (3d Cir. 1994) (citing *Martin v. Tango’s Restaurant*, 969 F.2d 1319, 1323 (1st Cir. 1992)). Although written notice is frequently provided, it is not required to satisfy the employer’s notice burden. Compare *Kilgore v. Outback Steakhouse of Florida, Inc.*, 160 F.3d 294, 299 (6th

Cir. 1998) (written notice provided to all applicants as matter of course), with *Pellon v. Business Representation Int’l, Inc.*, 528 F. Supp. 2d 1306, 1310–11 (S.D. Fla. 2007), *appeal docketed*, No. 08–10133 (11th Cir. Jan. 8, 2008) (Section 3(m)’s requirement was met through verbal notice that plaintiff would be paid \$2.13 plus tips, combined with prominent display of FLSA poster explaining tip credit). Additionally, while employees must be “informed” of the employer’s use of the tip credit, the employer need not “explain” the tip credit. See *Kilgore*, 160 F.3d at 298 (“[A]n employer must provide notice to the employees, but need not necessarily ‘explain’ the tip credit \* \* \* [I]nform’ requires less from an employer than the word ‘explain.’”); cf. *Bonham v. Copper Cellar Corp.*, 476 F. Supp. at 101 & n.6 (“vague references to conversations about the minimum wage” are insufficient to establish section 3(m) notice).

The second provision of the 1974 amendments to section 3(m) made it clear that tipped employees must receive at least the minimum wage and must generally retain any tips received by them as gratuities for services performed. An employer, however, can take advantage of a “tip credit” to offset a portion of its minimum wage obligation. Prior to the 1974 amendments, the compensation of tipped employees was often a matter of agreement. Tipped employees could agree, for example, that an employer was only obligated to pay cash wages when an employee’s tips were less than the minimum wage, or that the employee’s tips would be turned over to the employer, who could then use the tips to pay the minimum wage. See *Usery v. Emersons Ltd.*, 1976 WL 1668, \*2 (E.D. Va. 1976), *vacated and remanded on other grounds sub. nom. Marshall v. Emersons Ltd.*, 593 F.2d 565 (4th Cir. 1979). The 1974 amendments to section 3(m) were intended to prohibit such agreements. See S. Rep. No. 93–690, at 43 (1974) (“The latter provision is added to make clear the original Congressional intent that an employer could not use the tips of a ‘tipped employee’ to satisfy more than 50 percent of the Act’s applicable minimum wage.”). The Department’s current regulations, which were in effect prior to the 1974 amendments and allowed an employer to require employees to turn over all their tips to the employer, were therefore invalidated by the amendment to the extent that turning tips over to the

employer effectively cuts into the minimum wage.

Under the 1974 amendments to section 3(m), an employer’s ability to utilize an employee’s tips to satisfy any portion of the employer’s minimum wage obligation was limited to taking a credit against the employee’s tips of up to 50 percent of that obligation. Section 3(m) provides the only method by which an employer may use tips received by an employee to satisfy the employer’s minimum wage obligation. An employer’s only options under section 3(m) are to take a credit against the employee’s tips of up to the statutory differential, or to pay the entire minimum wage directly. See Wage and Hour Opinion Letter WH–536, 1989 WL 610348 (October 26, 1989) (defining when an employer does not claim a tip credit as when the employer does not retain any tips and pays the employee the minimum wage).

Thus, in a situation in which an employee earns \$10 an hour in tips and the employer pays \$2.13 an hour in cash wages and claims the statutory maximum as a tip credit, the employee has received only the minimum wage under section 3(m). (Under section 3(m), the “wage” of a tipped employee equals the sum of the cash wage paid by the employer and the amount it claimed as a tip credit.) The amount of tips the employee received in excess of the tip credit are not considered “wages” paid by the employer and any deductions from the employee’s tips made by the employer would therefore result in a violation of the employer’s minimum wage obligation. If, however, the employer paid the employee a direct wage in excess of the minimum wage—and thus did not claim a credit against any portion of the employee’s tips—the employer would be able to make deductions so long as they did not reduce the direct wage payment below the minimum wage. See Wage and Hour Opinion Letter WH–536, 1989 WL 610348 (October 26, 1989). In such a situation, the deduction would be viewed as coming from the employer’s wage payment that exceeds the minimum wage.

The proposed rule updates the regulations to incorporate the 1974 amendments, the legislative history, subsequent court decisions, and the Department’s interpretations. Sections 531.52, 531.55(a), 531.55(b), and 531.59 eliminate references to employment agreements providing either that tips are the property of the employer or that employees will turn tips over to their employers, and clarify that the availability of the tip credit provided by section 3(m) requires that all tips

received must be paid out to tipped employees in accordance with the 1974 amendments. Section 531.55(a), which describes compulsory service charges, also is updated by changing the example of such a charge from 10 percent to 15 percent to reflect more current customary industry practices.

The 1974 amendments also clarified that section 3(m)'s statement that employees must retain their tips does not preclude the practice of tip pooling "among employees who customarily and regularly receive tips." 29 U.S.C. 203(m). The Department's regulation on the subject provides that "the amounts received and retained by each individual [through a tip pooling arrangement] as his own are counted as his tips for purposes of the Act." 29 CFR 531.54.

Wage and Hour interpreted the tip pooling clause more fully in opinion letters and in its FOH. The FOH provides, for example, that a tip pooling arrangement cannot require employees to contribute a greater percentage of their tips to the tip pool than is "customary and reasonable." FOH section 30d04(b). The agency expanded upon this position, in its opinion letters and in litigation, that "customary and reasonable" equates to 15 percent of an employee's tips or two percent of daily gross sales. See, e.g., Wage and Hour Opinion Letter WH-468, 1978 WL 51429 (Sept. 5, 1978). Several courts have rejected the agency's maximum contribution percentages, however, "because neither the statute nor the regulations mention [the requirement stated in the agency interpretation] and the opinion letters do not explain the statutory source for the limitation that they create." *Kilgore v. Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 302-03 (6th Cir. 1998); see *Davis v. B&S, Inc.*, 38 F. Supp. 2d 707, 718 n.16 (N.D. Ind. 1998) (citing *Dole v. Continental Cuisine, Inc.*, 751 F. Supp. 799, 803 (E.D. Ark. 1990) ("The Court can find no statutory or regulatory authority for the Secretary's opinion [articulated in an opinion letter] that contributions in excess of 15% of tips or 2% of daily gross sales are excessive.")). Based on these court decisions and the unequivocal statutory language, the proposed rule updates § 531.54 to clarify that section 3(m) of the FLSA does not impose a maximum tip pool contribution percentage. However, the proposed rule states that the employer must inform each employee of the required tip pool contribution, and an employee's participation in a tip pool cannot bring the employee's wages below the minimum wage.

The 1974 amendments also revised another aspect of section 3(m). Prior to the 1974 amendments, section 3(m) of the FLSA provided that an employee could petition the Wage and Hour Administrator to review the tip credit claimed by an employer. See Public Law No. 89-601, 80 Stat. 830 (1966) ("[I]n the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased \* \* \* the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount."). The 1974 amendments eliminated the review clause to clarify that the employer, not the employee, bears the ultimate burden of proving "the amount of tip credit, if any, [he] is entitled to claim." S. Rep. No. 93-690, at 43. Two outdated regulatory provisions promulgated in 1967, however, still purport to permit petitions to the Wage and Hour Administrator for tip credit review despite the fact that the statute no longer provides for this review. See 29 CFR 531.7, 531.59.

Consistent with the 1974 amendments, this proposed rule deletes section 531.7, which permits employees to petition the Wage and Hour Administrator for tip credit review. References to the Administrator's review in section 531.59 are also deleted, and the language is updated to reflect the burden on the employer to prove the amount of the tip credit to which it is entitled.

#### 8. Fair Labor Standards Act Amendments of 1977

On November 1, 1977, Congress amended section 3(t) of the FLSA, 29 U.S.C. 203(t). Public Law No. 95-151, § 3(a), 91 Stat. 1245. Section 3(t) of the FLSA defines the phrase "tipped employee." Prior to the 1977 amendment, the definition encompassed "any employee engaged in an occupation in which he customarily and regularly receives more than \$20 a month in tips." The 1977 amendment raised the threshold in section 3(t) to \$30 a month in tips.

To reflect the 1977 amendment, this proposed rule changes the references in 29 CFR 531.50(b), 531.51, 531.56(a)-(e), 531.57, and 531.58 from \$20 to \$30.

