Annual Review
Statutes & Regulations Panel
Supplementary Materials

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FEDERAL PROCUREMENT STATUTORY UPDATE:

December 2018-December 2019

By Michael J. Schaengold, Melissa P. Prusock & Danielle K. Muenzfeld[1]

I. Small Business Runway Extension Act of 2018, Pub. L. No. 115-324 (Dec. 17, 2018)

On December 17, 2018, President Trump signed into law the Small Business Runway Extension Act of 2018, Pub. L. No. 115-324. The Act changes the formula for determining whether a firm meets revenue-based small business size standards by lengthening the period for calculating average annual receipts from three years to five years. The Act does not change any revenue limits or impact size standards for manufacturing contracts, which are based on employee count.

The purpose of the change is to prevent firms from prematurely becoming ineligible for small business programs because of spikes in revenue. According to the legislative history, allowing firms to average their revenue over five years for small business qualification purposes will give them more stability as they grow, more time to prepare for competition with larger companies, and a greater likelihood of success in the often difficult middle market when they graduate from small business programs. *See* H.R. Rep. 115-939, at 2 (2018); U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-523, FEDERAL CONTRACTING: AWARDS TO MID-SIZED BUSINESSES & OPTIONS FOR INCREASING THEIR OPPORTUNITIES (Aug. 20, 2019), *available at* www.gao.gov/assets/710/700999.pdf (GAO concludes that when companies that received small business set-aside contracts grow and become "mid-size" businesses (i.e., are no longer "small" for FAR and SBA purposes), they have a very difficult time competing for and receiving the award of Federal contracts; for example, GAO found that, between 2008 and 2017, very few small businesses (about 2.5%) grew to mid-size and continued to receive some type of Federal contracts). The Act is designed to improve newly graduated firms' ability to succeed to protect the Federal investment in small business programs and enhance competition among other-than-small contractors.

Before this law was enacted, in April 2018, the Small Business Administration "revised its white paper explaining how it establishes, reviews and modifies small business size standards." 83 Fed. Reg. 18,468 (2018). In the Federal Register notice concerning the revised white paper's publication, SBA advised that a commenter had suggested making the change subsequently implemented by the Act in December. However, SBA rejected the suggestion, stating that

> SBA believes that calculating average annual receipts over three years ameliorates fluctuations in receipts due to variations in economic conditions. SBA maintains that three years should reasonably balance the problems of fluctuating receipts with the overall capabilities of firms that are about to exceed the size standard. Extending the averaging period to five years would allow a business to greatly exceed the size standard for some years and still be eligible for Federal assistance, perhaps at the

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> expense of other smaller businesses. Such a change is more likely to benefit successful small business graduates by allowing them to prolong their small business status, thereby reducing opportunities for currently defined small businesses.

Id. at 18,473-74. SBA's response did not mention that, at the time of the revised white paper's publication, the Small Business Act required SBA to use a three-year averaging period for size standards based on annual receipts.

As noted, the Act amends the Small Business Act to increase the measurement period to five years and overrules SBA's objection to implementing this change. However, the Act may actually hurt certain businesses that have experienced decreasing revenues over five years. For some businesses, the additional two years required to be included in the calculation of average annual receipts for five years may include one or two years of high revenue (in one or both of the first two years of the five-year period), which are followed by declining revenue. Under the new five-year calculation, the business might not be considered small, while under a three-year calculation, the business would be small. Therefore, contrary to its apparent intent, the Act may not help all businesses to stay small for a longer period.

The Act does not specifically require implementing regulations or specify an effective date. As a result, while the formula change arguably should have immediate effect, *see, e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991), SBA issued a notice (effective December 21, 2018), *see* SBA Information Notice No. 6000-180022, that states that the "change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process." GAO and SBA's Office of Hearing and Appeals ("OHA") have declined to overturn this decision. *See TechAnax, LLC; Rigil Corp.*, B-408685.22; B-408685.25, Aug. 16, 2019, 2019 CPD ¶ 294 at 5-7; *Size Appeal of Cyber Analytics, Inc., d/b/a Crown Point Systems*, SBA No. SIZ-6022, 2019 WL 4265910 (Aug. 27, 2019).

The House Committee on Small Business, Subcommittee on Contracting and Infrastructure held a hearing on March 26, 2019, entitled "Cleared for Take-off? Implementation of the Small Business Runway Extension Act," to "consider the current state of H.R. 6330's [i.e., the Small Business Runway Extension Act's] implementation and potential solutions to mitigate any challenges during the process and if steps may be necessary to expand its reach." *See* https://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=477. The hearing "examined SBA's conclusion that the Runway Extension Act was not effective upon enactment and therefore, not applicable to contracts, offers, or bids until the SBA concluded its rulemaking process." *See* H. Rpt. 116-116, accompanying H.R. 2345, at 4. On April 18, 2018, Reps. Stauber and Golden introduced H.R. 2345, Clarifying the Small Business Runway Extension Act, "to address the delay in implementation of the Small Business Runway Extension Act." *See* H. Rpt. 116-116, accompanying H.R. 2345, at 3. In mid-July 2019, the legislation passed the House and was referred to the Senate Committee on Small Business and Entrepreneurship, where it remains pending.

On June 24, 2019, the SBA issued a proposed rule implementing the Small Business Runway Extension Act. *See* 84 Fed. Reg. 29,399. The proposed rule states that it "would affect

the application of SBA's size standard rules after the effective date of a final rule. Thus, until the effective date of a final rule, SBA will continue to apply the 3-year averaging period in the present [13 C.F.R.] § 121.104 for calculating annual average receipts for all SBA's receipts-based size standards." 84 Fed. Reg. 29,399, 29,401. Regulations.gov reports that 218 comments were received. *See* https://www.regulations.gov/document?D=SBA-2019-0006-0001. As of November 4, 2019, although the Comment period closed in August, the SBA has yet to promulgate the final rule.

II. The Federal Acquisition Supply Chain Security Act of 2018, Title II of Pub. L. No. 115-390 (Dec. 21, 2018)

On December 21, 2018, the President signed into law the Strengthening and Enhancing Cyber-Capabilities by Utilizing Risk Exposure Technology ("SECURE Technology") Act. Title II of that Act is the Federal Acquisition Supply Chain Security Act of 2018, *see* 41 U.S.C. §§ 1321-28, 4713. The statute is designed to enable executive agencies to reduce or eliminate "supply chain risk" by excluding or removing certain "sources" or "covered articles" (which include information and communications technology and services) from the supply chain. The legislative history highlights that "[m]any of the technologies the Federal Government relies on for vital, daily functions either could be or already have been targeted by bad actors or hostile nation states. The actors' motivations vary, but the effects are the same: a less secure America." S. Rept. No. 115-408, at 2 (2018). It further makes clear that this Act is intended to address the threat of cyberattacks and espionage by China and Russia. *Id*. at 2-4.

The Act does not enumerate specific sources or covered articles that create supply chain risk. Instead, it provides for the performance of supply chain risk assessments and the authority to exclude or remove sources or covered articles based on the risk assessments.

The Act establishes the Federal Acquisition Security Council, which includes representatives from OMB (the Council Chair), GSA, DHS (including the Cybersecurity and Infrastructure Security Agency), the Office of the Director of National Intelligence (including the National Counterintelligence and Security Center), DOJ (including the FBI), DOD (including the NSA), and the Department of Commerce (including the NIST). The Council's responsibilities include developing a Government-wide strategy for addressing supply chain risks from information and communications technology and services acquisitions; facilitating information sharing within the Government and, as appropriate, with the private sector; and serving as the Government-wide resource for the development of best practices and mitigation activities associated with supply chain risk.

A critical Council responsibility is to "establish criteria and procedures for": (A) "recommending orders applicable to executive agencies requiring the exclusion of sources or covered articles from executive agency procurement actions" ("exclusion orders"); (B) "recommending orders applicable to executive agencies requiring the removal of covered articles from executive agency information systems" ("removal orders"); and (C) "requesting and approving exceptions to an issued exclusion or removal order when warranted by [the] circumstances[.]"

Significantly, the Council shall "issue recommendations, for application to executive agencies or any subset thereof, regarding the exclusion of sources or covered articles from any executive agency procurement action, including source selection and consent for a contractor to subcontract, or the removal of covered articles from executive agency information systems." A notice of the Council's recommendation shall be issued to any source named in the recommendation. The notice must advise that "within 30 days after receipt of notice, the source may submit information and argument in opposition to the recommendation." However, the basis of the Council's recommendation may be withheld from the source "to the extent consistent with national security and law enforcement interests."

Council "recommendations" together with any information submitted in response by a source shall be reviewed by: "(i) The Secretary of Homeland Security, for exclusion and removal orders applicable to civilian agencies[;]" "(ii) The Secretary of Defense, for exclusion and removal orders applicable to [DOD] and national security systems other than sensitive compartmented information systems;" and "(iii) The Director of National Intelligence, for exclusion and removal orders applicable to the intelligence community and sensitive compartmented information systems[.]" These three officials (or their very senior designees) "may issue exclusion and removal orders based upon such [Council] recommendations."

If these officials "issue orders collectively resulting in a governmentwide exclusion, the [GSA] Administrator and officials at other executive agencies responsible for management of the Federal Supply Schedules, governmentwide acquisition contracts and multi-agency contracts shall help facilitate implementation of such orders by removing the covered articles or sources identified in the orders from such contracts." These officials shall annually review such exclusion or removal orders, which may be rescinded.

The Act also provides the head of an executive agency (or appropriate designee) the authority to take "covered procurement actions" with respect to either a single "covered procurement" or a class of "covered procurements." A "covered procurement action" includes: (A) "The exclusion of a source that fails to meet" certain "qualification requirements established under" 41 U.S.C. § 3311 (for testing or other quality assurance demonstration) "for the purpose of reducing supply chain risk in the acquisition or use of covered articles;" (B) "The exclusion of a source that fails to achieve an acceptable rating with regard to an evaluation factor providing for the consideration of supply chain risk in the evaluation of proposals for the award of a contract or the issuance of a task or delivery order;" (C) "The determination that a source is not a responsible source as defined in [41 U.S.C. § 113] based on considerations of supply chain risk;" or (D) "The decision to withhold consent for a contractor to subcontract with a particular source or to direct a contractor to exclude a particular source from consideration for a subcontract under the contract." A covered procurement action can only be taken if a "joint recommendation" is provided to the agency head "by the chief acquisition officer and the chief information officer of the agency" concluding that "there is a significant supply chain risk in a covered procurement."

The agency head must advise the source of the "joint recommendation." The notice must provide that "within 30 days after receipt of the notice, the source may submit information and argument in opposition." If "an urgent national security interest requires the immediate exercise of" covered procurement action authority, the agency head may make a covered procurement action determination and temporarily delay providing notice to the named source. The agency

head must conduct an annual review of such covered procurement action determinations "and promptly amend any covered procurement action as appropriate."

Notably, the Act states that "an exclusion or removal order" shall not be issued, and/or a "covered procurement action" taken, "based solely on the fact of foreign ownership of a potential procurement source that is otherwise qualified to enter into procurement contracts with the Federal Government." With the possible exception of Contract Disputes Act cases, the U.S. Court of Appeals for the District of Columbia Circuit has "exclusive jurisdiction" (under Administrative Procedure Act like review standards) to review an exclusion or removal order, or a "covered procurement action," provided an appeal is filed within 60 days of a source receiving notice of such order or action. The statute further provides that any action under this Act "shall not be subject to administrative review or judicial review, including bid protests before the Government Accountability Office or in any Federal court."

Although this Act became effective on March 21, 2019, it applies to "contracts awarded before, on, or after that date." The Federal Acquisition Security Council is required to issue an implementing interim final rule on December 21, 2019 with a final rule due on December 21, 2020. FAR Case No. 2019-018 has also been opened to implement this Act, presumably with a focus on the "covered procurement action" aspects (i.e., 41 U.S.C. § 4713) of this Act. Assuming no further extensions, a proposed implementing FAR rule is due to be released by November 6, 2019. The exclusion provisions under the Act sunset on December 21, 2023.

III. Good Accounting Obligation in Government Act (Jan. 3, 2019), Pub. L. No. 115-414

On January 3, 2019, the President signed into law the Good Accounting Obligation in Government Act, which is also known as the "GAO-IG Act." Under the Act, in "the annual budget justification submitted to Congress," which accompanies the President's budget, "each agency shall include": (1) "a report listing each public [GAO] recommendation" "designated by [GAO] as 'open' or 'closed, unimplemented' for" not less than 1 year preceding the annual budget justification's submission date; and (2) "a report listing each public recommendation for corrective action from the Office of Inspector General ['OIG']" of an agency that was published not less than 1 year before annual budget justification's submission date, and for which no final action was taken as of the annual budget justification's submission.

In addition, in the annual budget justification submitted to Congress, each agency shall include "a report on the implementation status" of the above-referenced GAO and OIG public recommendations. This report shall include: (A) with respect to a public recommendation designated by GAO as "open" or "closed, unimplemented" that the agency has decided not to implement, "a detailed justification for the decision," or where "the agency has decided to adopt [the recommendation], a timeline for full implementation" "if the agency determines that the recommendation has clear budget implications;" and (B) with respect to a public recommendation for corrective action from an OIG "for which no final action or action not recommended has been taken, an explanation of the reasons why no final action or action not recommended was taken," or where the agency has decided to adopt an unimplemented recommendation, a timeline for implementation. However, for the first 12 months after a public GAO or OIG recommendation is made, "if the agency is determining whether to implement the public recommendation" and

includes a statement to that effect in the annual budget justification, the agency is exempt for that 12 month period from compliance with the report issuance requirements in (A) and (B), above.

To the extent that there are discrepancies between the above-referenced OIG reports and the semiannual OIG reports required to be submitted by 5 U.S.C. App. § 5(a), they must be explained. A similar explanation is required for GAO reports. Agencies are required to provide a copy of the above-referenced reports to GAO and the agency OIG.

The Senate Report for the Act states that "[b]y disclosing open recommendations and being required to explain the lack of implementation in an agency's budget request, agencies will be held more accountable for unimplemented recommendations and Congress and the public can more readily scrutinize an agency's funding request in light of unfulfilled efficiency improvements that may yield cost savings." S. Rep. No. 115-331, at 2 (2018), *quoted in* "Insight: New Law Requires Agencies to Report on Outstanding IG Recommendations" (Congressional Research Service, IN11026, Jan. 28, 2019), at 2. In other words, the Act is designed to increase the transparency of outstanding GAO and OIG recommendations and improve agency accountability for tracking and resolving them.

Under 31 U.S.C. § 720(b), when GAO "makes a report that includes a recommendation to the head of an agency," he or she "shall submit a written statement on action taken or planned on the recommendation" by the agency head. The Act increases from 60 days to 180 days the time period for submission of the statement to the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Oversight and Government Reform, and the "congressional committees with jurisdiction over the agency program or activity that is the subject of the recommendation." The Act also requires that the statement be submitted to the House and Senate Committees on Appropriations "in the first request for appropriations submitted more than 180 days after the date of the [GAO] report." Previously that requirement had been "in the first request for appropriations submitted more than" 60 days. The additional time will enable agencies to "plan substantive action in response to GAO's recommendations and will result in responses that are more useful to congressional committees and GAO in following up on agencies' implementation of the recommendation." S. Rep. No. 115-331, at 3.

IV. Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018 (Jan. 8, 2019), Pub. L. No. 115-425

On January 8, 2019, the President signed into law the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, which (among other actions) amends the Trafficking Victims Protection Act of 2000, impacts several aspects of procurement law, and requires certain changes to the FAR. *See* FAR Subpart 22.17, Combating Trafficking in Persons.