#### 9. Meal Credit Under Section 3(m)

The proposed rule further amends § 531.30 to incorporate Wage and Hour's longstanding enforcement position regarding the voluntary acceptance of

meals. A "wage" paid pursuant to section 3(m) of the FLSA may include "the reasonable cost \* \* \* to the employer of furnishing \* \* \* board, lodging, or other facilities \* \* \* customarily furnished by such employer to his employees." 29 U.S.C. 203(m). "Facilities" include employer-provided meals. See 29 CFR 531.32. The Department's regulation at 29 CFR 531.30, however, provides that an employer's ability to take credit for a facility is limited to those instances where an employee's acceptance was "voluntary and uncoerced." In other words, an employer could not take a wage credit for employees who did not choose to accept the meal.

After a number of courts rejected the agency's position on this point with regard to credit for meals, the agency adopted an enforcement position providing that an employer can take a meal credit even if an employee does not voluntarily accept the meal. See FOH section 30c09(b) ("WH no longer enforces the 'voluntary' provision with respect to meals."); see also *Davis Bros., Inc. v. Donovan*, 700 F.2d 1368, 1370 (11th Cir. 1983); *Donovan v. Miller Properties, Inc.*, 711 F.2d 49, 50 (5th Cir. 1983).

Thus, under the agency's current enforcement policy articulated in the FOH, an employer may require an employee to accept a meal provided by the employer as a condition of employment, and may take credit for the actual cost of that meal even if the employee's acceptance is not voluntary. The proposed rule amends 29 CFR 531.30 to reflect previous court decisions and the agency's current enforcement posture on meal credits.

#### 10. Section 7(o) Compensatory Time Off

Section 7 of the FLSA requires that a covered employee receive compensation for hours worked in excess of 40 in a workweek at a rate not less than one and one-half times the regular rate of pay at which the employee is employed. 29 U.S.C. 207(a). In 1985, subsequent to the U.S. Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which held that the FLSA may be constitutionally applied to state and local governments, Congress added section 7(o), 29 U.S.C. 207(o), to the FLSA to permit public agencies to grant employees compensatory time off in lieu of cash overtime compensation pursuant to an agreement with employees or their representatives. The purpose of this exception to the Act's usual requirement of cash overtime pay was "to provide flexibility to state and local government employers and an

element of choice to their employees regarding compensation for statutory overtime hours.” H.R. Rep. No. 331, 99th Cong., 1st Sess. 19 (1985).

Section 7(o) provides a detailed scheme for the accrual and use of compensatory time off. Subsection 7(o)(1) authorizes the provision of compensatory time off in lieu of overtime pay. Subsection 7(o)(2) specifies how a public employer creates a compensatory time off plan. Subsection 7(o)(3) establishes limits for the amount of compensatory time off that an employee may accrue. Section 7(o)(4) provides the requirements for cashing out compensatory time upon an employee’s termination. Section 7(o)(5) governs a public employee’s use of accrued compensatory leave. That section states:

An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and (B) who has requested the use of such compensatory time, shall be permitted by the employee’s employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. 207(o)(5)(A), (B).

In 1987, after notice and comment, the Department issued final regulations implementing section 7(o) (29 CFR 553.20–28). Section 553.25 of the regulations implements section 7(o)(5)’s requirements regarding the use of compensatory time off. Section 553.25(c) provides:

(1) Whether a request to use compensatory time has been granted within a “reasonable period” will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

(2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employers and the employee (or the representative of the employee) reached prior to the performance of the work. (See § 553.23). To the extent that the [conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of “reasonable period”.

Section 553.25(d) states:

When an employer receives a request for compensatory time off, it shall be honored unless to do so would be “unduly disruptive” to the agency’s operations. Mere

inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99–331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency’s ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee’s services.

In recent years, a number of courts have examined the proper interpretation of section 7(o)(5)(B)’s “reasonable period” requirement with regard to whether an employer must allow an employee to take off the specific days that the employee requests unless that time off would cause an undue disruption.

In *Mortensen v. County of Sacramento*, 368 F.3d 1082 (9th Cir. 2004), the court held that under section 7(o)(5)(B), a public agency may deny its employees the right to use accrued compensatory time off on the specific days they request, without establishing that such use of compensatory time would “unduly disrupt the operations of the public agency.” The court relied upon the statutory language providing that an employee who has requested the use of compensatory time “shall be permitted \* \* \* to use such time within a reasonable period after making the request.” 29 U.S.C. 207(o)(5)(B). The court held that this language unambiguously states that once an employee requests compensatory time off, the employer must allow the employee to use the time within a reasonable period after the request and, thus, it does not require the employer to grant the time off on the specific days requested. In the court’s opinion, section 7(o)(5)(B)’s “unduly disrupt” clause merely indicates the condition that releases an employer from the obligation to permit the use of compensatory time within a “reasonable period” after it is requested. Because the court found no ambiguity in the statute, it declined to defer to the Department’s regulation at 29 CFR 553.25(d). *Accord Scott v. City of New York*, 340 F. Supp. 2d 371, 380 (S.D.N.Y. 2004).

Similarly, in *Houston Police Officers Union v. City of Houston*, 330 F.3d 298 (5th Cir.), cert. denied, 540 U.S. 879 (2003), the court held that the plain language of section 207(o)(5)(B) does not require a public agency to grant compensatory time off on the date specifically requested, but instead requires that the agency permit the leave within a reasonable period after the employee requests its use. The court stated that “mandating a ‘reasonable

period’ for use of comp time is different from mandating the employee’s chosen dates. The language offers a span of time to the employer, the beginning of which is the date of the employee’s request.” 330 F.3d at 303. The court noted that if granting the request would unduly disrupt operations, the public agency is released from the previously imposed requirement. Because the court deemed the statutory language unambiguous, it held that deference to the Department’s regulation would be inappropriate.

Moreover, the court stated that even if the statute were ambiguous, the regulation at section 553.25(d) “simply does not address whether the statute mandates an employee’s specifically requested dates for comp time.” 330 F.3d at 304. The court (330 F.3d at 304–05) also refused to defer to the Department’s *amicus curiae* brief filed in *DeBraska v. City of Milwaukee*, 131 F. Supp. 2d 1032 (E.D. Wis. 2000).<sup>1</sup>

In *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999), cert. denied, 528 U.S. 1157 (2000), the court held that the plaintiffs-police officers’ collective bargaining agreement with the City of Memphis permitted the City to deny the specific day requested for the use of compensatory time without a showing that such use would unduly disrupt its operations. Under the agreement, the City required police officers requesting compensatory time to sign the precinct’s “comp time” log book within 30 days of the requested day off. Once the commanding officer determined that additional requests for a particular day would adversely affect the functioning of the unit, no additional requests for the use of compensatory time on that day were allowed.

The plaintiffs-police officers argued that the City’s practice of denying officers the use of compensatory time off on a particular day violated section 7(o)(5)(B) because the City denied the leave without satisfying the “unduly

<sup>1</sup> In contrast to *Houston Police Officers Union*, the district court in *DeBraska v. City of Milwaukee*, 131 F. Supp. 2d at 1034, found that the statute was “somewhat ambiguous.” The court held that section 7(o)(5)(B) establishes that if an employee gives reasonable notice of a request for compensatory time, the specific days requested must be granted unless the employer demonstrates that the leave would unduly disrupt the employer’s services to the public. The court thus agreed with the interpretation of section 7(o)(5) presented in the Department’s *amicus curiae* brief, and it concluded that the current regulations support this view, because § 553.25(d) provides that in order to deny a compensatory leave request an agency must believe that granting the leave would “impose an unreasonable burden on the agency’s ability to provide services of acceptable quality and quantity for the public during the time requested[.]” (Emphasis added). The court stated that granting time off on an alternate date would be inconsistent with this phrase.



disrupt" standard. The court rejected the argument on the ground that it "completely ignores the phrase 'reasonable period,' which the Act gives the parties the freedom to define." 190 F.3d at 756 (citations omitted). The court noted that the regulations provide that to the extent that the parties' agreement specifies "the conditions under which an employee can take compensatory time off \* \* \* the terms of such agreement or understanding will govern the meaning of 'reasonable period.'" 190 F.3d at 756-57 (quoting 29 CFR 553.25(c)(2)). The court reasoned that the parties had agreed that "the reasonable period for requesting the use of banked compensatory time begins thirty days prior to the day in question and ends when the number of officers requesting the use of compensatory time on the given date would bring the precinct's staffing levels to the minimum level necessary for efficient operation." 190 F.3d at 757. Therefore, on this basis, the court upheld the district court's determination that the City had not violated section 7(o)(5)(B). *See Beck v. City of Cleveland*, 390 F.3d 912 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 2930 (2005) (*Aiken* involved the "reasonable period" clause of section 7(o)(5)(B)).

The appellate decisions uniformly read the statutory language unambiguously to state that once an employee requests compensatory time off, the employer has a reasonable period of time to allow the employee to use the time, unless doing so would be unduly disruptive. The Department proposes to revise the current rule to adhere to the appellate court rulings cited above. Proposed § 553.25(c) adds a sentence that states that section 7(o)(5)(B) does not require a public agency to allow the use of compensatory time on the day specifically requested, but only requires that the agency permit the use of the time within a reasonable period after the employee makes the request, unless the use would unduly disrupt the agency's operations. Additionally, the phrase "within a reasonable period after the request" has been added to the final sentence of proposed § 553.25(d) and the phrase "during the time requested" has been replaced with "during the time off" to clarify the employer's obligation.

#### 11. Fluctuating Workweek Method of Computing Overtime Under 29 CFR 778.114

The proposed rule would also clarify the Department's regulation at 29 CFR 778.114 addressing the fluctuating workweek method of computing overtime compensation for salaried

nonexempt employees. The current regulation provides that an employer may use the fluctuating workweek method for computing half-time overtime compensation if an employee works fluctuating hours from week to week and receives, pursuant to an understanding with the employer, a fixed salary as straight-time compensation "(apart from overtime premiums)" for whatever hours the employee is called upon to work in a workweek, whether few or many. In such cases, an employer satisfies the overtime pay requirement of section 7(a) of the FLSA if it compensates the employee, in addition to the salary amount, at least one-half of the regular rate of pay for the hours worked in excess of 40 hours in each workweek. Because the employee's hours of work fluctuate from week to week, the regular rate must be determined separately each week based on the number of hours actually worked each week. The payment of additional bonus supplements and premium payments to employees compensated under the fluctuating workweek method has presented challenges to both employers and the courts in applying the current regulations.

The proposed regulation provides that bona fide bonus or premium payments do not invalidate the fluctuating workweek method of compensation, but that such payments (as well as "overtime premiums") must be included in the calculation of the regular rate unless they are excluded by FLSA sections 7(e)(1)-(8). The proposal also adds an example to § 778.114(b) to illustrate these principles where an employer pays an employee a nightshift differential in addition to a fixed salary.

Paying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for employees. Moreover, the Department's proposed clarification is consistent with the Supreme Court's decision in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942), on which the existing regulation is patterned. That case held that, where a nonexempt employee had received only a fixed weekly salary (with no additional overtime premium pay) for working variable irregular hours that regularly exceeded 40 per week and fluctuated from week to week, the employer was required to retroactively pay an additional 50% of the employee's regular rate of pay multiplied by the overtime hours worked to satisfy the FLSA's time and a half overtime pay requirement. *Id.* at 573-74, 580-81. The quotient of the weekly wage divided by the number of

hours actually worked each week, including the overtime hours, determined the "regular rate at which [the] employee [was] employed" under the fixed salary arrangement. *Id.* at 580. The Department's proposed clarification would eliminate any disincentive for employers to pay additional bona fide bonus or premium payments.

#### IV. Paperwork Reduction Act

This rule does not impose new information collection requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

#### V. Executive Order 12866; Small Business Regulatory Enforcement Fairness Act; Regulatory Flexibility

This proposed rule is not economically significant within the meaning of Executive Order 12866, or a "major rule" under the Unfunded Mandates Reform Act or Section 801 of the Small Business Regulatory Enforcement Fairness Act.

As discussed previously in this preamble, over the years, Congress has amended the FLSA to refine or to add to exemptions and to clarify the minimum wage and overtime pay requirements. However, in many cases, the Department of Labor has not revised the FLSA regulations to comport with these statutory changes. The Department believes that the existing outdated regulatory provisions may cause confusion within the regulated community resulting in inadvertent violations and the costs of corrective compliance measures to remedy them.

The Department has determined that the proposed changes will not result in any additional compliance costs for regulated entities because the current compliance obligations derive from current law and not the outdated regulatory provisions that have been superseded years ago.

The Department is aware that this interpretation appears to be inconsistent with OMB Circular A-4's guidance on the use of analysis baselines, which states: "In some cases, substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action. In these cases, you should use a pre-statute baseline" to conduct the preliminary regulatory impact analysis. However, as the discussion below indicates, the Department believes the use of a pre-statute baseline would be extremely difficult for statutes enacted a decade or more in the past. Fundamental changes in the economy and labor market (e.g., the introduction of technology, changes in the size and composition of the labor

force, changes in the economy that impact the demand for labor, etc.) would make it difficult, if not impossible, to separate those changes from changes that resulted from enactment of the statute.

Moreover, the Department believes the economic impacts due to the statutory changes to the FLSA are typically greatest in the short run and diminish over time. This is due to labor markets determining the most efficient way to adjust to the new requirements, and because the Department believes many of the changes mandated by various revisions to the FLSA are reflective of the natural evolution of the labor market and would have become more common even in the absence of regulatory changes.<sup>2</sup> Therefore, the impacts resulting from the promulgation of the proposed regulations are not likely to be measurable. In fact, the Department anticipates that if implemented as a final rule, this proposed rule will simply enhance the Department's enforcement of, and the public's understanding of, compliance obligations under the FLSA by replacing outdated regulations with updated provisions that reflect current law.

The Department requests comments on this assessment.

#### *1996 and 2007 Amendments to the FLSA Minimum Wage*

The current FLSA regulations reference the minimum wage in several places. In some places the regulations refer to the 1981 minimum wage of \$3.35 while in others they refer to the 1991 minimum wage of \$4.25.

In order to avoid the current inconsistencies between the FLSA regulations and the statute the Department is proposing to revise the regulations so that they refer to the statutory minimum wage rather than a specific minimum wage. Since the proposed regulations do not include any reference to a specific minimum wage, the Department believes they do not impose the burden of increasing the minimum wage from the levels specified in the current regulations. That burden was imposed by the statutory changes and is unrelated to the FLSA regulations.

Thus, the Department concludes that the only incremental effect of this proposal on the public from these changes is possibly clearing up some confusion. This differentiates the minimum wage provisions from many

other rulemakings in which DOL is given little statutory discretion, but nonetheless is still required to update the CFR.

#### *Small Business Job Protection Act of 1996*

Sections 2101 through 2103 of Title II of SBJPA, entitled the "Employee Commuting Flexibility Act of 1996," amended section 4(a) of the Portal Act, 29 U.S.C. 254(a) to state that for travel time involving the employee's use of employer-provided vehicles for commuting at the beginning and end of the workday to be considered noncompensable, the use of the vehicle must be "conducted under an agreement between the employer and the employee or the employee's representative." The Department believes that since 1996 the labor market has adjusted to this statutory change and that it would be very difficult, if not impossible, to estimate the impact of this amendment. It is likely that as part of their overall compensation package, some employers and their employees have agreed to make the travel time compensable while others have agreed to make it noncompensable. In addition, since this provision simply clarifies that compensability should be subject to an agreement, but does not otherwise restrict the type of agreement employers and employees may reach, the Department believes this provision by its nature does not impose a significant burden on the public. Therefore, the Department concludes that the proposed regulatory changes will have no measurable effect on the public except to possibly clear up some confusion.

In addition, section 2105 of the SBJPA amended the FLSA effective August 20, 1996, by adding section 6(g), 29 U.S.C. 206(g), which provides that "[a]ny employer may pay any employee [who has not attained the age of 20] of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than \$4.25 an hour." The Department believes that the labor market has also adjusted to this change during the period since the enactment of the SBJPA. Although youths would obviously want to receive the normal minimum wage rather than the youth wage, some youths will decide to accept the lower youth wage in order to gain experience in the labor market. Similarly, although some employers may like to pay the lower youth wage, some may find compliance with the added requirements associated with the youth wage not to be worth the savings in wages. Thus, the Department

concludes that the proposed regulatory changes will have no measurable effect on the public except to possibly clear up some confusion.

#### *Agricultural Workers on Water Storage/Irrigation Projects*

Public Law No. 105-78, 111 Stat. 1467 (Nov. 13, 1997), amended section 13(b)(12) of the FLSA, 29 U.S.C. 213(b)(12), by extending the exemption from overtime pay requirements applicable to workers on water storage and irrigation projects where at least 90 percent of the water is used for agricultural purposes, rather than where the water is used exclusively for agricultural purposes. The Department believes that the labor market has also adjusted to this change during the period since the enactment of the amendment. Although agricultural workers and workers employed on water storage/irrigation projects listed in the exemption are not required to be paid time and one-half for the hours worked in excess of 40 in a work week, their overall compensation will be determined by market forces. In some cases, employers and their employees will choose some form of premium overtime pay (even though it is not mandated by the FLSA) while others may choose a higher salary with no additional compensation for the hours worked in excess of 40 in a week. In addition, this provision applies to a relatively small part of the overall U.S. labor force, thus the Department believes any possible impacts due to this exemption would likely not be substantial. Thus, the Department concludes that the proposed regulatory changes will have no measurable effect on the public except to possibly clear up some confusion.