Under Section 101, "Grants to Assist in the Recognition of Trafficking," the HHS Secretary, in consultation with the Secretaries of Education and Labor, "may award grants to local educational agencies, in partnership with a" nongovernmental, nonprofit agency, "to establish, expand, and support programs": (i) "to educate school staff to recognize and respond to signs of labor trafficking and sex trafficking;" and (ii) "to provide age-appropriate information to students on how to avoid becoming victims of labor trafficking and sex trafficking."

Section 111 of the Act, which does not apply to DOD, requires the GSA Administrator to "ensure that any contract entered into for provision of air transportation with a domestic carrier under [49 U.S.C. § 40118] requires that the contracting air carrier submits to the [GSA Administrator], the Secretary of Transportation, the Administrator of the Transportation Security Administration, the Secretary of Labor and the Commissioner of U.S. Customs and Border Protection an annual report" concerning: (1) "the number of personnel trained in the detection and reporting of potential human trafficking," including information on certain required training; (2) "the number of notifications of potential human trafficking victims received from staff or other passengers;" and (3) "whether the air carrier notified the National Human Trafficking Hotline or law enforcement at the relevant airport of the potential human trafficking victim for each such notification of potential human trafficking, and if so, when the notification was made." FAR Case No. 2019-017 has been opened to implement this Section with the report (and draft FAR rule) due date extended to November 20, 2019.

Section 112, which is entitled "Ensuring United States Procurement Does Not Fund Human Trafficking," amends the Trafficking Victims Protection Act of 2000 by adding new subsection (k), "Agency Action To Prevent Funding Of Human Trafficking." This new provision requires the Secretaries of State and Labor, the Administrator of the Agency for International Development ("AID"), and the OMB Director annually "to each submit a report to the GSA Administrator" that describes agency and contractor actions to ensure compliance with the various laws and regulations relating to prohibiting, preventing, investigating and penalizing human trafficking, including training and education related thereto, as well as information on investigations into contractors and subcontractors that may have violated such laws and regulations and any remedial or law enforcement actions taken.

Section 113 of the Act requires that "[a]ny curriculum, including any continuing education curriculum, for the acquisition workforce used by the Federal Acquisition Institute" "shall include at least 1 course, lasting at least 30 minutes, regarding the law and regulations relating to human trafficking and contracting with the Federal Government."

Under Section 206, the AID Administrator is required to annually report to relevant congressional committees: (1) "each obligation or expenditure of Federal funds by the Agency for the purpose of combating human trafficking and forced labor;" and (2) "with respect to each such obligation or expenditure, the program, project, activity, primary recipient, and any subgrantees or subcontractors."

V. The National Defense Authorization Act for FY 2020?

A National Defense Authorization Act ("NDAA") has been passed for the last 58 years. As of November 4, 2019, the NDAA for Fiscal Year ("FY") 2020 has not been passed by Congress or presented to the President. Conference negotiations between the House and Senate on the FY 2020 NDAA continue as of the submission of these materials. Lawmakers are working to reconcile the House (H.R. 2500) and Senate (S. 1790) versions of the FY 2020 NDAA, but remain at odds over several major issues, including border wall funding.

On October 29, 2019, Senator James Inhofe, the Senate Armed Services Committee Chairman, introduced S. 2731, "Essential National Security Authorities Act for Fiscal Year

2020." The bill, referred to as a "skinny NDAA," is a "basic version of the annual defense authorization [and] fulfills Congress's duty to provide for the common defense by extending essential, noncontroversial authorities for national security programs that would otherwise expire soon." Press Release by Sen. Inhofe, "SASC Chairman Inhofe Introduces Bill to Maintain National Defense, Support for Troops" (Oct. 29, 2019), available at https://www.inhofe.senate.gov/newsroom/press-releases/sasc-chairman-inhofe-introduces-bill-to-maintain-national-defense-support-for-troops. This skinny NDAA has various problems, including failing to identify the specific military construction projects to be funded.

We will provide an update on the status of the FY 2020 NDAA at the PubKLaw Annual Review on December 12. While (as noted) an NDAA has been passed by Congress for the last 58 years, the NDAA passage has occasionally been delayed until as late as January of the relevant Fiscal Year.

Rules and Regulations

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Standards: Revised Size Standards Methodology

AGENCY: U.S. Small Business Administration.

ACTION: Notification of availability of white paper.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) advises the public that it has revised its size standards methodology white paper explaining how it establishes, reviews, or revises small business size standards. The revised white paper, entitled ''SBA's Size Standards Methodology (April 2019)'' (Revised Methodology) is available on the SBA's website at *http://www.sba.gov/size-standards-methodology* as well as on the Federal rulemaking portal at *http://www.regulations.gov.* SBA intends to apply the Revised Methodology to the ongoing second five-year comprehensive review of size standards required by the Small Business Jobs Act of 2010 (Jobs Act). On April 27, 2018, SBA published a notification seeking comments on proposed revisions to its size standards methodology. This notification discusses the comments SBA received on the proposed Revised Methodology and Agency's responses, followed by a description of major changes to the methodology and their impacts on size standards.

DATES: The Revised Methodology is effective on April 11, 2019.

FOR FURTHER INFORMATION CONTACT: Khem R. Sharma, Chief, Office of Size Standards, (202) 205–7189 or *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

To determine eligibility for Federal small business assistance programs, SBA establishes small business definitions (commonly referred to as size standards) for all private industries in the United States. SBA's existing size standards use two primary measures of business size: Average annual receipts and number of employees. Financial assets and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC), 7(a), and Certified Development Company (CDC/504) Programs determine small business eligibility using either the industry based size standards or net worth and net income based alternative size standards. Presently, there are 27 different industry based size standards, covering 1,023 North American Industry Classification System (NAICS) industries and 13 ''exceptions.'' Of these, 526 are based on average annual receipts, 505 on number of employees (one of which also includes barrels per day total refining capacity), and five on average assets.

In 2010, Congress passed the Small Business Jobs Act (Jobs Act) (Sec. 1344, Pub. L. 111–240, 124 Stat. 2504, Sept. 27, 2010) requiring SBA to review, every five years, all size standards and make necessary adjustments to reflect market conditions. In 2016, SBA completed the first 5-year review of size standards under the Jobs Act and is now conducting the second 5-year review of size standards. SBA also reviews and adjusts, as necessary, all monetary based size standards for inflation every five years. SBA's latest inflation adjustment to size standards became effective on July 14, 2014 (79 FR 33647 (June 12, 2014)). SBA also updates its size standards, also every five years, to adopt the Office of Management and Budget's (OMB) 5-year NAICS revisions to its table of small business size standards. SBA adopted OMB's 2017 NAICS revisions for its size standards, effective October 1, 2017 (82 FR 44886 (September 27, 2017)).

As part of the previous comprehensive size standards review, in 2009 SBA established a detailed size standards methodology (2009 Methodology) explaining how SBA establishes, reviews, or adjusts size standards based on the evaluation of industry and Federal contracting factors. SBA has now revised the 2009 Methodology to incorporate the recent amendments to the Small Business Act (Act) relating to the establishment of size standards, to address public comments the Agency received on the 2009 Methodology, and to make certain analytical improvements to its size standards analysis based on its own review of the methodology.

On April 27, 2018, SBA published a notification in the **Federal Register** advising the public that the Agency had revised its size standards methodology (Revised Methodology) and made it available on SBA's website at *http://www.sba.gov/size-standards-methodology* and on the Federal rulemaking portal at *http://www.regulations.gov* for review and comments (83 FR 18468). SBA proposed a number of changes to its size standards methodology, including moving from an ''anchor'' approach to a ''percentile'' approach for evaluating industry characteristics, assigning a separate size standard for each NAICS industry instead of selecting a size standard from a limited number of fixed size standards as in the 2009 Methodology, lowering the threshold for selecting industries for the evaluation of the Federal contracting factor to $20 million in annual Federal contracting dollars from the $100 million threshold as in the 2009 Methodology, and applying the 4-firm concentration ratio to all industries, as opposed to using it only when the ratio is 40% or more as in the 2009 Methodology.

SBA sought comments on these changes as well as on a number of policy issues/questions that the Agency faces when developing a methodology for establishing, evaluating, or revising its small business size standards, such as: Whether SBA's size standards should be higher than entry level business size; whether SBA should vary size standards from program to program or geographically; whether SBA should establish a ceiling or cap beyond which a business concern cannot be considered small; whether SBA should apply a single measure of business size for all industries (*i.e.,* employees or annual receipts); and whether SBA should adjust employee based size standards to account for labor productivity, similar to the adjustment of monetary based size standards for inflation. The comment period for the Revised Methodology was from April 27, 2018 to June 26, 2018.

SBA received a total of 14 comments on the proposed Revised Methodology, two of which were not pertinent and

were not considered. The 12 valid comments and SBA's responses thereto are discussed below.

B. Comments on the Proposed Revised Methodology

1. Comments on Calculation of Average Annual Receipts

Five commenters suggested that SBA should revise its method for calculating the average annual receipts for size standards purposes by allowing firms to use the three lowest annual receipts over the preceding five years or, at least, to calculate the average annual receipts over the preceding five years, as opposed to the three preceding years. The commenters argued that the increased use of large contract vehicles (such as governmentwide acquisition vehicles or indefinite-delivery, indefinite-quantity contracts) to award Federal contracts to small businesses can cause very rapid growth in firms' size, thereby resulting in the loss of their small business status. The commenters asserted that small businesses need time to develop infrastructure to be able to compete for unrestricted procurements with large firms after graduating to other-than-small status. Commenters also mentioned that some industries are subject to fluctuating market conditions that may skew average annual receipts calculated over the 3-year period.

Three commenters suggested that SBA should only consider Federal contractor size when determining average firm size within any NAICS industry. They noted that including firms which do not do business with the Federal Government could skew the true size of businesses participating in Federal contracting, resulting in size standards that are not reflective of government buying practices.

One commenter asserted that firms should be allowed to deduct subcontractor costs from annual receipts calculations. The commenter argued that subcontracting services can be very expensive and take up a substantial portion of the total contract value, at least for Advertising Agencies (NAICS 541810).

SBA's Response

Any consideration to change the rule on how SBA calculates average annual receipts for size standards or any other part of SBA's small business regulations would require formal rulemaking in accordance with the Administrative Procedure Act. The purpose of the size standards methodology white paper is to explain what data sources and factors SBA considers when establishing and revising size standards, but not to change SBA's small business regulations.

The Small Business Runway Extension Act of 2018 (Runway Extension Act) (Pub. L. 115–324 (Dec. 17, 2018)) amended section 3(a)(2)(C)(ii)(II) of the Small Business Act by changing the period for calculation of annual average receipts of businesses providing services from three (3) years to five (5) years. This change to the calculation of annual average receipts requires the issuance of a proposed rule and approval by the SBA Administrator. Accordingly, SBA will be initiating a rulemaking to implement the new law into SBA's regulations. Businesses must continue to report their annual receipts based on a 3-year average until SBA amends its regulations.

SBA would not consider the average size of government contractors only as a measure of average firm size in establishing size standards for several reasons. First, SBA's size standards are used not only for Federal procurement purposes, but also for various non-procurement purposes, including establishing eligibility for SBA's loan programs, conducting flexibility regulatory analyses for Federal rulemaking under the Regulatory Flexibility Act, and determining eligibility for small business exemptions from certain Federal reporting and compliance requirements. Second, firms that are government contractors in an industry do not provide an adequate representation of all firms that are interested, willing, or able to perform Federal work in that industry. For example, of about 5.5 million employer firms in the U.S., only about 400,000 firms (or about 7.2 percent) are registered in the System for Award Management (SAM) for Federal contracting purposes, of which about 38 percent have received any Federal contracts during fiscal years 2014–2017. Third, for size standards purposes, SBA considers receipts from all sources (*e.g.,* commercial, Federal, etc.) and the receipts data on government contractors in SAM and the Federal Procurement Data System—Next Generation (FPDS–NG) also include receipts from all sources, not just from Federal work. Fourth, as current size standards are, on average, several times higher than the average size of all firms in the industry, SBA's size standards already reflect that firms that receive Federal contracts are typically larger than all firms in the overall industry. Finally, in accordance with the Jobs Act, every five years, SBA reviews, and adjusts, where necessary, all size standards to ensure that they reflect current market conditions, including government buying trends.

SBA's regulation in 13 CFR 121.104(a) provides several exclusions from the calculation of receipts for size standards purposes, but subcontracting costs is not one of them, meaning that subcontracting costs are part of receipts and cannot be excluded from the calculation. However, as stated in Footnote 10 to the SBA table of size standards, for certain industries, including Advertising Agencies (NAICS 541810), funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions, are excluded from receipts. Subcontracting occurs in most industries (although at varying degrees) and may even vary from firm to firm within the same industry. For example, while some small businesses may want to perform all or most of their Federal work themselves, others may elect to subcontract a large part or most of their work out to others. Allowing businesses to exclude subcontractor costs from receipts would put firms performing most of their work in-house in serious competitive disadvantage relative to those who subcontract a significant portion of their work out to others. This may also encourage businesses to subcontract more of their set-aside contract work to others to maintain their small business status, which would defeat the very intent of the set-aside program, especially if the work is subcontracted out to large businesses. As stated elsewhere in this notification, any consideration to amend the rule on how SBA defines and calculates receipts for size purposes would require formal rulemaking. Additionally, the methodology white paper is not meant to address issues concerning size standards for specific industries. SBA will consider such issues in future rulemakings as part of the ongoing second 5-year review of size standards under the Jobs Act.

2. Comment on Data Sources

One commenter argued that SBA should not use the 2012 Economic Census data for evaluating industry characteristics. The commenter argued that the 2012 Economic Census only reflects industry conditions before 2012 and is, therefore, outdated. The commenter suggested that SBA should look at industry-specific publications that provide richer and more current industry data. To support its argument that the Advertising Agencies size standard should be higher than the current $15 million, the commenter submitted reports from the two industry associations.

SBA's Response

While the methodology states that the 2012 Economic Census data is the latest available principal source of industry data that SBA uses for size standards analysis, SBA will consider the 2017 Economic Census data as it becomes available, as well as any other newer data available from other sources, including industry specific publications, provided that such data provides an accurate and comprehensive representation of all firms within the industry. However, many industry publications do not provide a comprehensive picture of the industry they represent. For example, the two industry associations referred to by one of the commenters included about 600–700 advertising agencies, whereas there are more than 12,000 advertising firms in the United States. SBA believes that, for consistency, all industries sharing the same measure of size standards (such as receipts based or employee based) should be evaluated using the single set of industry data. Moreover, the data from industry publications does not usually provide information on all industry factors that SBA examines when establishing size standards. Not all industries have industry publications and, where they do, the information is likely to be incomplete and inconsistent with the Economic Census data SBA uses for size standards analysis. However, SBA will consider any industry specific data submitted as part of the public comments to proposed rulemakings. Despite a time lag for the availability of the Economic Census data, SBA believes that the Economic Census is still the most consistent and comprehensive data available out there for evaluating industry structure to comply with the statutory requirement that the size standards vary from industry to industry in order to reflect differences in characteristics among the various industries.

3. Comments on Industry Analysis

One commenter suggested using the median instead of the mean for average firm size calculations. The same commenter also did not see the usefulness of using the ''percentile'' approach in the Revised Methodology and asked where the ''anchor'' size standard values came from. Another commenter, however, agreed with SBA's proposal to replace the ''anchor'' approach in the 2009 Methodology with the ''percentile'' approach in the Revised Methodology. The commenter stated that the new approach provides a reasonable methodology for incorporating the economic characteristics of individual industries into SBA's size standards analysis and suggested that, for transparency, SBA should provide the primary factor values and associated size standards supported by each factor for each industry and sub-industry reviewed. This commenter disagreed with the idea to use the median instead of the mean as a measure of the average firm size.

SBA's Response

In response to these opposing comments (*i.e.,* one supporting the median and another supporting the mean), SBA conducted analyses using both the mean (simple average) and the median firm size. In terms of numbers of industries for which size standards would change or remain the same, the results from the two approaches were very similar for a large majority of industries. For most industries where the levels of calculated size standards differed between the two approaches, such differences were generally small. SBA has provided a detailed justification in the Revised Methodology white paper for replacing the old ''anchor'' approach with the new ''percentile'' approach. SBA has determined that the ''percentile'' approach provides a better approach to evaluating differences among industries and varying size standards accordingly. In addition, as stated in the Revised Methodology, the ''anchor'' approach that entails grouping all industries under a common (so-called ''anchor'') size standard (*i.e.,* the size standard shared by most industries) is inconsistent with the statute that such groupings should be limited to the 4-digit NAICS level. For these reasons, SBA will continue to use the simple average (mean) as one of the two measures of firm size (other being the weighted average) and is adopting the ''percentile'' approach to evaluate industry characteristics, as proposed.

SBA does not provide in the methodology white paper the primary factor values and associated size standards supported for each industry and sub-industry in the methodology as the results are likely to change with the availability of new data. The methodology is intended to explain SBA's approach to establishing, reviewing, or adjusting size standards. SBA will provide such results for the public review and comment on individual proposed rulemakings on reviews of size standards for various NAICS sectors.

4. Comments on Number of Size Standards and Rounding

One commenter agreed with SBA's approach to rounding size standards to the nearest $500,000 for receipts based size standards and to the nearest 50 employees for employee based size standards (or to the nearest 25 employees for employee based size standards in Wholesale Trade and Retail Trade). This commenter believed that the increased number of and reduced increments between size standards would limit the effect of errors, counteract the limitations of the data used by SBA in calculating size standards, and ensure that similar industries are treated in an equitable fashion, and more accurately reflect each industry's economic characteristics. The same commenter disagreed with SBA's policy of capping calculated size standards at some predetermined maximum levels instead of allowing the data to determine what the maximum size standard levels should be. If the agency decides to continue with this policy, the commenter suggested that capping should be applied for the calculation of the aggregated size standard, not for size standard for each factor individually. Another commenter questioned where do the minimum and maximum size standards levels come from, although they were fully explained in the proposed Revised Methodology.

SBA's Response

The National Defense Authorization Act of Fiscal Year 2013 (NDAA 2013) (Pub. L. 112–239, Section 1661, Jan. 2, 2013) amended the Small Business Act requiring SBA not to impose the limitation on the number of size standards and to establish specific size standards for each NAICS industry. In absence of any adverse comments to this approach, SBA is adopting the number of size standards and the rounding procedure, as proposed.

Allowing the data alone to determine a maximum size standard would lead to very high size standards for some industries, thereby allowing very successful businesses with hundreds of millions in receipts or tens of thousands of employees to qualify as small and be eligible for Federal assistance intended for small businesses. For example, under receipts based size standards, if not capped, about 20 industries (excluding Retail Trade) would end up with a size standard of $100 million or more (with some being as high as more than $1 billion) and another 30 industries would have a size standard between $50 million and $100 million,

as compared to the proposed receipts based cap of $40 million and the current maximum of $38.5 million. Similarly, for employee based size standards, about a dozen industries would end up with having a size standard of 5,000 employees or more (some being as large as 20,000 employees) and another 25 would have a size standard between 2,000 employees and 5,000 employees, as compared to the proposed and current maximum of 1,500 employees. From a policy standpoint, it would be almost impossible for SBA to justify such large businesses as small for Federal small business programs. Additionally, in the absence of caps, the calculated size standards will be very small (in some cases even negative) for some industries such that businesses qualifying as small would not only lack capabilities to meet the Federal Government small business procurement requirements, but also businesses graduating out of such small size standards would not have yet developed enough size to be competitive in the market and would still need Federal support to grow and be competitive on their own. SBA believes that such very high or very low size standards would not enable the Agency to effectively fulfill its critical mission to serve and protect the interests of American small businesses. Accordingly, SBA is adopting its policy of capping calculated size standards, both at the factor level and the aggregate level, at maximum or minimum values, as proposed.

5. Comments on Federal Contracting Factor

One commenter noted the asymmetry in using the Federal contracting factor to increase size standards when small business Federal contract shares are lower than for their overall market shares while not decreasing them when those shares are higher than the overall market share. Another commenter agreed with the increased utilization of the Federal contracting factor for industries with at least $20 million in Federal contracting dollars (as opposed to a $100 million level in the previous methodology). This commenter felt that the adoption of a lower threshold allows for a more detailed analysis of competitive and economic characteristics of relevant industries. However, the commenter disagreed with SBA's use of ''maximum size caps'' as it would not allow, the commenter argued, the size standard to increase according to the Federal contracting factor.

SBA's Response

The objective of the Federal contracting factor is to assess how successful small businesses have been in receiving Federal contracts under the current size standards and to adjust them if small businesses are not faring well in the Federal marketplace relative to the overall market, but not to penalize small businesses by lowering size standards where they are doing well. Generally, SBA adjusts size standards upwards for industries where the small business shares in the Federal market are substantially lower (*i.e.,* 10 percent or more) than their shares in the overall market and maintains them at their current levels (instead of lowering them) for industries where those differences are less than 10 percent or where small business shares in the Federal market are higher than the small business shares in the overall market. Lowering size standards, simply because the shares of small businesses in the Federal contracts are higher than their shares in the industry's overall market, would not serve the interests of small businesses or contribute to SBA's mission to ensure that small businesses receive a fair proportion of Federal government contracts. Accordingly, for the Federal contracting factor, SBA will maintain size standards at their current levels where the small business shares of the Federal market are higher than the small business shares in the overall market. Additionally, to be consistent, SBA will apply the same capping procedure for all factors, including the Federal contracting factor.

6. Comments on Industry Competition

One commenter stated that he did not feel the ''industry competition'' or ''size distribution of firms'' were necessary factors for analyzing industry structure. This commenter suggested examining a correlation matrix of all factors, which may result in the need of using only one or two factors to determine size standards. The commenter also insisted that the Herfindahl index is a more generally accepted measure of industry competitive structure and that this is preferable to the four- or eight-firm concentration ratio. A different commenter agreed with the use of a four-firm concentration ratio for all industries in the Revised Methodology, as opposed to using it only for those industries where that ratio was 40 percent or higher in the 2009 Methodology.

SBA's Response

The statute requires that small business definitions vary from industry to industry to reflect differences among the various industries. For that, in accordance with its regulations in 13 CFR 121.102, SBA evaluates four industry factors, namely average firm size, average assets as a proxy for start-up costs and entry barriers, industry competition, and size distribution of firms. SBA examined correlations among all industry factors and found that using just one or two factors alone would not adequately account for differences among the various industries. To account for industry competition, SBA also tried using the Herfindahl index instead of the four-firm concentration ratio and the results were found to be very similar between the two measures. Because it is simpler and easier to explain to the public and it has long been used for SBA's size standards analyses, in the Revised Methodology, SBA is adopting the four-firm concentration ratio as a measure of industry competition.

7. Comments on Industry-Specific Size Standards

Several commenters expressed various viewpoints concerning size standards for various industries as well as how NAICS codes should be defined for contracting purposes. One commenter suggested creating a new NAICS code to accommodate firms supplying finished products to the government as ''nonmanufacturers'' while also performing supply chain management and distribution services. Another commenter argued that the size standards for sale and rental of heavy equipment should be harmonized by changing the receipt based size standard for the equipment rental companies to the one that is employee based. A further commenter proposed adding additional sub-industry categories (or ''exceptions'') to NAICS codes 541330, 541513, and 236220 to more adequately describe the scope of Federal work in these industries. This commenter also felt that the size standards for some industries in NAICS Sector 54 and Subsector 236 should be raised. Yet another commenter argued that the size standard for NAICS code 561440 should be higher than the current $15 million level. A final commenter disagreed with SBA's approach in a 2016 final rule to excluding the largest firms in its calculation of the employee based size standard for the Environmental Remediation Services (ERS) exception to NAICS 562910 (Remediation Services). It further argued that no firms at the proposed 1,250-employee size standard would have been dominant in the ERS industry. The same commenter also suggested that SBA should provide

a full description of SBA's approach to evaluating industries with size standards exceptions.

SBA's Response

SBA neither defines nor modifies NAICS industry definitions. It simply adopts the NAICS industry definitions and their updates, as published by OMB. Any suggestions for the creation of new NAICS industry categories should be submitted during OMB's notice and comment process of its reviews and revisions of the NAICS definitions. Every five years, OMB (in coordination with government statistical agencies in the U.S., Canada and Mexico) reviews and modifies existing NAICS definitions or creates new ones to ensure that industry definitions reflect changes in the economy.

Some firms may elect to both sell and rent the equipment. However, because firms that are primarily engaged in the equipment rental activity are very different from those primarily engaged in selling equipment (as a manufacturer or a distributor), the industry data does not support the same size standard for the two groups. Accordingly, whereas SBA's size standards for equipment rental industries are based on receipts, those for equipment manufacturers and distributors are based on employees. A firm that sells the equipment that it did not manufacture itself is considered a nonmanufacturer and can qualify as small under the 500-employee nonmanufacturer size standard.

The size standards methodology does not revise any size standards as such. It only explains the methodology on how SBA establishes and reviews size standards. Therefore, with the release of the final Revised Methodology, SBA is not making any changes to any size standards that are currently in effect. However, as part of the ongoing second 5-year comprehensive review of size standards under the Jobs Act, SBA will review all size standards and make necessary adjustments in the coming years to ensure that they reflect current industry and Federal market conditions. The Agency plans to issue proposed rules on all receipts based size standards, including those in NAICS Sector 54 and Subsector 236, in the near future. Depending upon the results from the analysis of the latest data available, some industries may see their size standards adjusted, while others may see no changes. Interested parties will have opportunity to comment on SBA's proposed size standards and suggest alternatives, along with supporting data and analysis, if they believe that the proposed standards are not appropriate.

As the industry data from the Economic Census are limited to the 6-digit NAICS levels, SBA does not have the necessary data to be able to create new sub-industry categories below the 6-digit levels and establish size standards thereto. SBA is already faced with difficulty in reviewing size standards for the existing sub-industry categories (''exceptions'') particularly because the industry data from SAM and FPDS–NG used to evaluate these ''exceptions'' are not consistent with the industry data from the Economic Census that SBA uses to evaluate industry characteristics.

When evaluating the SAM and FPDS–NG data for reviews of size standards under ''exceptions,'' SBA trims the data on firms on both ends of the size distribution to prevent extreme observations (*i.e.,* observations with questionable receipts values given the number employees or vice versa) from distorting the results. Additionally, to make the SAM and FPDS–NG data more consistent with the Economic Census tabulations where an industry's data only includes firms that are primarily engaged in that industry, SBA also removes very large firms for which the contribution of Federal contracts under that ''exception'' is quite small relative to their overall enterprise revenues. Accordingly, SBA removed from the evaluation of the ERS size standard a few of the largest firms for which Federal contracts received under that ''exception'' accounted for less than 25 percent of their overall receipts. Additionally, several commenters opposing the proposed size standard also argued that the large, diversified environmental firms for which the Federal environmental remediation work is not their major activity should be excluded in evaluating the ERS size standard. While the law states that a firm qualifying as small should not be dominant in its industry, it does not, however, mean that all non-dominant firms can or should be classified as small. In response to the comment, in the final Revised Methodology, SBA is including a new section describing its general approach to evaluating the size standard for ''exceptions.''

8. Comments on Policy Issues

Several commenters addressed various policy issues concerning the size standards methodology for which SBA sought comments and suggestions from interested parties. These comments are discussed below.

a. Should SBA establish size standards that are higher than industry's entry-level business size?

One commenter stated that it made sense for size standards to be higher than the industry entry-level size since firms larger than entry-level size could still experience disadvantages in the industry. However, the commenter suggested imposing time limits for participation in SBA programs to disincentivize firms to remain at an inefficient size.

SBA's Response

Except for businesses participating in the 8(a) business development program, SBA does not impose time limits for eligibility for small business programs. Doing so would be too complicated as the time to reach an efficient size is likely to vary from industry to industry and firm to firm within an industry, not to mention the complexity time limits would add to determining eligibility for such programs.

b. Should size standards vary from program to program or geographically?

Two commenters agreed with SBA that varying size standards by program or geography would create confusion and be difficult to administer.

SBA's Response

SBA's methodology provides for establishing a single set of industry specific size standards for both SBA's financial programs and Federal procurement programs. Similarly, as size standards are applied at the national level and market dominance is evaluated nationally, SBA does not vary size standards geographically.

c. Should there be a single basis for size standards—i.e., should SBA apply the number of employees, receipts, or some other basis to establish its size standards for all industries?

One commenter who addressed this issue asserted that receipts are the best measure for determining size, not gross profits. Using gross profits would require, the commenter maintained, SBA to review a concern's balance sheet, possibly with risks of disclosure of the concern's financial records to its competitors.

SBA's Response

SBA does not use profits as a measure of business size for any industry nor does it review a concern's balance sheet or financial records for size standards analysis, except for size determination of a company whose small business size status is protested. SBA mostly uses either receipts or number of employees.

As explained in the methodology, SBA uses receipts for most services, retail trade, construction and agricultural enterprises and employees for all manufacturing, most mining and utilities, and a few other industries.

d. Should there be a ceiling beyond which a business concern cannot be considered as small?

One commenter thought a maximum ceiling was a good idea but acknowledged it might be somewhat arbitrary. Another commenter strongly disagreed with placing ''caps'' on size standards and reasoned that SBA should follow the results from its analysis when establishing size standards and allow natural maximums to develop based on the data. The commenter felt that imposing caps on size standards before conducting the economic data analysis would be arbitrary and non-transparent.

SBA's Response

SBA has addressed this issue elsewhere in this notice, that capping calculated size standards at certain minimum and maximum levels is crucial for fulfilling its mission to serve and protect the interests of American small businesses and ensuring that Federal small business assistance goes to small businesses in need of such assistance the most.

e. Should there be a fixed number of size standard ranges or ''bands'' as SBA applied for the recently completed comprehensive size standards review?

Two commenters agreed with using ''bands'' of size standards across related industries. One of them further recommended putting groups of related industries under the same size standards. The use of size standard ''bands,'' the commenters noted, prevents confusion and could also discourage size protests.

SBA's Response

While SBA agrees that using ''bands'' or limited number of fixed size standard levels (as under the previous methodology) would simplify size standards, it would run counter to the statute that there shall not be any limitation on the number of size standards and that each NAICS industry be assigned the appropriate size standard. SBA has, in the past, used common size standards for industries within certain NAICS Industry Groups, even if the data suggested different standards for individual industries in the group. However, a 2013 amendment to the statute limits the use of common size standards, except where a justification would exist for establishing a single size standard for industries within the 4-digit NAICS Industry Group, provided that such size standard is appropriate for each individual industry in the group. Thus, in view of these statutory limitations on the number of size standards and use of common size standards, SBA is adopting the size standards structure, as proposed.

f. Should SBA consider adjusting employee based size standards for labor productivity growth or increased automation?