#### *Certain Volunteers at Private Non-Profit Food Banks*

Section 1 of the Amy Somers Volunteers at Food Banks Act, Public Law No. 105-221, 112 Stat. 1248 (Aug. 7, 1998), amended section 3(e) of the FLSA, 29 U.S.C. 203(e), by adding section (5) to provide that the term "employee" does not include individuals volunteering solely for humanitarian purposes at private non-profit food banks and who receive groceries from those food banks. 29 U.S.C. 203(e)(5). The Department believes that the labor market has also adjusted to this change during the period since the enactment of the amendment. The Department also believes this regulatory change is not likely to have caused an impact we would consider significant, since it applies to a small part of the public and

<sup>2</sup> For example, as nominal wages rise over time, the marginal impact of a fixed minimum wage provision decreases, since it is less binding on the market.

simply clarifies that certain individuals may be considered volunteers.

#### *Employees Engaged in Fire Protection Activities*

In 1999, Congress amended section 3 of the FLSA, 29 U.S.C. 203, by adding section (y) to define "an employee in fire protection activities." This change in definition impacts the employees who may be covered by the partial overtime exemption allowed by § 7(k) (29 U.S.C. 207(k)) or the overtime exemption for public agencies with fewer than five employees in fire protection activities pursuant to § 13(b)(20) (29 U.S.C. 213(b)(20)).

The Department believes that these provisions apply to a relatively small proportion of the labor market, and that the market has adjusted to this change during the period since the enactment of the amendment. Although employees engaged in fire protection activities are not required to be paid time and one-half for the hours worked in excess of 40 in a work week, but rather must be paid overtime pursuant to section 7(k) of the FLSA, 29 U.S.C. 207(k), their overall compensation will be determined by market forces. In some cases, employers and their employees will choose some form of premium overtime pay (even where it is not mandated by the FLSA) while others may choose a higher salary with no additional compensation for the excess hours.

Similarly, the Department believes that the market has adjusted to no exemptions for the ambulance and rescue service employees of non-fire department public agencies (§ 553.215(b)), the rescue service employees of hospitals and nursing homes, and the ambulance and rescue service employees of private organizations because the statute clearly requires employment by a fire department for the exemption. While there may have been some short run effects related to the statutory change, in the years since the enactment of the statute, employers and their employees have adjusted to the overtime requirement.

Thus, the Department concludes that the proposed regulatory changes will have no measurable effect on the public except to possibly clear up some confusion.

#### *Stock Options Excluded From the Computation of the Regular Rate*

The Worker Economic Opportunity Act enacted by Congress on May 18, 2000, amended §§ 7(e) and 7(h) of the FLSA, 29 U.S.C. 207(e), (h). In § 7(e), a new subsection (8) adds "[a]ny value or

income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program" meeting particular criteria to the types of remuneration that are excluded from the computation of the regular rate. In § 7(h), the amendment clarifies that the amounts excluded under § 7(e) may not be counted toward the employer's minimum wage requirement under section 6, and that extra compensation excluded pursuant to the new subsection (8) may not be counted toward overtime pay under § 7. The Department believes that the labor markets have adjusted to this statute, which provides additional alternatives for employee compensation, but does not otherwise limit or mandate the overall levels of compensation owed to any category of worker. The proposed regulatory changes merely help to correct any confusion in this area.

#### *Fair Labor Standards Act Amendments of 1974 and 1977*

On April 7, 1974, Congress enacted an amendment to section 13(b)(10)(B) of the FLSA, 29 U.S.C. 213(b)(10)(B). Public Law No. 93-259, 88 Stat. 55 (1974). This amendment added an overtime exemption for salespersons primarily engaged in selling boats (in addition to the pre-existing exemption for sellers of trailers or aircraft). This amendment also eliminated the overtime exemption for partsmen and mechanics servicing trailers or aircraft.

The Department believes that these provisions apply to a relatively small proportion of the labor market, and that the labor market has also adjusted to this change during the long period since the enactment of the amendment. Although salespersons primarily engaged in selling boats are not required to be paid time and one-half for the hours worked in excess of 40 in a work week, their overall compensation will be determined by market forces. In some cases, employers and their employees may choose some form of premium overtime pay (even though it is not mandated by the FLSA) while others may choose a higher salary and commissions with no additional compensation for the hours worked in excess of 40 in a week.

Similarly, the Department believes that the market has adjusted to no exemptions for partsmen and mechanics servicing trailers or aircraft. Although there may have been some short run effects related to the statutory change, in the years since enactment of the statute, employers and their employees have adjusted to the overtime requirement.

Thus, the Department concludes that the proposed regulatory changes will have no measurable effect on the public except to possibly clear up some confusion.

On November 1, 1977, Congress amended section 3(t) of the FLSA, 29 U.S.C. 203(t). Public Law No. 95-151, § 3(a), 91 Stat. 1245. Section 3(t) of the FLSA defines the phrase "tipped employee." The amendment changed the conditions for taking the tip credit when making wage payments to qualifying tipped employees under the FLSA. Prior to the 1977 amendment, the definition encompassed "any employee engaged in an occupation in which he customarily and regularly receives more than \$20 a month in tips." The 1977 amendment raised the threshold in section 3(t) to \$30 a month in tips.

Although the mandatory paid wage (\$2.13) for tipped employees is below the minimum wage, these workers must still receive hourly compensation (cash wages plus tips) at least equal to the minimum wage. Moreover, regardless of the minimum wage, if the hourly compensation is too low employers will have trouble finding a sufficient number of workers. The Department believes that the labor market has also adjusted to this change during the period since the enactment of the amendment and that the regulatory changes will have no measurable economic effect on the public except to possibly clear up some confusion.

#### *Meal Credit Under Section 3(m)*

The proposed rule further amends § 531.30 to incorporate Wage and Hour's longstanding enforcement position regarding the voluntary acceptance of meals. The Department's current regulation at 29 CFR 531.30 provides that an employer's ability to take credit for a facility is limited to those instances where an employee's acceptance is "voluntary." However, after a number of courts rejected the Department's position on this point with regard to the credit for meals, the Wage and Hour Division adopted an enforcement position in the 1980's providing that an employer can take a meal credit even if an employee does not voluntarily accept the meal. Thus, under the Wage and Hour Division's current enforcement policy articulated in the Field Operations Handbook (Section 30c09(b)), an employer may require an employee to accept a meal provided by the employer as a condition of employment, and may take credit for the actual cost of that meal even if the employee's acceptance is not voluntary.

Since these changes in case law and the Department's enforcement policy

have been in place since the 1980's, the Department believes that the labor market has adjusted to this change. Workers who do not want a portion of their compensation to take the form of meals will seek other employment while other workers might seek employers who provide meals. Since the overall compensation will be the result of market forces and the market has had decades to adjust to the case law, the proposed regulatory changes will have no measurable economic effect on the public.

#### *Section 7(o) Compensatory Time Off*

In 1987, the Department issued final regulations implementing a detailed scheme for the accrual and use of compensatory time off (section 7(o)). Section 7(o)(5) governs a public employee's use of accrued compensatory leave. That section states:

An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. 207(o)(5). In recent years, a number of courts have examined the proper interpretation of section 7(o)(5)(B)'s "reasonable period" requirement with regard to whether an employer must allow an employee to take off the specific days that the employee requests unless that time off would cause an undue disruption. The appellate courts that have addressed this issue have uniformly read the statutory language unambiguously to state that once an employee requests compensatory time off, the employer has a reasonable period of time to allow the employee to use the time, unless doing so would be unduly disruptive. As one court noted, "mandating a 'reasonable period' for use of comp time is different from mandating the employee's chosen dates." *Houston Police Officers Union v. City of Houston*, 330 F.3d 298, 303 (5th Cir. 2003).

Proposed § 553.25(c) adds a sentence that states that section 7(o)(5)(B) does not require a public agency to allow the use of compensatory time on the day specifically requested, but only requires that the agency permit the use of the time within a reasonable period after the employee makes the request, unless the use would unduly disrupt the agency's operations. Additionally, the phrase "within a reasonable period after the

request" has been added to the final sentence of proposed § 553.25(d) and the phrase "during the time requested" has been replaced with "during the time off" to clarify the employer's obligation.

The Department believes that the proposed changes will eliminate some of the confusion over the use of compensatory time off. Under current conditions, some public agency employees may accrue compensatory time off under the mistaken belief that they can specify an exact date when they will use their accrued compensatory time off. The proposed clarification makes it clear that public sector employers may permit employees to use accrued compensatory time off within a "reasonable period" after the employee's request is made.

Even though we believe this clarification is consistent with the court's interpretation of current statutory and regulatory requirements, and therefore does not change the nature of compensatory time off rights and responsibilities, the Department recognizes as a result of this regulatory clarification that some employees may choose not to accrue compensatory time off. Although the Department typically considers existing final regulations as part of the baseline for regulatory impact analysis, and therefore feels incorporating these court clarifications into the baseline may be consistent with OMB Circular A-4 guidance, we would like to recognize that this clarification may have some slight impacts. For example, if the supply of workers willing to accrue compensatory time off declines, then some public sector employers may choose to negotiate with their employees to develop an agreement or understanding that provides more flexibility as to the use of compensatory time off than the minimum mandated by section 7(o). In fact, it is probable that some negotiations between public sector employers and their employees has already occurred as a result of the court decisions.

#### *Fluctuating Workweek Method of Computing Overtime Under 29 CFR 778.114*

The proposed rule would also clarify the Department's regulation at 29 CFR 778.114 addressing the fluctuating workweek method of computing overtime compensation for salaried employees. The proposed regulation provides that bona fide bonus or premium payments do not invalidate the fluctuating workweek method of compensation, but that such payments (as well as "overtime premiums") must be included in the calculation of the

regular rate unless they are excluded by FLSA sections 7(e)(1)–(8). Paying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for both employers and their employees. The Department's proposed clarification would eliminate any disincentive for employers to pay additional bona fide bonus or premium payments. The Department has determined that the proposed regulatory clarification will have no measurable economic effect on the public except to possibly reduce some litigation.

#### *Conclusion*

The Department concludes that incorporating these statutory amendments and court interpretations into the FLSA and Portal Act regulations will not impose any measurable costs on any private or public sector entity.

Furthermore, because the proposed rule will not impose any measurable costs on employers, the Department certifies that it would not have a significant economic impact on a substantial number of small entities. Accordingly, the Department need not prepare an initial regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### **VI. Unfunded Mandates Reform Act**

This proposed rule has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.* For the purposes of the UMRA, the Department certifies that this rule does not impose any Federal mandate that may result in increased expenditures by State, local, or tribal governments, or increased expenditures by the private sector, of more than \$100 million in any year.

#### **VII. Executive Order 13132 (Federalism)**

The Department has reviewed this rule in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255, Aug. 10, 1999). This rule does not have federalism implications as outlined in E.O. 13132. The rule does 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**

The Department has reviewed this rule under the terms of Executive Order 13175 and determined it did not have

“tribal implications.” The rule does 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.” As a result, no tribal summary impact statement has been prepared.

#### IX. Effects on Families

The Department certifies that this rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

#### X. Executive Order 13045, Protection of Children

The Department has reviewed this rule under the terms of Executive Order 13045 and determined this action is not subject to E.O. 13045 because it is not economically significant as defined in E.O. 12866 and it does not impact the environmental health or safety risks of children.

#### XI. Environmental Impact Assessment

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

#### XII. Executive Order 13211, Energy Supply

The Department has determined that this rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

#### XIII. Executive Order 12630, Constitutionally Protected Property Rights

The Department has determined that this rule is not subject to Executive Order 12630 because it does not involve implementation of a policy “that has taking implications” or that could impose limitations on private property use.

#### XIV. Executive Order 12988, Civil Justice Reform Analysis

The Department drafted and reviewed this proposed rule in accordance with

Executive Order 12988 and determined that the rule will not unduly burden the federal court system. The rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

#### List of Subjects

##### 29 CFR Part 4

Administrative practice and procedures, Employee benefit plans, Government contracts, Labor, Law enforcement, Minimum wages, Penalties, Wages.

##### 29 CFR Part 531

Employment, Labor, Minimum wages, Wages.

##### 29 CFR Part 553

Firefighters, Labor, Law enforcement officers, Overtime pay, Wages.

##### 29 CFR Part 778

Employment, Overtime pay, Wages.

##### 29 CFR Part 779

Compensation, Overtime pay.

##### 29 CFR Part 780

Agriculture, Irrigation, Overtime pay.

##### 29 CFR Part 785

Compensation, Hours of work.

##### 29 CFR Part 786

Compensation, Minimum wages, Overtime pay.

##### 29 CFR Part 790

Compensation, Hours of work.

#### Victoria A. Lipnic,

*Assistant Secretary, Employment Standards Administration.*

#### Alexander J. Passantino,

*Acting Administrator, Wage and Hour Division.*

For the reasons set forth above, the Department proposes to amend Title 29, parts 4, 531, 553, 778, 779, 780, 785, 786, and 790 of the Code of Federal Regulations as follows:

#### PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

1. The authority citation for part 4 continues to read as follows:

**Authority:** 41 U.S.C. 351 *et seq.*; 41 U.S.C. 38 and 39; 5 U.S.C. 301.

##### § 4.159 General minimum wage [Revised]

2. Amend § 4.159 by deleting the final sentence.

3. Amend § 4.167 by revising the twelfth sentence to the end, to read as follows:

##### § 4.167 Wage payments—medium of payment.

\* \* \* The general rule under that Act provides, when determining the wage an employer is required to pay a tipped employee, the maximum allowable hourly tip credit is limited to the difference between \$2.13 and the applicable minimum wage specified in section 6(a)(1) of that Act. (See § 4.163(k) for exceptions in section 4(c) situations.) In no event shall the sum credited as tips exceed the value of tips actually received by the employee. The tip credit is not available to an employer unless the employer has informed the employee of the tip credit provisions and all tips received by the employee have been retained by the employee (other than as part of a valid tip pooling arrangement among employees who customarily and regularly receive tips; see section 3(m) of the Fair Labor Standards Act).

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

4. The authority citation for part 531 is revised to read as follows:

**Authority:** Sec. 3(m), 52 Stat. 1060; sec. 2, 75 Stat. 65; sec. 101, 80 Stat. 830; sec. 29(B), 88 Stat. 55, Pub. L. 93–259; 29 U.S.C. 203(m) and (t).

##### § 531.7 [Removed and Reserved]

5. Remove and reserve § 531.7.

6. Amend § 531.30 by revising the second sentence to read as follows:

##### § 531.30 “Furnished” to the employee.

\* \* \* Not only must the employee receive the benefits of the facility for which the employee is charged, but, with the exception of meals, the employee’s acceptance of the facility must be voluntary and uncoerced.

\* \* \* Amend § 531.36 by revising paragraph (a) to read as follows:

##### § 531.36 Nonovertime workweeks.

(a) When no overtime is worked by the employees, section 3(m) and this part apply only to the applicable minimum wage for all hours worked. To illustrate, where an employee works 40 hours a week at a cash wage rate of at least the applicable minimum wage and is paid that amount free and clear at the end of the workweek, and in addition is furnished facilities, no consideration need be given to the question of whether such facilities meet the requirements of section 3(m) and this part, since the employee has received in cash the applicable minimum wage for all hours worked. Similarly, where an employee is employed at a rate in excess of the

applicable minimum wage and during a particular workweek works 40 hours for which the employee receives at least the minimum wage free and clear, the employer having deducted from wages for facilities furnished, whether such deduction meets the requirement of section 3(m) and subpart B of this part need not be considered, since the employee is still receiving, after the deduction has been made, a cash wage of at least the minimum wage for each hour worked. Deductions for board, lodging, or other facilities may be made in nonovertime workweeks even if they reduce the cash wage below the minimum wage, provided the prices charged do not exceed the "reasonable cost" of such facilities. When such items are furnished the employee at a profit, the deductions from wages in weeks in which no overtime is worked are considered to be illegal only to the extent that the profit reduces the wage (which includes the "reasonable cost" of the facilities) below the required minimum wage. Facilities must be measured by the requirements of section 3(m) and this part to determine if the employee has received the applicable minimum wage in cash or in facilities which may be legitimately included in "wages" payable under the Act.

\* \* \* \* \*

8. Revise § 531.37 to read as follows:

**§ 531.37 Overtime workweeks.**

(a) Section 7 requires that the employee receive compensation for overtime hours at "a rate of not less than one and one-half times the regular rate at which he is employed." When overtime is worked by an employee who receives the whole or part of his or her wage in facilities and it becomes necessary to determine the portion of wages represented by facilities, all such facilities must be measured by the requirements of section 3(m) and subpart B of this part. It is the Administrator's opinion that deductions may be made, however, on the same basis in an overtime workweek as in nonovertime workweeks (see § 531.36), if their purpose and effect are not to evade the overtime requirements of the Act or other law, providing the amount deducted does not exceed the amount which could be deducted if the employee had only worked the maximum number of straight-time hours during the workweek. Deductions in excess of this amount for such articles as tools or other articles which are not "facilities" within the meaning of the Act are illegal in overtime workweeks as well as in nonovertime workweeks. There is no limit on the amount which may be deducted for "board, lodging, or

other facilities" in overtime workweeks (as in workweeks when no overtime is worked), provided that these deductions are made only for the "reasonable cost" of the items furnished. These principles assume a situation where bona fide deductions are made for particular items in accordance with the agreement or understanding of the parties. If the situation is solely one of refusal or failure to pay the full amount of wages required by section 7, these principles have no application. Deductions made only in overtime workweeks, or increases in the prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade the overtime requirements of the Act.