Three commenters disagreed with the idea of adjusting employee-based size standards for productivity and/or automation. While one commenter thought that this would be arbitrary, another stated that the effects of productivity changes are already captured in the Economic Census data that SBA uses for industry analysis. The third commenter asserted that labor productivity changes are too small to warrant meaningful size standard adjustments and would already be captured in each 5-year comprehensive industry review. This commenter also believed that productivity growth would have to be accounted for on an industry-by-industry basis which would result in a very complicated adjustment process.

SBA's Response

SBA does not quite agree that adjusting employee based size standards for productivity would be arbitrary as there is available data on measures of productivity, both by industry (by NAICS subsector or industry group) and for the overall economy. However, SBA agrees that accounting for productivity changes on an industry-by-industry basis would entail a complicated methodology. SBA concurs with the commenters that the effects of productivity changes are already captured by the Economic Census data and would be reflected in the 5-year size standards reviews. Accordingly, the Revised Methodology does not provide for adjustments to employee based size standards for productivity changes.

g. Should SBA consider lowering its size standards?

One commenter stated that SBA should perhaps consider lowering size standards depending on the goals of its programs. Another commenter opposed lowering size standards in view of the government procurement trend of using larger and longer-term procurements.

SBA's Response

As stated in the Revised Methodology, while the results from SBA's analysis of the relevant data would serve as a principal basis for proposing revisions to size standards, other factors (such as public comments, administration's policies and priorities, the current market conditions, and impacts on small businesses) would also be important when proposing or finalizing size standards revisions. When SBA decides to deviate from the results of its analysis, it would provide in the rule a detailed justification for such decisions.

C. Changes in the Revised Methodology

The Revised Methodology, entitled ''SBA's Size Standards Methodology (April 2019)'', is available for review and download on the SBA's website at *http://www.sba.gov/size-standards-methodology* as well as on the Federal rulemaking portal at *http://www.regulations.gov.* It describes in detail how SBA establishes, evaluates, or adjusts its small business size standards pursuant to the Act and related legislative guidelines. Specifically, the document provides a brief review of the legal authority and early legislative and regulatory history of small business size standards, followed by a detailed description of the size standards analysis.

Section 3(a) of the Act (15 U.S.C. 632(a); Pub. L. 85–536, 67 Stat. 232, as amended) provides SBA's Administrator (Administrator) with authority to establish small business size standards for Federal government programs. The Administrator has discretion to determine precisely how small business size standards should be established. The Act and its legislative history highlight three important considerations for establishing size standards. First, size standards should vary from industry to industry according to differences among industries. 15 U.S.C. 632(a)(3). Second, a firm that qualifies as small shall not be dominant in its field of operation. 15 U.S.C. 632(a)(1). Third, pursuant to 15 U.S.C. 631(a), the policies of the Agency should be to assist small businesses as a means of encouraging and strengthening their competitiveness in the economy. These three considerations continue to form the basis for SBA's methodology for establishing, reviewing, or revising small business size standards.

1. Industry Analysis

SBA examines the structural characteristics of an industry as a basis to assess differences among the various industries and the overall degree of competitiveness of the industry and of firms therein. As described more fully in the Revised Methodology document, SBA generally evaluates industry

structure by analyzing four primary factors—average firm size (both the simple and weighted average), degree of competition within an industry (the 4-firm concentration ratio), start-up costs and entry barriers (average assets as a proxy), and distribution of firms by size (the Gini coefficient). This approach to assessing industry characteristics that SBA has applied historically remains very much intact in the Revised Methodology. As the fifth primary factor, SBA assesses the ability of small businesses to compete for Federal contracting opportunities under the current size standards. For this, SBA examines the small business share of total Federal contract dollars relative to the small business share of total industry's receipts for each industry. SBA also considers other secondary factors as they relate to specific industries and interests of small businesses, including technological change, competition among industries, industry growth trends, and impacts of the size standards on SBA programs.

While the factors SBA uses to examine industry structure remain intact, its approach to assessing the differences among industries and translating the results to specific size standards has changed in the Revised Methodology. Specifically, in response to the public comments against the ''anchor'' size standards approach applied in the previous review of size standards, a recent amendment to the Act limiting the use of common size standards (*see* section 3(a)(7) of the Act under NDAA 2013), and SBA's own review of the methodology, in the Revised Methodology, SBA replaces the ''anchor'' approach with a ''percentile'' approach as an analytical framework for assessing industry differences and deriving a size standard supported by each factor for each industry.

Under the ''anchor'' approach, SBA generally compared the characteristics of each industry with the average characteristics of a group of industries associated with the ''anchor'' size standard. For the recent review of size standards, the $7 million was the ''anchor'' for receipts based size standards and 500 employees was the ''anchor'' for employee based size standards (except for Wholesale Trade and Retail Trade). If the characteristics of a specific industry under review were similar to the average characteristics of industries in the anchor group, SBA generally adopted the anchor standard as the appropriate size standard for that industry. If the specific industry's characteristics were significantly higher or lower than those for the anchor group, SBA assigned a size standard that was higher or lower than the anchor.

In the past, including the recent review of size standards, the anchor size standards applied to a large number of industries, making them a good reference point for evaluating size standards for individual industries. For example, at the start of the recent review of size standards, the $7 million (now $7.5 million due to the adjustment for inflation in 2014) anchor standard was the size standard for more than 70 percent of industries that had receipts based size standards. A similar proportion of industries with employee based size standards had the 500-employee anchor standard. However, when the characteristics of those industries were evaluated individually, for a large majority of them the results yielded a size standard different from the applicable anchor. Consequently, now just 24 percent of industries with receipts based size standards and 22 percent of those with employee based size standards have the anchor size standards. Additionally, section 3(a)(7) of the Act limits the SBA's ability to create common size standards by grouping industries below the 4-digit NAICS level. The ''anchor'' approach would entail grouping industries from different NAICS sectors, thereby making it inconsistent with the statute.

Under the ''percentile'' approach in the Revised Methodology, SBA ranks each industry within a group of industries with the same measure of size standards using each of the four industry factors. As stated earlier, these four industry factors are average firm size, average assets size as proxy for startup costs and entry barriers, industry competition (the 4-firm concentration ratio), and distribution of firms by size (the Gini coefficient). As detailed in the Revised Methodology, the size standard for an industry for a specific factor is derived based on where the factor of that industry falls relative to other industries sharing the same measure of size standards. If an industry ranks high for a specific factor relative to most other industries, all else remaining the same, a size standard assigned to that industry for that factor is higher than those for most industries. Conversely, if an industry ranks low for a specific factor relative to most industries in the group, a lower size standard is assigned to that industry. Specifically, for each industry factor, an industry is ranked and compared with the 20th percentile and 80th percentile values of that factor among the industries sharing the same measure of size standards (*i.e.,* receipts or employees). Combining that result with the 20th percentile and 80th percentile values of size standards among the industries with the same measure of size standards, SBA computes a size standard supported by each industry factor for each industry. The Revised Methodology provides detailed illustration of the statistical analyses involved in this approach.

2. Number of Size Standards

SBA applied a limited number of fixed size standards in the 2009 Methodology used in the first 5-year review of size standards: Eight revenue based size standards and eight employee based size standards. In response to comments against the fixed size standards approach and section 3(a)(8) of the Act requiring SBA to not limit the number of size standards, in the Revised Methodology, SBA has relaxed the limitation on the number of small business size standards. Specifically, SBA will calculate a separate size standard for each NAICS industry, with a calculated receipts based size standard rounded to the nearest $500,000, except for industries in NAICS Subsectors 111 (Crop Production) and 112 (Animal Production and Aquaculture) for which the calculated standard is rounded to the nearest $250,000. Similarly, a calculated employee based size standard is rounded to the nearest 50 employees for the manufacturing and other industries with employee based standards, except those in Wholesale Trade and Retail Trade for which the calculated standard is rounded to the nearest 25 employees.

However, as a policy decision, SBA will continue to maintain the minimum and maximum size standard levels. Accordingly, SBA will not generally propose or adopt a size standard that is either below the minimum or above the maximum level, even though the calculations might yield values below the minimum or above the maximum level. The minimum size standard generally reflects the size a small business should be to have adequate capabilities and resources to be able to compete for and perform Federal contracts. On the other hand, the maximum size standard represents the level above which businesses, if qualified as small, would cause significant competitive disadvantage to smaller businesses when accessing Federal assistance. SBA's minimum and maximum size standards are shown in Table 1, ''Minimum and Maximum Receipts and Employee Based Size Standards,'' below.

TABLE 1—MINIMUM AND MAXIMUM RECEIPTS AND EMPLOYEE BASED SIZE STANDARDS

Type of size standards	Minimum	Maximum
Receipts based size standards (excluding agricultural industries in Subsectors 111 and 112)	$5 million	$40 million.
Receipts based size standards for agricultural industries in Subsectors 111 and 112	$1 million	$5 million.
Employee based standards for Manufacturing and other industries (except Wholesale and Retail Trade).	250 employees	1,500 employees.
Employee based standards in Wholesale and Retail Trade	50 employees	250 employees.

With respect to receipts based size standards, SBA is establishing $5 million and $40 million, respectively, as the minimum and maximum size standard levels (except for most agricultural industries in Subsectors 111 and 112). These levels reflect the current minimum receipts-based size standard of $5.5 million and the current maximum of $38.5 million, rounded for simplicity. Section 1831 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017) (Pub. L. 114–328, 130 Stat. 2000, December 23, 2016) amended the Act directing SBA to establish and review size standards for agricultural enterprises in the same manner it establishes and reviews size standards for all other industries. The evaluation of the industry data from the 2012 Census of Agriculture (the latest available) seems to suggest that $5 million minimum and $40 million maximum size standards would be too high for agricultural industries in Subsectors 111 and 112. Accordingly, SBA is establishing $1 million as the minimum size standard and $5 million as the maximum size standard for industries in NAICS Subsector 111 (Crop Production) and Subsector 112 (Animal Production and Aquaculture). Regarding employee based size standards, SBA's minimum and maximum levels for manufacturing and other industries (excluding Wholesale and Retail Trade) reflect the current minimum and maximum size standards among those industries. For employee based size standards for wholesale and retail trade industries, the proposed minimum and maximum values are the same as what SBA used in its 2009 Methodology.

3. Evaluation of Federal Contracting Factor

For industries where Federal contracting is significant, SBA considers Federal contracting as one of the primary factors when establishing, reviewing, or revising size standards. Under the 2009 Methodology that was applied in the previous comprehensive size standards review, SBA evaluated the Federal contracting factor for industries with $100 million or more in Federal contract dollars annually for the latest three fiscal years. However, the analysis of the FPDS–NG data suggests that the $100 million threshold is too high, thereby rendering the Federal contracting factor irrelevant for about 73 percent of industries (excluding wholesale trade and retail trade industries that are not used for Federal contracting purposes), including those for which the Federal contracting factor is significant (*i.e.,* the small business share of industry's total receipts exceeding the small business share of industry's total contract dollars by 10 percentage points or more). Thus, SBA determined that the threshold should be lowered. In the Revised Methodology, SBA evaluates the Federal contracting factor for industries with $20 million or more in Federal contract dollars annually for the latest three fiscal years. Under the $20 million threshold, excluding wholesale trade and retail trade industries, nearly 50 percent of all industries would be evaluated for the Federal contracting factor as compared to just about 27 percent under the $100 million threshold. Because NAICS codes in Wholesale Trade and Retail Trade do not apply to Federal procurement, SBA does not consider the Federal contracting factor for evaluating size standards industries in those sectors.

For each industry averaging $20 million or more in Federal contract dollars annually, SBA compares the small business share of total Federal contract dollars to the share of total industrywide receipts attributed to small businesses. In general, if the share of Federal contract dollars awarded to small businesses in an industry is 10 percentage points or more lower than the small business share of total industry's receipts, keeping everything else the same, a justification would exist for considering a size standard higher than the current size standard. In cases where that difference is less than 10 percent or the small business share of the Federal market is already higher than the small business share of the overall market, it would generally support the current size standards.

4. Evaluation of Industry Competition

For the reasons provided in the Revised Methodology and discussed above with respect to the public comments, SBA continues to use the 4-firm concentration ratio as a measure of industry competition. In the past, SBA did not consider the 4-firm concentration ratio as an important factor in size standards analysis when its value was below 40 percent. If an industry's 4-firm concentration ratio was 40 percent or higher, SBA used the average size of the four largest firms as a primary factor in determining a size standard for that industry. In response to public comments as well as based on its own evaluation of industry factors, in the Revised Methodology SBA apples all values of the 4-firm concentration ratios directly in the analysis, as opposed to using the 40 percent rule. Based on the 2012 Economic Census data, the 40 percent rule applies only to about one-third of industries for which 4-firm ratios are available. For the same reason, SBA is also dropping the average firm size of the four largest firms as an additional factor of industry competition. Moreover, the four-firm average size is found to be highly correlated with the weighted average firm size, which is used as one of the two measures of average firm size.

5. Summary of and Reasons for Changes

Table 2, ''Summary of and Reasons for Changes,'' below, summarizes what has changed in the Revised Methodology as compared to the 2009 Methodology and the impetus for such changes, specifically whether the changes are based on statute or discretionary.

TABLE 2—SUMMARY OF AND REASONS FOR CHANGES

Process/factor	Current	Revised	Reason
Industry analysis	"Anchor" approach ..... Average characteristics of industries with so called "anchor" size standards formed the basis for evaluating individual industries.	"Percentile" approach ..... The 20th percentile and 80th percentile values for industry characteristics form the basis for evaluating individual industries.	• Section 3(a)(7) of the Small Business Act limits use of common size standards only to the 4-digit NAICS level. • The percentage of industries with "anchor" size standards decreased from more than 70 percent at the start of the recent size standards review to less than 25 percent today. • Some public comments objected to the "anchor" approach as being outdated and not reflective of current industry structure.
Number of size standards.	The calculated size standards were rounded to one of the predetermined fixed size standards levels. There were eight fixed levels each for receipts based and employee based standards.	Each NAICS industry is assigned a specific size standard, with a calculated receipts based standard rounded to the nearest $500,000 and a calculated employee-based standard rounded to 50 employees (to 25 employees for Wholesale and Retail Trade).	• Section 3(a)(8) of the Small Business Act mandates SBA to not limit the number of size standards and to assign an appropriate size standard for each NAICS industry. • Some public comments also raised concerns with the fixed size standards approach.
Federal contracting factor.	Evaluated the small business share of Federal contracts vis-à-vis the small business share of total receipts for each industry with $100 million or more in Federal contracts annually.	Each industry with $20 million or more in Federal contracts annually is evaluated for the Federal contracting factor.	• The $100 million threshold excludes about 73 percent of industries from the consideration of the Federal contracting factor. Lowering that threshold to $20 million increases the percentage of industries that will be evaluated for the Federal contracting factor to almost 50 percent. • Evaluating more industries for the Federal contracting factor also improves the analysis of the industry's competitive environment pursuant to section 3(a)(6) of the Small Business Act.
Industry competition.	Was considered as significant factor if the 4-firm concentration ratio was 40 percent or more and 4-firm average formed the basis for the size standard calculation for that factor.	Considers all values of the 4-firm concentration ratio and calculates the size standard based directly on the 4-firm ratio. Industries with a higher (lower) 4-firm concentration ratio will be assigned a higher (lower) standard.	• Some commenters opposed using the 40 percent threshold and recommended using all values of the 4-firm concentration ratio. • The 4-firm average is highly correlated with the weighted average.

6. Impacts of Changes in the Methodology

To determine how the above changes in the methodology would generally affect size standards across various industries and sectors, SBA estimated new size standards using both the 2009 Methodology (*i.e.,* "anchor" approach) and the Revised Methodology (*i.e.,* "percentile" approach) for each industry (except those in Sectors 42 and 44–45, and Subsectors 111 and 112).