(b) Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where board, lodging, or other facilities are customarily furnished as addition to a cash wage, the reasonable cost of the facilities to the employer must be considered as part of the employee's regular rate of pay. *See Walling v. Alaska Pacific Consolidated Mining Co.*, 152 F.2d 812 (9th Cir. 1945), *cert. denied*, 327 U.S. 803.

9. Remove the undesignated center heading above § 531.50.

10. Designate §§ 531.50 through 531.60 as subpart D, and add a heading for subpart D to read as follows:

**Subpart D—Tipped Employees**

11. Revise § 531.50 to read as follows:

**§ 531.50 Statutory provisions with respect to tipped employees.**

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

(1) The cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996 [i.e., \$2.13]; and

(2) An additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (a)(1) of this section and the wage in effect under section 206(a)(1) of this title.

(b) "Tipped employee" is defined in section 3(t) of the Act as follows: *Tipped employee* means any employee engaged in an occupation in which he

customarily and regularly receives more than \$30 a month in tips.

12. Amend §§ 531.51, 531.56, 531.57, 531.58 to remove and add terms as follows:

**§§ 531.51, 531.56, 531.57, 531.58 [Amended]**

In 29 CFR part 531, "Wage Payments Under the Fair Labor Standards Act of 1938," remove the words "\$20" and add, in their place, "\$30" wherever they appear in the following places:

- a. Section 531.51;
- b. Section 531.56 heading and paragraphs (a) through (e);
- c. Section 531.57; and
- d. Section 531.58.

13. Amend § 531.52 by revising the third, fourth and fifth sentences, to read as follows:

**§ 531.52 General characteristics of "tips."**

\* \* \* Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity. Where an employee is being paid wages no more than the minimum wage, the employer is prohibited from using an employee's tips for any reason other than to make up the difference between the required cash wage paid and the minimum wage or in furtherance of a valid tip pool. Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips.

14. Amend § 531.54 by adding two sentences to the end of the paragraph to read as follows:

**§ 531.54 Tip pooling.**

\* \* \* Section 3(m) does not impose a maximum contribution percentage on tip pools. An employer must notify its employees of any required tip pool contribution amount.

15. Revise § 531.55 to read as follows:

**§ 531.55 Examples of amounts not received as tips.**

(a) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its employees, cannot be counted as a tip received in applying the provisions of section 3(m) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.

(b) As stated above, service charges and other similar sums which become part of the employer's gross receipts are not tips for the purposes of the Act. Where such sums are distributed by the employer to its employees, however, they may be used in their entirety to satisfy the monetary requirements of the Act.

16. Amend § 531.56 by revising the last sentence in paragraph (d) to read as follows:

**§ 531.56 "More than \$30 per month in tips."**

\* \* \* \* \*

(d) *Significance of minimum monthly tip receipts.* \* \* \* It does not govern or limit the determination of the appropriate amount of wage credit under section 3(m) that may be taken for tips under section 6(a)(1) (tip credit equals the difference between the minimum wage required by section 6(a)(1) and \$2.13 per hour).

\* \* \* \* \*

17. Revise § 531.59 to read as follows:

**§ 531.59 The tip wage credit.**

(a) In determining compliance with the wage payment requirements of the Act, under the provisions of section 3(m) the amount paid to a tipped employee by an employer is increased on account of tips by an amount equal to the formula set forth in the statute (minimum wage required by section 6(a)(1) of the Act minus \$2.13), provided that the employer satisfies all the requirements of section 3(m). This tip credit is in addition to any credit for board, lodging, or other facilities which may be allowable under section 3(m).

(b) As indicated in § 531.51, the tip credit may be taken only for hours worked by the employee in an occupation in which the employee qualifies as a "tipped employee." Pursuant to section 3(m), an employer is not eligible to take the tip credit unless it has informed its employees that it intends to avail itself of the tip wage credit. Such notice shall be provided in advance of the employer's use of the tip credit; the notice need not be in writing, but must communicate to employees that the employer intends to treat tips as satisfying part of the employer's minimum wage obligation. The credit allowed on account of tips may be less than that permitted by statute (minimum wage required by section 6(a)(1) minus \$2.13); it cannot be more. In order for the employer to claim the maximum tip credit, the employer must demonstrate that the employee received at least that amount in actual tips. If the employee received less than the maximum tip credit amount in tips, the

employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips. With the exception of tips contributed to a bona fide tip pool as described in § 531.31, the tip credit provisions of section 3(m) also require employers to permit employees to retain all tips received by the employee.

18. Amend § 531.60 by removing the paragraph designation "(a)" and revising the first and third sentences to read as follows:

**§ 531.60 Overtime payments.**

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

\* \* \* \* \*

**PART 553—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS**

19–20. The authority citation for part 553 continues to read as follows:

**Authority:** Secs. 1–19 52 Stat. 1060, as amended (29 U.S.C. 201–219); Pub. L. 99–150, 99 Stat. 787 (29 U.S.C. 203, 207, 211).

21. Amend § 553.25 by adding a sentence at the end of paragraph (c)(1) and by revising the last sentence of paragraph (d) to read as follows:

**§ 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \* Section 7(o)(5) does not require a public agency to allow an employee to use compensatory time on the specific day requested, but rather only requires the agency to permit an employee to use the time within a reasonable period after the employee makes the request, unless such use

would unduly disrupt the agency's operations.

\* \* \* \* \*

(d) \* \* \* For an agency to turn down a request from an employee for compensatory time off within a reasonable period after the request requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time off without the use of the employee's services.

22. Revise § 553.210(a) to read as follows:

**§ 553.210 Fire protection activities.**

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee \* \* \* in fire protection activities" refers to "an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk." The term includes such incidental nonfirefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (c) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity.

\* \* \* \* \*

**§§ 553.212 and 553.215 [Reserved]**

23. Remove and reserve §§ 553.212 and 553.215.

**§§ 553.221, 553.222, 553.223, 553.226, and 553.231 [Amended]**

24. Amend §§ 553.221, 553.222, 553.223, 553.226 and 553.231 to remove and add terms as follows. Remove the words "firefighter" or "firefighters" and add, in their place, the words "employee in fire protection activities"

or “employees in fire protection activities,” respectively, wherever they appear in the following places:

- a. Section 553.221(a), (d), and (g);
- b. Section 553.222(a) and (c);
- c. Section 553.223(a), (c), and (d);
- d. Section 553.226(c); and
- e. Section 553.231(b).

#### **PART 778—OVERTIME COMPENSATION**

25. The authority citation for part 778 continues to read as follows:

**Authority:** 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*

26. Revise § 778.110 to read as follows:

##### **§ 778.110 Hourly rate employee.**

(a) *Earnings at hourly rate exclusively.* If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the “regular rate.” For overtime hours of work the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a \$12 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of \$588 (46 hours at \$12 plus 6 at \$6). In other words, the employee is entitled to be paid an amount equal to \$12 an hour for 40 hours and \$18 an hour for the 6 hours of overtime, or a total of \$588.

(b) *Hourly rate and bonus.* If the employee receives, in addition to the earnings computed at the \$12 hourly rate, a production bonus of \$46 for the week, the regular hourly rate of pay is \$13 an hour (46 hours at \$12 yields \$552; the addition of the \$46 bonus makes a total of \$598; this total divided by 46 hours yields a regular rate of \$13). The employee is then entitled to be paid a total wage of \$637 for 46 hours (46 hours at \$13 plus 6 hours at \$6.50, or 40 hours at \$13 plus 6 hours at \$19.50).

27. Revise § 778.111 to read as follows:

##### **§ 778.111 Pieceworker.**

(a) *Piece rates and supplements generally.* When an employee is employed on a piece-rate basis, the regular hourly rate of pay is computed by adding together total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker’s “regular rate” for that week. For overtime work the

pieceworker is entitled to be paid, in addition to the total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as far as pieceworkers are concerned, see § 778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, for example, if the employee has worked 50 hours and has earned \$491 at piece rates for 46 hours of productive work and in addition has been compensated at \$8.00 an hour for 4 hours of waiting time, the total compensation, \$523.00, must be divided by the total hours of work, 50, to arrive at the regular hourly rate of pay—\$10.46. For the 10 hours of overtime the employee is entitled to additional compensation of \$52.30 (10 hours at \$5.23). For the week’s work the employee is thus entitled to a total of \$575.30 (which is equivalent to 40 hours at \$10.46 plus 10 overtime hours at \$15.69).