For receipts based size standards, the anchor group consisted of industries with the $7.5 million size standard, and the higher size standard group included industries with the size standard of $25 million or higher, with the weighted average size standard of $33.2 million for the group. Similarly, for employee based size standards the anchor group comprised industries with the 500-employee size standard, and higher size standard group comprised industries with size standard of 1,000 employees or above, with the weighted average size standard of 1,180 employees. These and 20th percentile and 80th percentile values for receipts-based and employee-based size standards are shown, below, in Table 3, "Reference Size Standards under Anchor and Percentile Approaches."

TABLE 3—REFERENCE SIZE STANDARDS UNDER ANCHOR AND PERCENTILE APPROACHES

	Anchor approach		Percentile approach	
	Anchor level	Higher level	20th percentile	80th percentile
Receipts standard ($ million)	$7.5	$33.2	$7.5	$32.5
Employee standard (no. of employees)	500	1,180	500	1,250

Under the anchor approach, SBA derived the average value of each industry factor for industries in the anchor industry groups as well as those in the higher size standard groups. In the percentile approach, the 20th percentile and 80th percentile values were computed for each industry factor. These results are presented, below, in Table 4, "Industry Factors under Anchor and Percentile Approaches." As shown in the table, generally, the anchor values are comparable with the 20th percentile values and higher level

values are comparable with the 80th percentile values.

TABLE 4—INDUSTRY FACTORS UNDER ANCHOR AND PERCENTILE APPROACHES

	Anchor approach		Percentile approach	
	Anchor	Higher level	20th percentile	80th percentile
Industry factors for receipts based size standards, excluding Subsectors 111 and 112				
Simple average receipts size ($ million)	0.78	6.99	0.83	7.52
Weighted average receipts size ($ million)	18.10	685.87	19.42	830.65
Average assets size ($ million)	0.35	5.08	0.34	5.22
Four-firm concentration ratio (%)	10.4	34.4	7.9	42.4
Gini coefficient	0.678	0.829	0.686	0.834
Industry factors for employee based size standards, excluding Sectors 42 and 44–45				
Simple average firm size (no. of employees)	33.4	96.8	29.5	118.3
Weighted average firm size (no. of employees)	232.2	1,371.3	250.7	1,629.0
Average assets size ($ million)	4.79	23.34	4.14	40.54
Four-firm concentration ratio (%)	24.8	50.2	24.7	61.3
Gini coefficient	0.770	0.842	0.760	0.853

Under the anchor approach, using the anchor size standard and average size standard for the higher size standard group, SBA computed a size standard for an industry's characteristic (factor) based on that industry's position for that factor relative to the average values of the same factor for industries in the anchor and higher size standard groups. Similarly, for the percentile approach, combining the factor value for an industry with the 20th percentile and 80th percentile values of size standards and industry factors among the industries with the same measure of size standards, SBA computed a size standard supported by each industry factor for each industry. Under both approaches, a calculated receipts based size standard was rounded to the nearest $500,000 and a calculated employee based size standard was rounded to the nearest 50 employees.

With respect to the Federal contracting factor, for each industry averaging $20 million or more in Federal contracts annually, SBA considered under both approaches the difference between the small business share of total industry receipts and that of Federal contract dollars under the current size standards. Specifically, under the Revised Methodology, the existing size standards would increase by certain percentages when the small business share of total industry receipts exceeds the small business share of total Federal contract dollars by 10 percentage points or more. Those percentage increases, detailed in the Revised Methodology, to existing size standards generally reflect receipts and employee levels needed to bring the small business share of Federal contracts at par with the small business share of industry receipts.

The results were generally similar between the two approaches in terms of changes to the existing size standards, with size standards increasing for some industries and decreasing for others under both approaches. The sector that was most impacted was NAICS Sector 23 (Construction), with a majority of industries experiencing decreases to the current size standard affecting about 1 percent of all firms in that sector under both approaches. Other negatively impacted sectors under both approaches were Sector 31–33 (Manufacturing), Sector 48–49 (Transportation and Warehousing), and Sector 51 (Information), affecting, respectively, 0.1 percent, 0.6 percent, and less than 0.1 percent of total firms in those sectors, with slightly higher impacts under the percentile approach. All other sectors would see moderate positive impacts under both approaches, impacting 0.1–0.2 percent of all firms in most of those sectors. Overall, the changes to size standards as the result of the changes in the methodology, if adopted, would have a minimal impact on number businesses that qualify as small under the existing size standards. Excluding NAICS Sectors 42 and 44–45 and Subsectors 111 and 112, 97.75 percent of businesses would qualify as small under the new calculated size standards using the ''anchor'' approach vs. 97.70 percent qualifying under the ''percentile'' approach in the Revised Methodology. Under the current size standards, 97.73 percent of businesses are classified as small.

D. Conclusion

After considerations of all relevant comments, SBA is adopting the Revised Methodology, as proposed for comments, except that the Agency has now included a new section on the evaluation of size standards at sub-industry levels (usually referred to as ''exceptions'') in response to comment. The Revised Methodology, entitled ''SBA's Size Standards Methodology (April 2019),'' is available for review/download on the SBA website at *http://www.sba.gov/size-standards-methodology* as well as on the Federal rulemaking portal at *http://www.regulations.gov*. SBA will apply the Revised Methodology in the ongoing, second five-year review of size standards as required by the Jobs Act.

Dated: April 4, 2019.

Linda M. McMahon,

Administrator.

[FR Doc. 2019–07130 Filed 4–10–19; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–0839; Product Identifier 2017–NE–31–AD; Amendment 39–19614; AD 2019–07–03]

RIN 2120–AA64

Airworthiness Directives; Zodiac Seats France Cabin Attendant Seats

AGENCY: Federal Aviation Administration (FAA), DOT.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 10, 12, 13, 18, and 26

[FAC 2019–02; FAR Case 2017–009; Item I; Docket No. 2017–0009, Sequence No. 1]

RIN 9000–AN45

Federal Acquisition Regulation: Special Emergency Procurement Authority

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement sections of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 to expand special emergency procurement authorities for acquisitions of supplies or services that facilitate defense against or recovery from cyber attack, provide international disaster assistance under the Foreign Assistance Act of 1961, or support response to an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

DATES: *Effective Date:* June 5, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Camara Francis, Procurement Analyst, at 202–550–0935, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2019–02, FAR Case 2017–009.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 83 FR 29736 on June 26, 2018, to implement sections 816 and 1641 of the NDAA for FY 2017 (Pub. L. 114–328). Sections 816 and 1641 modify 41 U.S.C. 1903, Special Emergency Procurement Authority. The revisions to 41 U.S.C. 1903 establish special emergency procurement authorities to allow for higher micro-purchase threshold (MPT) and simplified acquisition threshold (SAT) for acquisitions of supplies or services that facilitate defense against or recovery from cyber attack; support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 *et seq.;* or support responses to an emergency or major disaster (42 U.S.C. 5122), except that this new authority allows treatment of acquisitions, for property or a service, as a commercial item only for acquisitions to facilitate the defense against or recovery from a cyber attack against the United States.

II. Discussion and Analysis

No public comments were submitted in response to the proposed rule. Therefore, there are no changes made to the final rule.

III. Expected Impact of the Final Rule and Proposed Cost Savings

Prior to enactment of the NDAA for FY 2017, for acquisitions of supplies or services that are to be used to support a contingency operation, or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, agencies had the authority, as provided in FAR part 13, to utilize the higher MPT of $20,000 in lieu of $3,500 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and $30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States (except for acquisitions of construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate requirements (Construction)). Additionally, prior to the enactment of the NDAA for FY 2017, agencies had the authority, as provided in FAR part 13, to utilize the higher SAT of $750,000 in lieu of $150,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and $1.5 million for any contract to be awarded and performed, or purchase to be made, outside the United States; and utilize the higher threshold of $13 million in lieu of $7 million for use of simplified acquisition procedures (SAP) for the acquisition of commercial items (including acquisitions treated as acquisitions of commercial items to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack).

This final rule expands the use of the special emergency procurement authorities to apply to acquisitions of supplies or services that facilitate defense against or recovery from a cyber attack; support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 *et seq.*; or support a response to an emergency or major disaster (42 U.S.C. 5122).

This rule will impact all businesses that submit offers in response to Federal solicitations for supplies or services covered by the expanded special emergency procurement authorities. Acquisitions with an estimated value between the MPT or SAT and the higher thresholds for the expanded special emergency procurement authorities will use simplified procedures, thereby reducing the requirements imposed on the offerors when responding to the solicitation.

DoD, GSA, and NASA have performed a regulatory cost analysis on this final rule. The following is a summary of the estimated public cost savings calculated in 2016 dollars at a 7-percent discount rate and in perpetuity:

Summary	Public	Government	Total
Present Value	−$18,969,086	−$3,342,671	−$22,311,757
Annualized Costs	−1,327,836	−233,987	−1,561,823
Annualized Value Costs (as of 2016 if Year 1 is 2019)	−1,083,909	−191,003	−1,274,912

To access the full regulatory cost analysis for this rule, go to the Federal eRulemaking Portal at *www.regulations.gov,* search for ''FAR Case 2017–009,'' click ''Open Docket,'' and view ''Supporting Documents.''

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new solicitation provisions or clauses, or impact any existing provisions or contract clauses.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This final rule is considered to be an E.O. 13771 deregulatory action. The total annualized value of the cost savings is −$1,274,912 (as of 2016 if Year 1 is 2019). Details on the estimated cost savings can be found in Section III of this preamble.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule implements sections 816 and 1641 of the NDAA for FY 2017 (Pub. L. 114–328), which amend 41 U.S.C. 1903.

The objective of this rule is to expand special emergency procurement authorities for acquisitions of supplies or services that—

- Facilitate defense against or recovery from cyber attack;
- Provide international disaster assistance under the Foreign Assistance Act of 1961; or
- Support response to an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

There were no public comments. The requirements in the rule are not expected to have a significant economic impact on a substantial number of small entities because the rule merely expands existing flexibilities associated with contracting under the SAT to include defense against or recovery from cyber attacks, international disaster assistance, and response to emergencies or major disasters, in which a smaller percentage of small entities participate, as compared to other than small entities. Based on an average of contract actions reported in the Federal Procurement Data System data for fiscal years 2014—2016, this rule applies to less than 100 small entities that submit offers in response to solicitations for the acquisition of supplies or services—

- Between $150,000 and $750,000 to facilitate defense against or recovery from cyber attacks.
- Between $3,500 and $30,000 or between $150,000 and $1.5 million, to provide international disaster assistance under the Foreign Assistance Act of 1961; and
- Between $3,500 and $20,000 or between $150,000 and $750,000, to support response to emergencies or major disasters in the U.S.;

This rule reduces compliance requirements on small entities, resulting in estimated savings to affected small entities of approximately $650,330 in the first year.

The rule contains no reporting, recordkeeping, or other compliance requirements on the vendor community.

DoD, GSA, and NASA have not identified any significant alternatives consistent with the statute that would further reduce impact on small entities.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

This final rule does not contain any information collection requirements that would require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 10, 12, 13, 18, and 26

Government procurement.

Dated: March 19, 2019.

William F. Clark,

Director, Office of Government-Wide Acquisition Policy, Office of Acquisition Policy, Office of Government-Wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 10, 12, 13, 18, and 26 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 10, 12, 13, 18, and 26 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by—

■ a. Adding in alphabetical order the definitions ''Emergency'' and ''Major disaster'';

■ b. Revising paragraph (3) introductory text of the definition ''Micro-purchase threshold''; and

■ c. Revising paragraph (1) introductory text of the definition ''Simplified acquisition threshold''.

The additions and revisions read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Emergency, as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203, and subpart 26.2, means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States (42 U.S.C. 5122).

* * * * *

Major disaster, as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203, and subpart 26.2, means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby (42 U.S.C. 5122).

* * * * *

Micro-purchase threshold * * *

(3) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 *et seq.*; or to support response to an emergency or major disaster (42 U.S.C. 5122), as described in 13.201(g)(1), except for construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (41 U.S.C. 1903)—

* * * * *

Simplified acquisition threshold * * *

(1) Acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 *et seq.*; or to support response to an emergency or major disaster (42

U.S.C. 5122), (41 U.S.C. 1903), the term means—

* * * * *

PART 10—MARKET RESEARCH

10.001 [Amended]

■ 3. Amend section 10.001 by removing from paragraph (a)(2)(vi)(A) ''recovery from'' and adding ''recovery from cyber,'' in its place.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.102 [Amended]

■ 4. Amend section 12.102 by removing from paragraph (f)(1) ''recovery from'' and adding ''recovery from cyber,'' in its place.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 5. Amend section 13.201 by revising paragraphs (g)(1) introductory text and (g)(2) to read as follows:

13.201 General.

* * * * *

(g)(1) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 *et seq.*; or to support response to an emergency or major disaster (42 U.S.C. 5122), the micro-purchase threshold is—

* * * * *

(2) Purchases using this authority must have a clear and direct relationship to the support of a contingency operation; or the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; international disaster assistance; or an emergency or major disaster.

* * * * *

■ 6. Amend section 13.500 by revising paragraph (c)(1) to read as follows:

13.500 General.

* * * * *

(c) * * *

(1) The acquisition is for commercial items that, as determined by the head of the agency, are to be used in support of a contingency operation; to facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster, or

* * * * *

PART 18—EMERGENCY ACQUISITIONS

■ 7. Amend section 18.001 by—

■ a. Revising paragraph (b);

■ b. Redesignating paragraph (c) as paragraph (d); and

■ c. Adding a new paragraph (c).

The revision and addition read as follows:

18.001 Definition.

* * * * *

(b) To facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack against the United States;

(c) In support of a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate the provision of international disaster assistance; or

* * * * *

■ 8. Revise section 18.202 to read as follows:

18.202 Defense or recovery from certain events.

(a) *Micro-purchase threshold.* The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster. (See 2.101.)

(b) *Simplified acquisition threshold.* The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster. (See 2.101.)

(c) *Treating certain items as commercial.* Contracting officers may treat any acquisition of supplies or services as an acquisition of commercial items if the head of the agency determines the acquisition is to be used to facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack. (See 12.102(f)(1) and 13.500(c)(2).)

(d) *Simplified procedures for certain commercial items.* The threshold limits authorized for use of this authority may be increased when it is determined the acquisition is to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster. (See 13.500(c).)

PART 26—OTHER SOCIOECONOMIC PROGRAMS

■ 9. Revise the heading for subpart 26.2 to read as follows:

Subpart 26.2—Major Disaster or Emergency Assistance Activities

* * * * *

■ 10. Amend section 26.202 by designating the undesignated paragraph as paragraph (a) and adding paragraph (b) to read as follows:

26.202 Local area preference.

* * * * *

(b) When using the authority under the Stafford Act, see the definitions of ''micro-purchase threshold'' and ''simplified acquisition threshold'' in 2.101 for the authority to use an increased micro-purchase threshold and simplified acquisition threshold.

[FR Doc. 2019–06620 Filed 5–3–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 8, 17, and 35

[FAC 2019–02; FAR Case 2018–015; Item II; Docket No. 2018–0015; Sequence No. 1]

RIN 9000–AN74

Federal Acquisition Regulation: Governmentwide and Other Interagency Contracts

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the John S.

Proposed Rules

Federal Register
Vol. 84, No. 93
Tuesday, May 14, 2019

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 124 and 127

RIN 3245–AG75

Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business—Certification

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The Small Business Administration (SBA) is proposing to amend its regulations to implement a statutory requirement to certify Women-Owned Small Business Concerns (WOSB) and Economically Disadvantaged Women-Owned Small Business Concerns (EDWOSB) participating in the Women-Owned Small Business Contract Program.