(b) *Piece rates with minimum hourly guarantee.* In some cases an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. Where the total piece-rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks the employee is in fact paid at an hourly rate and the minimum hourly guaranty is the regular rate in that week. In the example just given, if the employee was guaranteed \$11 an hour for productive working time, the employee would be paid \$506 (46 hours at \$11) for the 46 hours of productive work (instead of the \$491 earned at piece rates). In a week in which no waiting time was involved, the employee would be owed an additional \$5.50 (half time) for each of the 6 overtime hours worked, to bring the total compensation up to \$539 (46 hours at \$11 plus 6 hours at \$5.50 or 40 hours at \$11 plus 6 hours at \$16.50). If the employee is paid at a different rate for waiting time, the regular rate is the weighted average of the 2 hourly rates, as discussed in § 778.115.

28. Amend § 778.113 by revising paragraph (a) and the fifth sentence of paragraph (b) to read as follows:

##### **§ 778.113 Salaried employees—general.**

(a) *Weekly salary.* If the employee is employed solely on a weekly salary

basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of \$350 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee’s regular rate of pay is \$350 divided by 35 hours, or \$10 an hour, and when the employee works overtime the employee is entitled to receive \$10 for each of the first 40 hours and \$15 (one and one-half times \$10) for each hour thereafter. If an employee is hired at a salary of \$375 for a 40-hour week the regular rate is \$9.38 an hour.

(b) \* \* \* The regular rate of an employee who is paid a regular monthly salary of \$1,560, or a regular semimonthly salary of \$780 for 40 hours a week, is thus found to be \$9 per hour.

\* \* \*

29. Revise § 778.114 to read as follows:

##### **§ 778.114 Fixed salary for fluctuating hours.**

(a) An employee employed on a salary basis may have hours of work that fluctuate from week to week and be paid the salary amount pursuant to an understanding with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation for the total hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary and any bonus or premium payments not excluded from the regular rate under section 7(e)(1) through (8) of the Act is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest, and if the employee receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half the employee’s regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary and any non-excludable bonus or



premium payments to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary, bonus and premium payments satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate. Payment of overtime premiums and other bonus and non-overtime premium payments will not invalidate the "fluctuating workweek" method of overtime payment, but such payments must be included in the calculation of the regular rate unless excluded under section 7(e)(1) through (8) of the Act.

(b)(1) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of \$600 a week is paid with the understanding that it constitutes the employee's straight time compensation for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is approximately \$15.00, \$13.64, \$12.00, and \$12.50, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked in these examples, only additional half-time pay is due. For the first week the employee is entitled to be paid \$600; for the second week \$627.28 (\$600 plus 4 hours at \$6.82, or 40 hours at \$13.64 plus 4 hours at \$20.46); for the third week \$660 (\$600 plus 10 hours at \$6.00, or 40 hours at \$12.00 plus 10 hours at \$18.00); for the fourth week approximately \$650 (\$600 plus 8 hours at \$6.25 or 40 hours at \$12.50 plus 8 hours at \$18.75).

(2) If, in each week in the examples in paragraph (b)(1) of this section, 4 of the hours the employee worked were nightshift hours compensated at a premium rate of an extra \$5.00 per hour, the employee's total compensation would be calculated as follows: For the first week the employee is entitled to be paid \$620 (salary compensation of \$600 plus \$20.00 of non-overtime premium pay, with no overtime hours); for the second week \$648.20 (salary compensation of \$600 plus \$20.00 of non-overtime premium pay, with a regular rate of \$14.09 and four hours of overtime at \$7.05 for a total overtime payment of \$28.20); for the third week \$682.00 (salary compensation of \$600 plus \$20.00 of non-overtime premium pay, with a regular rate of \$12.40 and ten hours of overtime at \$6.20 for a total

overtime payment of \$62.00); for the fourth week \$671.68 (salary compensation of \$600 plus \$20.00 of non-overtime premium pay, with a regular rate of \$12.92 and eight hours of overtime at \$6.46 for a total overtime payment of \$51.68).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the amount of the salary plus any bonus or premium payments not excluded from the regular rate under section 7(e)(1) through (8) of the Act is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary amount covers all the hours worked in the workweek, whether few or many, and the employer pays the salary amount even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for overtime hours at a rate no greater than that which the employee receives for non-overtime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

30. Amend § 778.200 by adding paragraph (a) (8) and revising paragraph (b) to read as follows:

**§ 778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.**

(a) \* \* \*

(8) Any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(i) Grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's

participation in the program or at the time of the grant;

(ii) In the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(iii) Exercise of any grant or right is voluntary; and

(iv) Any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(A) Made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that any determinations may be based on length of service or minimum schedule of hours or days of work; or

(B) Made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(b) *Section 7(h)*. This subsection of the Act provides as follows:

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

\* \* \* \* \*

31. Amend § 778.208 by revising the first sentence to read as follows:

**§ 778.208 Inclusion and exclusion of bonuses in computing the "regular rate."**

Section 7(e) of the Act requires the inclusion in the regular rate of all remuneration for employment except eight specified types of payments. \* \* \*

**PART 779—THE FAIR LABOR STANDARDS ACT AS APPLIED TO RETAILERS OF GOODS OR SERVICES**

32–33. The authority citation for part 779 is revised to read as follows:

**Authority:** Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; Sec. 29(B), Pub. L. 93–259, 88 Stat. 55; 29 U.S.C. 201–219.

34. Revise the undesignated center heading for §§ 779.371 and 779.372 to read as follows:

**Automobile, Truck and Farm Implement Sales and Services, and Trailer, Boat and Aircraft Sales**

35. Amend § 779.371 by revising the fifth sentence of paragraph (a) to read as follows:

**§ 779.371 Some automobile, truck, and farm implement establishments may qualify for exemption under section 13(a)(2).**

(a) \* \* \* Section 13(b)(10) is applicable not only to automobile, truck, and farm implement dealers but also to dealers in trailers, boats, and aircraft. \* \* \*

\* \* \* \* \*

36. Amend § 779.372 by revising paragraphs (a), (b)(1)(ii), (b)(2), and (c) to read as follows:

**§ 779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).**

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, farm implements, trailers, boats, or aircraft. Section 13(b)(10)(A) states that the provisions of section 7 shall not apply with respect to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” Section 13(b)(10)(B) states that the provisions of section 7 shall not apply with respect to “any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers.” This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) \* \* \*

(1) \* \* \*

(ii) The establishment must be primarily engaged in the business of selling automobiles, trucks, or farm implements to the ultimate purchaser for section 13(b)(10)(A) to apply. If these tests are met by an establishment the exemption will be available for salesmen, partsmen and mechanics, employed by the establishment, who are primarily engaged during the work week

in the selling or servicing of the named items. Likewise, the establishment must be primarily engaged in the business of selling trailers, boats, or aircraft to the ultimate purchaser for the section 13(b)(10)(B) exemption to be available for salesmen employed by the establishment who are primarily engaged during the work week in selling these named items. An explanation of the term “employed by” is contained in §§ 779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships that qualify as retail or service establishments nor is it limited to establishments selling automobiles, trucks, and farm implements, but also includes dealers in trailers, boats, and aircraft.

(c) *Salesman, partsman, or mechanic.*

(1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale or servicing of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling. As used in section 13(b)(10)(B), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of trailers, boats, or aircraft that the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee’s own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such. This includes mechanical work required for safe

operation, as an automobile, truck, or farm implement. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer’s vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who primarily performs nonmechanical repair work is not exempt.

(4) Employees variously described as service manager, service writer, service advisor, or service salesman, who are primarily engaged in obtaining orders for servicing of automobiles, trucks, or farm implements that the establishment is primarily engaged in selling, are exempt under section 13(b)(10)(A). Such employees typically perform duties such as greeting customers and obtaining information regarding their service or repair concerns; diagnosing the mechanical condition of the automobile, truck, or farm implement brought in for repair; offering and attempting to sell appropriate diagnostic or repair services; providing estimates for the recommended services or repairs; writing up orders for work authorized by the customer; assigning the work to various employees; directing and checking on the work of mechanics; and communicating with customers regarding the status of their vehicles.

\* \* \* \* \*

**PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT**

37–38. The authority citation for part 780 continues to read as follows:

**Authority:** Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219.

39. Revise § 780.400 to read as follows:

**§ 780.400 Statutory provisions.**

Section 13(b)(12) of the Fair Labor Standards Act exempts from the overtime provisions of section 7 any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used

exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year.