DATES: Comments must be received on or before July 15, 2019.

ADDRESSES: You may submit comments, identified by RIN: 3245–AG75, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *For mail, paper, disk, or CD/ROM submissions:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.
- *Hand Delivery/Courier:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416, or send an email to *brenda.fernandez@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 207–7337; *brenda.fernandez@sba.gov.*

SUPPLEMENTARY INFORMATION: The WOSB Federal Contract Program (hereinafter referred to as the ''Program''), set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), authorizes Federal contracting officers to restrict competition to eligible WOSBs or EDWOSBs for Federal contracts in certain industries. Section 825 of the National Defense Authorization Act for Fiscal Year 2015, Public Law 113–291, 128 Stat. 3292 (December 19, 2014) (2015 NDAA), amended the Small Business Act to grant contracting officers the authority to award sole source awards to WOSBs and EDWOSBs and shorten the time period for SBA to conduct a required study to determine the industries in which WOSBs are underrepresented. In addition, section 825 of the 2015 NDAA amended the Small Business Act to create a requirement that a concern be certified as a WOSB or EDWOSB by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set aside or sole source contract under the authority of section 8(m) of the Small Business Act. 15 U.S.C. 637(m)(2)(E). The certification requirement applies only to participants wishing to compete for set-aside or sole source contracts under the Program. Once this rule is finalized, WOSBs that are not certified will not be eligible to compete on set asides for the Program. Other women-owned small business concerns that do not participate in the Program may continue to self-certify their status, receive contract awards outside the Program as WOSBs, and count toward an agency's goal for awards to WOSBs. For those purposes, contracting officers would be able to accept self-certifications without requiring them to verify any documentation. SBA is proposing to provide certification, to accept certification from certain identified government entities, and to allow certification by SBA-approved third party certifiers. As part of the changes necessary to implement a certification program, SBA is also proposing to amend its regulations with regard to continuing eligibility and program examinations. SBA is also proposing to adjust the economic disadvantage thresholds applicable to determining whether an individual qualifies as economically disadvantaged for participation in the 8(a) Business Development (BD) Program to make them consistent with the thresholds applicable to whether a woman qualifies as economically disadvantaged for EDWOSB status.

On September 14, 2015, SBA published in the **Federal Register** a final rule to implement the sole source authority for WOSBs and EDWOSBs and the revised timeline for SBA to conduct a study to determine the industries in which WOSBs are underrepresented. 80 FR 55019. SBA did not address the certification portion of the 2015 NDAA in this final rule because its implementation is more complicated, could not be accomplished by merely incorporating the statutory language into the regulations, and would have delayed the implementation of the sole source authority unnecessarily. SBA notified the public that because it did not want to delay the implementation of the WOSB sole source authority by combining it with the new certification requirement, SBA decided to implement the certification requirement through a separate rulemaking.

As part of the process to craft the regulations governing the WOSB/EDWOSB certification program, SBA issued an Advance Notice of Proposed Rulemaking (ANPR) on December 18, 2015. 80 FR 78984. The ANPR solicited public comments to assist SBA in drafting a proposed rule to implement a WOSB/EDWOSB certification program. SBA received 122 comments in response to the ANPR. SBA has reviewed all the comments while crafting this proposed rule and received additional input from interested stakeholders.

This proposed rule also proposes changes to § 124.104(c), to make the economic disadvantage requirements for the 8(a) BD program consistent to the economic disadvantage requirements for women-owned firms seeking EDWOSB

status. The proposed change would eliminate the distinction in the 8(a) BD program for initial entry into and continued eligibility for the program. The economic disadvantage criteria for EDWOSBs equate to the continuing eligibility criteria for the 8(a) BD program. This has resulted in the anomaly of a concern applying for EDWOSB and 8(a) BD status simultaneously and being found to be economically disadvantaged for EDWOSB purposes, but denied eligibility for the 8(a) BD program based on not being economically disadvantaged. This proposed rule intends to make economic disadvantage for the 8(a) BD program consistent to that for a woman seeking to qualify as economically disadvantaged for the EDWOSB program. SBA does not believe that it makes sense to allow a woman to qualify as economically disadvantaged for EDWOSB purposes, but to then be declined from 8(a) BD participation for not being economically disadvantaged.

In addition, SBA notes that in September 2017, SBA awarded a contract to conduct a study to assist the Office of Business Development in defining or establishing criteria for determining what constitutes ''economic disadvantage'' for purposes of firms applying to the 8(a) BD program. The results supported a $375,000 adjusted net worth for initial eligibility, as compared to the current $250,000 threshold. The study did not, however, consider differences in economic disadvantage between applying to the 8(a) BD program and continuing in the program once admitted. Because SBA believes that it is important to have the same economic disadvantage criteria for the 8(a) BD program as for the EDWOSB program, to avoid confusion and inconsistency between the programs, SBA considered applying a $375,000 net worth standard to both the 8(a) BD and EDWOSB programs. SBA concluded that the $375,000 net worth standard may not be appropriate as the standard for determining economic disadvantage because it related to entry into the 8(a) BD program as opposed to participation in the free enterprise system as an economically disadvantaged business owner. As such, this rule proposes to adopt the $750,000 net worth continuing eligibility standard for all economic disadvantage determinations in the 8(a) BD program. SBA specifically requests comments on whether the $375,000 net worth standard or the $750,000 net worth standard should be used for both the 8(a) BD and EDWOSB programs. In particular, SBA requests comments on how the different standards would affect small business owners participating in the federal marketplace.

SBA is proposing to amend 13 CFR 127 subpart C to establish the process by which SBA will certify firms as WOSBs or EDWOSBs. Proposed § 127.300(a) would provide that SBA will provide a free electronic application process to all firms seeking to be certified as WOSBs or EDWOSBs. In the pursuit of speed, efficiency, and ease of administrative burden, applicants would apply online through an electronic application process. Electronic applications are much faster to process than paper applications as the information can be sorted and searched for digitally. Electronic applications force all mandatory fields to be completed, thereby eliminating incomplete applications. Moreover, through electronic applications, notifications can be sent to applicants to confirm receipt of their applications, along with any follow-up electronic correspondence, rather than through time-consuming paper mail. Transitioning to purely electronic applications will also reduce transactions costs for the agency, saving taxpayer dollars in the process. Data analysis will also be enhanced as applications move to be only electronic. The ability to process WOSB and EDWOSB certifications in an expedited fashion will further SBA's mission to increase the number of WOSBs that win Federal Government contracts.

SBA is proposing that applicants would have the opportunity to request reconsideration of an initial decline decision, which would be consistent with the 8(a) BD application process. The contract protest mechanism, allowing interested parties to challenge the WOSB/EDWOSB status of an apparent successful offeror, will remain the same with an appeal right and will serve as a means to ensure that concerns awarded a Federal contract based on their WOSB or EDWOSB certifications are eligible for award.

SBA's regulations currently authorize the following WOSB/EDWOSB certifications: (1) Certification by third party national certifying entities approved by SBA, (2) certification by SBA as a Participant in the 8(a) BD program where the concern is owned and controlled by one or more women, and (3) concerns certified as owned and controlled by women and certified as Disadvantaged Business Enterprises (DBEs) by states pursuant to the U.S. Department of Transportation's (DOT's) DBE program. 13 CFR 127.300(d). Although the current program principally relies on self-certification, it also permits SBA to have non-governmental third party certifiers approved by SBA. SBA approved four non-governmental entities for that purpose as an alternative option for WOSB or EDWOSBs. These entities are not restricted from assessing fees for certification. In the ANPR, SBA sought comments on how those certification processes are working, how they can be improved, and how best to incorporate them into the new certification requirements. Almost all of the 122 comments that SBA received mentioned third party certifiers or their process. Overwhelmingly the commenters urged SBA to craft a system that would be as uniform as possible, with applicants not being treated differently depending on whom they chose for certification purposes. Almost every commenter that mentioned the topic also wanted the certification process by SBA to be free for all applicants. Commenters noted that 8(a) BD program applicants and HUBZone program applicants do not pay a fee for certification. Overall, commenters suggested that SBA create a clear, transparent, consistent, and free certification process. Commenters supportive of authorized third party certifiers offered that speed to certification is one attraction that might be worth the cost. SBA also received comments concerning whether a third party certifier could be a for-profit entity. The legislation does not limit participation as a third party certifier to entities that are non-profit, and SBA is not proposing any limitation. The proposed rule would also require any approved third party certifier to notify an applicant of its fees and the ability to apply online with SBA at no cost.

After evaluating the comments, SBA has determined that the new legislation permits a balance of options for the public. SBA has previously determined that the act of certifying a firm as eligible to receive a federal contract is generally an inherently governmental function. However, the 2015 NDAA specifically gives to SBA the authority to use a non-governmental certifying entity approved by SBA which is unique to the WOSB Program and does not affect inherently governmental authorities for approval as required in the 8(a) BD or HUBZone programs. SBA proposes to exercise this authority and will promulgate the requirements that prospective national certifying entities must adhere to in order to be approved.

SBA also proposes to use existing government entities at the Federal and State levels that have valid certification programs which SBA could accept in

lieu of an SBA only process. In addition to those that will apply directly to SBA for WOSB or EDWOSB certification, or through an approved national entity, the proposed rule would authorize SBA to accept certifications that have been issued by SBA, a Federal agency or State authority under the DOT/DBE program. SBA already certifies firms as eligible for its 8(a) BD and HUBZone programs without concerns being charged a fee for applying. The Department of Veterans Affairs (VA) certifies veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs) at no cost through its Center for Verification and Evaluation (CVE). Many veterans are also women. This rule proposes that SBA accept certifications by SBA (for the 8(a) BD and HUBZone programs) and VA that a firm is owned and controlled by women for purposes of WOSB/EDWOSB certification. The DOT DBE program has authority for certifying women under its State-run programs. Similarly, SBA proposes to accept these certifications that a firm is owned and controlled by women as well. SBA is therefore proposing to amend § 127.300 by deleting paragraphs (b) through (f) and explaining that the certification process will be handled by SBA and that SBA will accept, under certain conditions, the aforementioned Federal or State third party certifications.

SBA will accept from the VA, VOSB or SDVOSB certification for women veterans, provided that the business concern is 51% owned and controlled by one or more women who are veterans or service-disabled veterans. VA applies SBA's standards of ownership and control under its Center for Verification and Evaluation (CVE) program. Because VA does not determine economic disadvantage, SBA will only accept VA certifications as evidence of ownership and control by women. Women veterans or service-disabled veterans seeking EDWOSB status would have to apply directly to SBA for this certification. In such a case, SBA would accept VA's determination that the firm is owned and controlled by women, but the firm would still have to demonstrate that the women are economically disadvantaged.

Similarly, SBA will accept the DOT/DBE certification for WOSB eligibility. Because the thresholds of economic disadvantage are different between SBA and DOT's DBE program, SBA cannot accept the economic disadvantage determination of a DBE for the EDWOSB certification. Interested parties seeking EDWOSB status will have to apply directly to SBA for this certification.

SBA believes that there may difficulty in processing all the potential applications of those seeking WOSB or EDWOSB certifications in a timely manner. There are currently approximately 10,000 firms in the WOSB repository. SBA's 8(a) Business Development program processes approximately 3,000 applications a year, and SBA's HUBZone program processes approximately 1,500 applications per year. Because the WOSB/EDWOSB program is being designed so that only firms that have been certified are eligible for contracts through the program, SBA expects a large influx of applications as soon as these rules are finalized. If all those firms currently in the repository seek WOSB/EDWOSB certification from SBA immediately, there most likely will be a delay for many firms seeking certification. SBA is requesting comments on possible solutions to this potential bottleneck. One solution that SBA is considering is to adapt a process similar to that previously used by SBA in certifying firms as small disadvantaged businesses (SDBs) when there was an SDB program. Under such an approach, a firm could submit an offer as a WOSB or EDWOSB if it had submitted an application to SBA and had not received a negative determination regarding that application at the time it submits its offer. A concern would be required to notify the procuring agency of this conditional status in its offer. If a concern then becomes the apparent successful offeror on a WOSB/EDWOSB contract, the contracting officer would notify SBA and SBA would prioritize the firm's application and make a determination within 15 days from the date SBA received the contracting officer's notification. Such a timeframe should not be detrimental since it is the same afforded for size and status protests today. SBA specifically requests comments on this alternative and other possible approaches that would help ease the transition from self-certification to a required certification program.

Proposed § 127.301 and § 127.306 would provide guidance on how a concern may apply to the WOSB/EDWOSB Program. Proposed § 127.301 would provide guidance on initial applications, and proposed § 127.306 would address the procedures for denied applications and decertifications. Proposed § 127.305 would provide that WOSB Program applicants will be permitted to request reconsideration, within 30 calendar days of notification of an initial decline decision. In proposed § 127.306, SBA would require a one-year waiting period for a concern to re-apply after a decline or decertification. Currently the 8(a) BD program requires a concern to wait one year to reapply after a denied application. 13 CFR 124.207. SBA will render a final decision within 60 calendar days of a reconsideration request. In response to the SBA ANPR, many commenters requested that SBA adopt an appeal process for denied applications similar to the 8(a) BD development program. Other commenters wanted to emphasize giving concerns an ability to ask SBA to reconsider the application and make changes. SBA's HUBZone certification process does not currently utilize an appeal or reconsideration process. SBA is not proposing to adopt an appeal process similar to the 8(a) BD program for the WOSB Program, but would allow concerns the ability to request reconsideration. SBA believes that the reconsideration process should be sufficient for a firm to understand its deficiencies and come into compliance with the HUBZone eligibility requirements.

Proposed § 127.302 would provide information on how a concern may apply for certification. SBA is proposing to process all applications online. SBA is currently already processing all 8(a) BD program and HUBZone program applications electronically, and this would be an extension of that application process to the WOSB Program. Current participants in the WOSB Program have been using *https://certify.sba.gov* to self-certify for the past year.

Proposed § 127.303(a) would describe the information and documents that must be submitted during the electronic application process. In the ANPR, SBA requested comments on what information and documents should be collected during an application. Most commenters believed that SBA should continue to collect the documents listed in the current version of § 127.300(e). SBA agrees with these comments and while that list is not exhaustive, SBA believes that it is illustrative of the amount and types of documents that SBA will be collecting during the electronic application process. SBA is proposing to maintain the list of required documents on its website, and that the list of required documents ''may include, but is not limited to, corporate records, and business and personal financial records, including copies of signed Federal personal and business tax returns, individual and business bank statements.'' This is similar to the approach of SBA's other programs, in which SBA provides more detail of the documents required on SBA's website as well as part of the application process.

Proposed § 127.303(b) would make clear that SBA may need to request additional documents during the application process in order to confirm eligibility. Proposed § 127.303(c) would state that it is the concern's responsibility to notify SBA of any changes that could affect the firm's eligibility while SBA is reviewing the application. SBA is proposing to add new paragraphs § 127.303(d) and (e) to detail the additional information that concerns reapplying after a denial or decertification are required to submit. The proposed rule provides that concerns reapplying for certification will have to submit information showing what changes have been made to remedy the issues of ineligibility in the initial application.

Proposed § 127.304 would detail how SBA will process applications. WOSB program applicants will have their packages reviewed, similar to the 8(a) BD program, within 15 calendar days for completeness of an application. Concerns will be notified if required information is missing, and that SBA will not process incomplete applications. SBA proposes that it will make its determination within 90 days after a concern submits a complete application. This is consistent with the time frames and policies established for SBA's other certification programs. The 90-day time frame will not begin to run on submitted but incomplete applications. SBA proposes that after a complete application is submitted, SBA could still need additional information from an applicant. Proposed paragraph (c) would provide that it is the applicant's responsibility to demonstrate its eligibility and that SBA could draw adverse inferences when a concern fails to provide documents and information that SBA has requested. Proposed paragraph (d) would provide that a concern must be eligible when it applies, and must maintain its eligibility throughout the time SBA is evaluating its application. Proposed paragraph (e) would provide that any changes in circumstances may be relevant to a concern's eligibility, that a concern has an affirmative duty to notify SBA of any changes, and that SBA may decline to certify a concern that fails to notify SBA of changed circumstances. Proposed paragraphs (f) and (g) would provide that any decision regarding an application will be in writing. Proposed paragraph (f) would also state that it will be SBA's responsibility to update *https://certify.sba.gov* (or any successor system) and the System for Award Management, to indicate the firm has been certified by SBA.

Proposed § 127.305 would authorize a reconsideration process, which would permit a firm found to be ineligible to address deficiencies and change its bylaws, articles of incorporation, or other ownership documents to come into compliance with SBA's ownership and control requirements. As mentioned above, this is consistent with SBA's current application and continuing eligibility process for the 8(a) BD program. The goal of this proposed change is to allow eligible concerns to become certified as quickly as possible, even if there were deficiencies or eligibility issues on their initial applications.

Proposed § 127.306 would provide that concerns may reapply to the program one year after a final decline or decertification decision.

Third Party Certification

SBA is proposing to further amend subpart C of part 127 to establish procedures for Third Party Certification in the context of a required certification program. In proposed § 127.350, SBA is proposing that all Third Party Certifiers (TPCs) must be approved by SBA. Under the proposed rule, an approved TPC need not be a non-profit entity. SBA is also clarifying that a TPC is a non-governmental entity, in contrast to the governmental certifications (8(a), DOT/DBE, VA/CVE) that SBA will accept for WOSB/EDWOSB certification purposes.

SBA is proposing that in order to be certified by a TPC, an applicant must be registered in the System for Award Management (SAM) and must upload all required documents in *certify.gov.* An applicant using a TPC would be required to provide the TPC with access to the documents in *certify.sba.gov.* A firm certified by a TPC would need to upload the written certification from a TPC to *https://certify.sba.gov* (or any successor system). Proposed § 127.352 would provide that SBA will maintain the instructions for becoming a TPC on SBA's website.

Proposed § 127.353(a) would permit TPCs to charge a fee. As noted above, commenters generally favored free certification, but those comments pertained to certification by the Government and other commenters recognized a value to having TPCs in certain instances. SBA notes that any applicant that wishes to have its application for certification processed without a fee would always be able to submit its application to SBA. SBA recognizes that TPCs currently charge a fee to certify WOSBs, and believes that this option should not be eliminated for any applicant seeking the services of a TPC. Further, § 127.353(a)(1) and (2) would provide that all TPCs must notify potential applicants of the free option offered by SBA at the beginning of the application process. In addition, proposed § 127.353(b) would require that the method of the notification must be approved by SBA.

Proposed § 127.354 would provide the certification standards that TPCs must meet. The proposed rule identifies minimum standards that need to be met. As noted above, SBA received suggestions that consistency between certification options offered by various certifiers would be helpful for participants, and help alleviate possible confusion from having multiple certification options. These baseline standards will provide some consistency between various certifiers, ensuring that all certifiers are meeting the same minimum requirements.

Proposed § 127.355 would establish procedures that SBA will utilize to ensure that TPCs are meeting the requirements of subpart D. Specifically, SBA is proposing that it will conduct periodic compliance reviews, and that SBA may revoke its approval of a TPC that is not meeting the requirements.

Proposed § 127.356 would create the process for certification by a TPC. SBA is proposing that concerns submit their applications directly to the TPC, register in SAM, and upload all of the documents to *certify.sba.gov.* The applicant will provide the TPC with access to its documents in *certify.sba.gov.* Once certified, the applicant will upload the approval document to *certify.sba.gov.*

Proposed § 127.357 would address ineligibility determinations made by TPCs. Proposed § 127.357(a) would permit a concern found to be ineligible by a TPC to request reconsideration and a redetermination, at no additional cost to the concern. Proposed § 127.357(a) would also require the TPC to complete the reconsideration process within 60 calendar days. Finally, the proposed rule would prohibit a declined firm from reapplying for WOSB or EDWOSB certification by SBA or a TPC for a one-year period.

SBA is proposing to amend subpart D of part 127 to establish procedures for maintaining a concern's certification as WOSB or EDWOSB and conducting program examinations of WOSB program participants after certification. Proposed § 127.400 would require that concerns recertify their eligibility every three years. SBA proposes that failure to recertify in the time period provided will result in the concern being decertified, and thus removed as a certified WOSB or EDWOSB from the

Dynamic Small Business Search (DSBS) system.

Proposed § 127.401 would establish the ongoing obligations of certified WOSB Program participants. Specifically, this provision would provide that all certified concerns have an affirmative duty to notify SBA of any material changes in writing. Proposed § 127.402 would address the failure of a concern to recertify every three years or to notify SBA of a material change. The proposed language makes clear that such concerns would be decertified.

Proposed § 127.403 pertains to program examinations. Program examinations under the new regulations will serve a similar function as they had previously. However, they will be inherently different with the proposed new SBA certification. Proposed paragraph (a) would establish that an examination is an investigation by SBA to verify the accuracy of any WOSB/EDWOSB certification and to ensure that currently certified concerns continue to meet the eligibility criteria of the WOSB Program. Proposed paragraph (b) would provide that program examinations will be conducted by SBA staff, SBA field staff or others designated by the SBA's Director of Government Contracting (D/GC).

Proposed paragraph § 127.403(c) establishes that the scope of review for examinations is any information that is related to a concern's eligibility. SBA may conduct site visits when appropriate as part of the program examination. Further, proposed paragraph (d) would require that it is the program participant's responsibility to ensure that all required information has been submitted to SBA and that all that information is up to date and accurate. Additionally, this proposed section would provide that all of the required information is considered material by SBA in determining a concern's eligibility and that the information is assumed to be truthful and current.

Proposed § 127.404 would authorize SBA to conduct program examinations at its discretion any time after a concern has submitted an application to be certified. This regulation also clarifies that SBA may initiate an examination of a concern without notification. As noted above, in order to apply to the WOSB program and maintain eligibility a concern must provide SBA with required documents and information. This provision would provide that SBA may review any previously submitted information at any time as part of a program examination. Given that SBA may not need additional information when it begins the examination, it is not necessary to notify concerns that SBA is reviewing material that has already been submitted to SBA. Proposed § 127.405 would make clear that in addition to reviewing material already submitted, SBA may also request additional information when conducting a program examination.

Proposed § 127.406 would authorize SBA to decertify concerns that fail to provide or maintain the required certifications or documents. As noted above, SBA will maintain a list of all the required documents that a concern must provide and keep up-to-date. Concerns that fail to meet this requirement would be proposed for decertification. SBA would also propose decertification for firms that SBA determines no longer meet the eligibility requirements. Concerns would be proposed for decertification pursuant to § 127.406(a). Concerns proposed for decertification would be given 15 calendar days to respond. Proposed § 127.406(a)(3) would be added to establish that SBA will generally not consider new evidence in a response. SBA also proposes to add § 127.406(b) which would state that when a concern is decertified pursuant to this section, the D/GC will issue that decision in writing and will consider all the reasons why the firm was proposed for decertification. Further, this section would provide that SBA may draw adverse inferences when making this eligibility determination. Proposed § 127.406(c) would provide that decertified firms would be able to reapply to the program one year after decertification.

SBA is proposing to remove § 127.505, as the pertinent information in this provision is already detailed in § 121.406(b).

This proposed rule would not change the general procedures concerning WOSB/EDWOSB protests in relation to contract actions. A concern that has been determined ineligible as part of a status protest could continue to appeal that decision pursuant to newly redesignated § 127.605. However, SBA is proposing to amend newly redesignated § 127.604(f)(4) to clarify that firms found to be ineligible would need to reapply rather than request a reexamination. The proposed language also provides a citation to the appropriate regulation for reapplication procedures.

Compliance With Executive Orders 12866, 13563, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

The U.S. Small Business Administration (SBA) is required by statute to administer the WOSB Federal Contract Program (WOSB Program). The Small Business Act (Act) sets forth the certification criteria for the WOSB Program. Specifically, the Act states that a WOSB or EDWOSB must, ''be certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the SBA Administrator, as a small business concern owned and controlled by women.'' 15 U.S.C. 637(m)(2)(E).

The Federal Acquisition Regulation (FAR) and SBA regulations require that in order to be certified as a WOSB or EDWOSB a small business concern must provide documents supporting its WOSB or EDWOSB status to SBA. See 13 CFR 127.300 and FAR 19.1503(b)(3). The specific documents firms are required to provide are outlined in §§ 127.300(d) and (e). The Act also states that the SBA is authorized to conduct eligibility examinations of any certified WOSB or EDWOSB, and to handle protests and appeals related to such certifications. Id. § 637(m)(5)(A) and (5)(B).

Under the current system firms may be certified by third party certifiers, or they may essentially self-certify and upload the required documents to *sba.certify.gov.* In order to award a WOSB set-aside or sole source contract, the contracting officer must document that the contracting officer reviewed the firm's certifications and documentation. 13 CFR 127.503(g); FAR 19.1503(b)(3). The lack of required certification, coupled with the requirement that the contracting officer must verify that documents have been uploaded, may contribute to reluctance to use the program, resulting in the failure to meet the statutory goal of 5% of all prime contract dollars being awarded to

WOSBs. In FY 2017, the government wide WOSB goal of 5% was not met with actual performance at 4.71% ($20.8B). The government has only met the goal once (FY 2015). While the amount of dollars awarded to WOSBs under the set aside program are trending up, they still account for less than 0.016% of dollars awarded to WOSBs. A certification could help entice agencies to set aside more contracts for WOSBs, so that the government can meet the statutory 5% goal.

2. What are the potential benefits and costs of this regulatory action?

The benefit of the proposed regulation is a significant improvement in the confidence of contracting officers to make Federal contract awards to eligible firms. Under the existing system, the burden of eligibility compliance is placed upon the awarding contracting officer. Contracting officers must review the documentation of the apparent successful offeror on a WOSB or EDWOSB contract. Under this proposed rule, the burden is placed upon SBA and/or third party certifiers. All that a contracting officer need do is to verify that the firm is fact a certified WOSB or EDWOSB in SAM. A contracting officer would not have to look at any documentation provided by a firm or prepare any internal memorandum memorializing any review. This will encourage more contracting officers to set aside opportunities for WOSB Program participants as the validation process will be controlled by SBA in both SAM and DSBS. Increased procurement awards to WOSB concerns can further close a gap of under-representation of women in industries where in the aggregate WOSB represent 12 percent of all sales in contrast with male-owned businesses that represent 79% of all sales (per SBA Office of Advocacy Issue Brief Number 13, dated May 31, 2017 *https://www.sba.gov/sites/default/files/advocacy/Womens-Business-Ownership-in-the-US.pdf*).

Another benefit of the proposed regulation is to reduce the cost associated with the time required for completing WOSB certification by replacing the WOSB Program Repository with *Certify.SBA.gov* (''Certify'') in the regulation. It is also anticipated that the proposed WOSB certification methodology and likely increased use of WOSB/EDWOSB set asides may increase program participation levels by approximately 32%. Under the prior WOSB Program Repository, SBA determined that the average time required to complete the process required by the WOSB Program Repository was two hours, whereas the use of Certify results requires only one hour. Across an estimated 12,347 firms, the total cost savings is significant, as discussed below. Another potential benefit is the reduction of time and costs to WOSB firms through the reduction of program participation costs. By successfully leveraging technology, SBA has reduced the total cost of burden hours substantially from $2,533,200 to $967,965.

Based on the calculations below, the total estimated number of respondents (WOSBs and EDWOSBs) for this collection of information varies depending upon the types of certification that a business concern is seeking. For initial certification, the total estimated number of respondents is 9,349. The total number was calculated using the two-year average number of business concerns that have provided information through Certify from March 2016 through February 2018. For annual updates, the total number is 12,347. For examinations and protests, the total number is 130.

Type of certification	Number of respondents	Source
Initial certification	9,349	Average annual number of respondents to Certify between March 2016 and February 2018.
New certifications each year	500	Program participation is expected to remain constant after initial year of certification, with 500 new certifications annually.
Annual updates to certification	11,847	Program participation is expected to remain constant after initial year of certification, with a reduction of 500 participants annually through attrition.
Total annual responses	12,347	Annual new certifications plus annual updates.

Each respondent submits one response at the time of initial certification and one at the time of annual update. Estimated burden hours vary depending upon the type of certification that a WOSB or EDWOSB pursues. SBA conducted a survey among a sample of entities that assist WOSBs and EDWOSBs to provide information through Certify. The majority of those surveyed stated that for initial certifications the estimated time for completion is one hour per submission. For annual updates, because of the need to submit little if any additional information, the estimated burden is 0.5 hour per submission. For examinations and protests, the estimated burden is 0.25, which is much lower because firms have already provided the required documents identified in 13 CFR 127.300(d) and (e) through Certify. It is estimated that the initial certification will involve 9,349 existing participants and 2,998 new respondents in the first year. After the first year, initial certifications are expected for 500 new respondents annually with an additional 11,847 annual certifications for existing participants for a total of 12,347 participants in each succeeding year. The participant level is expected to remain stable at 12,347 participants annually with 500 new respondents and 500 attritions from the program annually. Further, 130 respondents are expected to participate in protests and appeals. The respondent's cost of burden hours for a five year period and average is provided in the following table.

COST OF BURDEN HOURS—5 YEAR COST ESTIMATE AND AVERAGE

Year	Initial—existing 1 hr @ $77.58 per participant	Initial—new participants 1 hr @ $77.58 per participant	Annual updates .5 hr @ $77.58 per participant	Examinations and protests .25 hr @ $77.58 per participant	Annual totals
Number of Program Participants					
1	9,349	2,998	.....	130	12,477
2	.....	500	11,847	130	12,477
3	.....	500	11,847	130	12,477
4	.....	500	11,847	130	12,477
5	.....	500	11,847	130	12,477
Costs					
1	$725,295	$232,585	.....	$2,521	$960,402
2	.....	38,790	$459,545	2,521	500,856
3	.....	38,790	459,545	2,521	500,856
4	.....	38,790	459,545	2,521	500,856
5	.....	38,790	459,545	2,521	500,856
5 Year Total:	.....	.....	.....	.....	2,963,828
Annual Cost Avg	.....	.....	.....	.....	592,766

(a) Respondent's Cost of Burden Hours:

Initial certification—transition of existing participants (one time cost):

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 9,349 × 1 hour × $77.58/hour = $725,295.

Initial certification—new participants (first year cost):

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 2998 × 1 hour × $77.58/hour = $232,585.

Initial certification—new participants (cost for each succeeding year after initial year):

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 500 × 1 hour × $77.58/hour = $38,790.

Annual update:

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 11,847 × .5 hour × $77.58/hour = $459,545.

Examinations and Protests (each year):

Estimated officer's salary = $77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

Total estimated burden: 130 × .25 hour × $77.58/hour = $2,521.

SBA previously stated that the estimated total respondent's cost of burden hours was $2,533,200 annually. By successfully leveraging technology, SBA has reduced the total cost of burden hours substantially from $2,533,200 to $960,402 for the initial year and $500,856 annually in succeeding years, with respective savings of $1,572,798 in the initial year and annual savings in successive years of $2,032,344 and a five year savings of $9,702,174 for WOSB to redirect as revenue generating resources to close the noted revenue disparity with male-owned businesses.