40. Amend § 780.401 by revising the first sentence of paragraph (a) and all of paragraph (b) to read as follows:

**§ 780.401 General explanatory statement.**

(a) Section 13(b)(12) of the Act contains the same wording exempting any employee employed in agriculture as did section 13(a)(6) prior to the 1966 amendments. \* \* \*

(b) In addition to exempting employees engaged in agriculture, section 13(b)(12) also exempts from the overtime provisions of the Act employees employed in specified irrigation activities. The effect of the 1997 amendment to section 13(b)(12) is to expand the overtime exemption for any employee employed in specified irrigation activities used for supply and storing of water for agricultural purposes by substituting “water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year” for the prior requirement that all the water be used for agricultural purposes. Prior to the 1966 amendments employees employed in specified irrigation activities were exempt from the minimum wage and overtime pay requirements of the Act.

\* \* \* \* \*

41. Revise § 780.406 to read as follows:

**§ 780.406 Exemption is from overtime only.**

This exemption applies only to the overtime provisions of the Act and does not affect the minimum wage, child labor, recordkeeping, and other requirements of the Act.

42. Amend § 780.408 by revising the section heading and the first four sentences of the paragraph to read as follows:

**§ 780.408 Facilities of system at least 90 percent of which was used for agricultural purposes.**

Section 13(b)(12) requires for exemption of irrigation work that the ditches, canals, reservoirs, or waterways in connection with which the employee’s work is done be “used exclusively for supply and storing of water at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year.” If a water supplier supplies water of which more than 10 percent is used for purposes other than “agricultural purposes” during the preceding

calendar year, the exemption would not apply. For example, the exemption would not apply where more than 10 percent of the water supplier’s water is delivered to a municipality to be used for general, domestic, and commercial purposes. The fact that a small amount of the water furnished for use in farming operations is in fact used for incidental purposes by the farmer on the farm does not, however, require the conclusion that such water was not ultimately delivered for agricultural purposes within the meaning of the irrigation exemption in section 13(b)(12). \* \* \*

**PART 785—HOURS WORKED**

43. The authority citation for part 785 is revised to read as follows:

**Authority:** 52 Stat. 1060; 29 U.S.C. 201–219; 29 U.S.C. 254.

44. Amend § 785.9 by adding a sentence after the third sentence in paragraph (a) to read as follows:

**§ 785.9 Statutory exemptions.**

(a) \* \* \* The use of an employer’s vehicle for travel by an employee and activities that are incidental to the use of such vehicle for commuting are not considered “principal” activities when meeting the following conditions: The use of the employer’s vehicle for travel is within the normal commuting area for the employer’s business or establishment and the use of the employer’s vehicle is subject to an agreement on the part of the employer and the employee or the representative of such employee. \* \* \*

45. Amend § 785.34 by adding a sentence after the first sentence to read as follows:

**§ 785.34 Effect of section 4 of the Portal-to-Portal Act.**

\* \* \* Section 4(a) further provides that the use of an employer’s vehicle for travel by an employee and activities that are incidental to the use of such vehicle for commuting are not considered principal activities when the use of such vehicle is within the normal commuting area for the employer’s business or establishment and is subject to an agreement on the part of the employer and the employee or the representative of such employee. \* \* \*

46. Amend § 785.50 by adding a sentence at the end of paragraph (a)(2) to read as follows:

**§ 785.50 Section 4 of the Portal-to-Portal Act.**

\* \* \* \* \*

(a) \* \* \*

(2) \* \* \* For purposes of this subsection, the use of an employer’s

vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee’s principal activities if the use of such vehicle for travel is within the normal commuting area for the employer’s business or establishment and the use of the employer’s vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

\* \* \* \* \*

**PART 786—MISCELLANEOUS EXEMPTIONS AND EXCLUSIONS FROM COVERAGE**

47. The authority citation for part 786 continues to read as follows:

**Authority:** 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

48. Revise the heading of part 786 to read as set forth above.

49. Add subpart G consisting of § 786.300 to read as follows:

**Subpart G—Youth Opportunity Wage**

**§ 786.300 Application of the youth opportunity wage.**

Section 6(g) of the Fair Labor Standards Act allows any employer to pay any employee who has not attained the age of 20 years a wage of not less than \$4.25 an hour during the first 90 consecutive calendar days after such employee is initially employed by such employer. For the purposes of hiring workers at this wage, no employer may take any action to displace employees, including partial displacements such as reducing hours, wages, or employment benefits. Any employer that violates these provisions is considered to have violated section 15(a)(3) of the Act.

50. Add subpart H consisting of § 786.350 to read as follows:

**Subpart H—Volunteers at Private Non-Profit Food Banks**

**§ 786.350 Exclusion from definition of “employee” of volunteers at private non-profit food banks.**

Section 3(e)(5) of the Fair Labor Standards Act excludes from the definition of the term “employee” individuals who volunteer their services solely for humanitarian purposes at private non-profit food banks and who receive groceries from the food banks.

**PART 790—GENERAL STATEMENT AS TO THE EFFECT OF THE PORTAL-TO-PORTAL ACT OF 1947 ON THE FAIR LABOR STANDARDS ACT OF 1938**

51. The authority citation for part 790 is revised to read as follows:

**Authority:** 52 Stat. 1060, as amended; 100 Stat. 1755; 29 U.S.C. 201–219; 29 U.S.C. 254.

52. Amend § 790.3 by adding a sentence at the end of paragraph (a)(2) to read as follows:

**§ 790.3 Provisions of the statute.**

\* \* \* \* \*

(a) \* \* \*

(2) \* \* \* For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

\* \* \* \* \*

[FR Doc. E8–16631 Filed 7–25–08; 8:45 am]

BILLING CODE 4510–27–P

**DEPARTMENT OF THE INTERIOR**

**Minerals Management Service**

**30 CFR Part 219**

[Docket ID: MMS–2007–OMM–0067]

RIN 1010–AD46

**Allocation and Disbursement of Royalties, Rentals, and Bonuses—Oil and Gas, Offshore**

**AGENCY:** Minerals Management Service (MMS), Interior.

**ACTION:** Extension of comment period for a proposed rule.

**SUMMARY:** The Minerals Management Service hereby gives notice that it is extending the public comment period on a proposed rule, which was published in the *Federal Register* on May 27, 2008, with public comments due by July 28, 2008. The proposed rule would amend the regulations on distribution and disbursement of royalties, rentals, and bonuses to include the allocation and disbursement of revenues from certain leases on the Gulf of Mexico Outer Continental Shelf in accordance with the provisions of the

Gulf of Mexico Energy Security Act of 2006. (73 FR 30331, May 27, 2008).

**DATES:** Written comments must be received by the extended due date of August 11, 2008. The MMS may not fully consider comments received after this date.

**ADDRESSES:** You may submit comments on the rulemaking by any of the following methods. Please use the Regulation Identifier Number (RIN) 1010–AD46 as an identifier in your message. See also Public Availability of Comments under Procedural Matters.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Under the tab “More Search Options,” click Advanced Docket Search, then select “Minerals Management Service” from the agency drop-down menu, then click “submit.” In the Docket ID column, select MMS–2007–OMM–0067 to submit public comments and to view supporting and related materials available for this rulemaking. Information on using [Regulations.gov](http://Regulations.gov), including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's “User Tips” link. The MMS will post all comments to the docket.

- Mail or hand-carry comments to the Department of the Interior; Minerals Management Service; *Attention:* Regulations and Standards Branch (RSB); 381 Elden Street, MS–4024, Herndon, Virginia 20170–4817. Please reference “Allocation and Disbursement of Royalties, Rentals, and Bonuses—Oil and Gas, Offshore, 1010–AD46” in your comments and include your name and return address.

**FOR FURTHER INFORMATION CONTACT:** Marshall Rose, Chief, Economics Division, Offshore Energy and Minerals Management at (703) 787–1538.

**SUPPLEMENTARY INFORMATION:** MMS has extended the deadline by two weeks for submitting comments on the proposed rule in order to give the public additional time to comment on its many new provisions.

Dated: July 23, 2008.

**Walter D. Cruickshank,**  
*Acting Director, Minerals Management Service.*

[FR Doc. E8–17247 Filed 7–25–08; 8:45 am]

BILLING CODE 4310–MR–P

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 73**

[DA 08–1698; MB Docket No. 08–128; RM–11460]

**Television Broadcasting Services; Hendersonville, TN**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a channel substitution proposed by Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network (“Trinity”), the licensee of WPGD–DT, DTV channel 51, Hendersonville, Tennessee. Trinity requests the substitution of DTV channel 33 for channel 51 at Hendersonville.

**DATES:** Comments must be filed on or before August 27, 2008, and reply comments on or before September 11, 2008.

**ADDRESSES:** Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Colby M. May, Esq., P.C., 205 3rd Street, SE., Washington, DC 20003.

**FOR FURTHER INFORMATION CONTACT:** David Brown, [david.brown@fcc.gov](mailto:david.brown@fcc.gov), Media Bureau, (202) 418–1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–128, adopted July 18, 2008, and released July 21, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail <http://www.BCPIWEB.com>. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202)