SBA believes that there are no additional capital or start-up costs or operation and maintenance costs and purchases of services costs to respondents as a result of this rule because there should be no cost in setting up or maintaining systems to collect the required information. As stated previously, the information requested should be collected and retained in the ordinary course of business.

3. What are the alternatives to this proposed rule?

The proposed regulations are required to implement specific statutory provisions which require promulgation of implementing regulations. One alternative considered would be to rely solely on third party certifiers to certify WOSBs and EDWOSBs. However, there is a cost to small businesses for third party certifiers. Firms submit the same documentation to third party certifiers that would submit to SBA, but third party certifiers charge on average $380 annually. Consequently, the cost of relying completely on third party certifiers would be $3,552,620.00 a year (9,349 initial applicants × $380). If third party certifiers were used for the anticipated increase to 12,477 annual participants, the cost would be $4,741,260. In addition, SBA maintains that certification for Federal procurement purposes is an inherently governmental function. Consequently, even if SBA utilized third party certifiers for an initial or preliminary review, SBA or a governmental entity would still have to be involved in reviewing those certifications. In addition, there is an intended benefit of certification. The intent is to increase confidence in the eligibility of firms so that contracting officers and activities utilize the sole source authority. Although trending upwards, WOSB/EDWOSB set aside and sole awards only accounted for 3.4% of total dollars awarded to WOSBs in FY 2017. The Federal Government has met the statutory WOSB goal of 5% of total

dollars awarded to WOSBs only once (FY 2015).

Executive Order 13563

As part of its ongoing efforts to engage stakeholders in the development of its regulations, on December 18, 2015, SBA issued an Advance Notice of Proposed Rulemaking in the **Federal Register,** 80 FR 78984. In response to that notice, SBA received 122 comments. SBA has incorporated those comments and suggestions in the proposed regulation to the extent feasible. In addition, SBA shared the proposed rule with the Small Business Procurement Advisory Council and the Federal Acquisition Regulation small business committee. In addition, the agency met with stakeholders.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13771

This proposed rule is expected to be an Executive Order 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the rule's economic analysis.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

In carrying out its statutory mandate to provide oversight of certification related to SBA's WOSB Federal Contract Program, SBA is currently approved to collect information from the WOSB applicants or participants through SBA Form 2413, and for EDWOSB applicants or participants, through SBA Form 2414. (OMB Control Number 3245–0374). This collection of information also requires submission or retention of documents that support the applicant's certification.

SBA has implemented a certification and information collection platform—Certify—that replicates the currently approved information collection. In other words, the information collected through Certify includes eligibility documents previously collected in the WOSB Repository, and information collected on SBA Form 2413 (WOSB) and SBA Form 2414 (EDWOSB). SBA recently revised this information collection to establish that the agency has discontinued these paper forms and will collect the information and supporting documents electronically through Certify. The recent submission made minor changes to add one question to request information on classes of stock for a corporation and eliminated one question that was redundant.

As currently approved this collection of information is submitted by small business applicants or program participants who self-certify or who obtain certification from an SBA approved third-party certifier. SBA has determined that this proposed rule does not add any additional burden to what is already in place for the current documentation required for self-certification.

As discussed above, this rule proposes to fully implement the statutory requirement for small business concerns to be certified by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set aside or sole source contract under the WOSB program. As a result of these changes, the rule proposes to eliminate the option to self-certify, set the standards for certification by SBA, and clarify the third-party certification requirements. SBA does not anticipate that these changes would impact the content of the information currently collected; however, it would be necessary to propose changes to the instructions, especially as they relate to self-certification, to make it clear that the option is no longer available. SBA does not believe that any required change to the instructions require the agency to resubmit the information collection to OMB for review and approval.

SBA notes that personal financial information reported on SBA Form 413 (Control Number 3245–0188) will also be submitted electronically through Certify by those applicants seeking SBA certification as an EDWOSB. However, applicants using third-party certifiers will continue to use the paper version of Form 413. This rule does not propose to make any changes to that collection. However, if comments on this proposed rule result in revisions to these WOSB/EDWOSB related collections of information, SBA will seek OMB approval, if necessary, before the rule is finalized.

Regulatory Flexibility Act, 5 U.S.C. 601–612

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines ''small entity'' to include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' This proposed rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns, but would not affect ''small organizations'' or ''small governmental jurisdictions.'' SBA's contracting programs generally apply only to ''business concerns'' as defined by SBA regulations, in other words, to small businesses organized for profit. ''Small organizations'' or ''small governmental jurisdictions'' are non-profits or governmental entities and do not generally qualify as ''business concerns'' within the meaning of SBA's regulations.

As stated in the regulatory impact analysis this rule will impact approximately 9,000–12,000 women-owned small businesses. If adopted in final form, these businesses will have to apply to SBA for certification. However, SBA has proposed to minimize the impact on WOSBs by accepting certifications already received from SBA, through DOT's DBE program, or the VA's CVE program, and by providing firms that have been certified by third party certifiers with a one-year grace period for certification. The costs to WOSBs for certification should be de minimis, because the required documentation already exists: Such as articles of incorporation, bylaws, stock ledgers or certificates, tax records, etc. In addition, this information is already required to be provided either to third party certifiers, governmental certifying entities (*e.g.,* DOT DBE, SBA 8(a) Business Development, VA CVE) or to SBA through Certify. Thus, the Administrator certifies that the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 124

Administrative practice and procedure, Government procurement, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 124 and 127 as follows:

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 1. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec.1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

■ 2. Amend § 124.104 as follows:
■ a. Remove the first two sentences of paragraph (c)(2) introductory text and add one sentence in their place;
■ b. Remove the first two sentences of paragraph (c)(3)(i) and add one sentence in their place; and
■ c. Revise the first sentence of paragraph (c)(4).

The additions and revision read as follows:

§ 124.104 Who is economically disadvantaged?

* * * * *

(c) * * *

(2) * * * The net worth of an individual claiming disadvantage must be less than $750,000. * * *

(3) * * * (i) SBA will presume that an individual is not economically disadvantaged if his or her adjusted gross income averaged over the three preceding years exceeds $350,000. * * *

(4) * * * An individual will generally not be considered economically disadvantaged if the fair market value of all his or her assets (including his or her primary residence and the value of the applicant/Participant firm) exceeds $6 million. * * *

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 3. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

■ 4. Revise subpart C to read as follows:

Subpart C—Certification of EDWOSB or WOSB Status

Certification by SBA

Certification by Third Party

Subpart C—Certification of WOSB or EDWOSB Status

Certification by SBA

§ 127.300 How is a concern certified as an WOSB or EDWOSB?

(a) *WOSB certification.* (1) A concern may apply to SBA for WOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A concern may submit evidence to SBA that it is a women-owned concern that is a certified 8(a) Participant, certified by the Department of Veterans Affairs (VA) CVE as a Service-Disabled Veteran Owned Business or Veteran-Owned Business, or certified as a Disadvantaged Business Enterprise (DBE) by a state agency authorized by the Department of Transportation (DOT); or

(3) A concern may submit evidence that it has been certified as a WOSB by an approved Third Party Certifier in accordance with this subpart.

(b) *EDWOSB certification.* (1) A concern may apply to SBA for EDWOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A women-owned business that is a certified 8(a) Participant qualifies as an EDWOSB;

(3) Firms certified by the VA or under DOT's DBE program as women-owned business concerns will be deemed to be owned and controlled by women, but must apply to SBA to demonstrate their economic disadvantage in order to be certified as EDWOSBs; or

(4) A concern may submit evidence that it has been certified as an EDWOSB by a third party certifier under this subpart.

(c) *SBA notification and designation.* If SBA determines that the concern is a qualified WOSB or EDWOSB, it will issue a letter of certification and designate the firm as a certified WOSB or EDWOSB on the Dynamic Small Business Search (DSBS) system, or successor system.

§ 127.301 When may a concern apply to SBA for certification?

A concern may apply for WOSB or EDWOSB certification and submit the required information whenever it can represent that it meets the eligibility requirements, subject to the restrictions of § 127.306. All representations and supporting information contained in the application must be complete and accurate as of the date of submission. The application must be signed by an officer of the concern who is authorized to represent the concern.

§ 127.302 Where can a concern apply for certification from SBA?

A concern seeking certification as a WOSB or EDWOSB may apply to SBA

for certification via *https://certify.sba.gov* or any successor system. Certification pages must be validated electronically or signed by a person authorized to represent the concern.

§ 127.303 What must a concern submit to SBA?

(a) To be certified by SBA as a WOSB or EDWOSB, a concern must provide documents and information demonstrating that it meets the requirements set forth in part 127 subpart B. SBA maintains a list of the minimum required documents that can be found at *https://certify.sba.gov.* A firm may submit additional documents and information to support its eligibility. The required documents must be provided to SBA during the application process electronically. This may include, but is not limited to, corporate records, business and personal financial records, including copies of signed Federal personal and business tax returns, and individual and business bank statements.

(b) In addition to the minimum required documents, SBA may request additional information from applicants in order to verify eligibility.

(c) After submitting the application, an applicant must notify SBA of any changes that could affect its eligibility.

(d) If a concern was decertified or previously denied certification, it must include with its application for certification a full explanation of why it was decertified or denied certification, and what, if any, changes have been made. If SBA is not satisfied with the explanation provided, SBA may decline to certify the concern.

(e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 127.401, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA may decline to certify the concern.

§ 127.304 How will SBA process the application for certification?

(a) The SBA's Director of Government Contracting (D/GC) or designee is authorized to approve or decline applications for certification. SBA must receive all required information and supporting documents before it will begin processing a concern's application. SBA will not process incomplete applications. SBA will advise each applicant within 15 calendar days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will make its determination within ninety (90) calendar days after receipt of a complete package, whenever practicable.

(b) SBA may request additional information or clarification of information contained in an application or document submission at any time.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the business concern's eligibility or demonstrate a lack of eligibility in the area or areas to which the information relates.

(d) The applicant must be eligible as of the date it submitted its application and up until the time the D/GC issues a decision. The decision will be based on the facts contained in the application, any information received in response to SBA's request for clarification, and any changed circumstances since the date of application.

(e) Any changed circumstances occurring after an applicant has submitted an application will be considered and may constitute grounds for decline. After submitting the application and signed representation, an applicant must notify SBA of any changes that could affect its eligibility. The D/GC may propose decertification for any EDWOSB or WOSB that fails to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

(f) If SBA approves the application, SBA will send a written notice to the concern and update *https://certify.sba.gov* or any successor system, and update DSBS and the System for Award Management (or any successor systems) to indicate the firm has been certified by SBA.

(g) A decision to deny eligibility must be in writing and state the specific reasons for denial.

(h) A copy of the decision letter will be sent to the electronic mail address provided with the application. SBA will consider any decision sent to this electronic mail address provided to have been received by the applicant firm.

(i) The decision of SBA to decline certification is the final Agency decision, unless the applicant seeks reconsideration pursuant to § 127.305.

§ 127.305 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?

(a) A concern whose application is declined may request that SBA reconsider its decision by filing a request for reconsideration at *https://certify.sba.gov,* or any successor system, within 30 calendar days of the date of SBA's decision.

(b) At the time of its request for reconsideration, the applicant must provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline, whether or not available at the time of initial application, including information and documentation regarding changed circumstances.

(c) SBA will issue a written decision within 60 calendar days of SBA's receipt of the applicant's request for reconsideration. SBA may approve the application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the D/GC will explain why the applicant is not eligible for admission to the EDWOSB or WOSB program and give specific reasons for the decline.

(d) If SBA declines the application solely on issues not raised in the initial decline, the applicant can ask for reconsideration as if it were an initial decline.

(e) The decision of SBA to decline certification is the final Agency decision.

§ 127.306 May declined or decertified concerns seek recertification at a later date?

A concern that SBA has declined or decertified may seek certification after one year from the date of decline or decertification if it believes that it has overcome all of the reasons for decline or decertification and is currently eligible. A concern found to be ineligible during a WOSB/EDWOSB status protest is precluded from applying for certification for one year from the date of the final agency decision (the D/GC's decision if no appeal is filed or the decision of SBA's Office of Hearings and Appeals (OHA) where an appeal is filed pursuant to § 127.605.

Certification by Third Party

§ 127. 350 What is a third party certifier?

A third party certifier is a non-governmental entity that SBA may approve to certify that an applicant firm is qualified for the WOSB or EDWOSB contracting program. A third party certifier may be a for-profit or non-profit entity. The list of SBA-approved third

party certifiers may be found on SBA's website at *sba.gov*.

§ 127.351 What third party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?

In order for SBA to accept a third party certification that a concern qualifies as a WOSB or EDWOSB, the concern must have a current, valid certification from an entity designated as an SBA-approved certifier. The third party certification must be submitted to SBA through *https://certify.sba.gov* (or a successor system).

§ 127.352 What is the process for becoming a third party certifier?

SBA will periodically hold open solicitations. All entities that believe they meet the criteria to act as a third party certifier will be free to respond to the solicitation. SBA will review the submissions, and if SBA determines that an entity has demonstrated it meets SBA criteria, SBA will enter into an agreement and designate the entity as an approved third party certifier.

§ 127.353 May third party certifiers charge a fee?

(a) Third party certifiers may charge a reasonable fee, but must notify applicants first, in writing, that SBA offers certification for free.

(b) The method of notification and the language that will be used for this notification must be approved by SBA. The third party certifier may not change its method or the language without SBA approval.

§ 127.354 What are the minimum required certification standards for a third party certifier?

(a) All third party certifiers must enter into written agreements with SBA. This agreement will detail the requirements that the third party certifier must meet. SBA may terminate the agreement if SBA subsequently determines that the entity's certification process does not comply with SBA-approved certification standards or is not based on the same program eligibility requirements as set forth in subpart B of this part or conducts itself in a manner contrary to SBA's values.

(b) Third party certifiers' certification process must comply with SBA-approved certification standards and track the WOSB or EDWOSB eligibility requirements set forth in subpart B of this part.

(c) In order for SBA to enter into an agreement with a third party certifier, the entity must establish the following:

(1) It will render fair and impartial WOSB/EDWOSB Federal Contract Program eligibility determinations;

(2) It will provide the approved applicant a valid certificate for entering into the SBA electronic platform, and will retain documents used to determine eligibility for a period of six (6) years to support SBA's responsibility to conduct a status protest, eligibility examination, agency investigation or audit of the third party determinations;

(3) Its certification process will require applicant concerns to register in SAM (or any successor system) and submit sufficient information as determined by SBA to enable it to determine whether the concern qualifies as a WOSB. This information must include documentation demonstrating whether the concern is:

(i) A small business concern under the SBA size standard corresponding to the concern's primary industry, as defined in 13 CFR 121.107;

(ii) At least 51 percent owned and controlled by one or more women who are United States citizens; and

(4) It will not decline to accept a concern's application for WOSB/EDWOSB certification on the basis of race, color, national origin, religion, age, disability, sexual orientation, marital or family status, or political affiliation.

§ 127.355 How will SBA ensure that approved third party certifiers are meeting the requirements?

(a) SBA will require third party certifiers to submit quarterly reports to SBA. These reports will contain information including the number of applications received, number of applications approved and denied, and other information that SBA determines may be helpful for ensuring that third party certifiers are meeting their obligations or information or data that may be useful for improving the program.

(b) SBA will conduct periodic compliance reviews of third party certifiers to ensure that they are properly applying SBA's WOSB/EDWOSB requirements and certifying firms in accordance with those requirements.

(1) SBA will conduct a compliance review on at least one third party certifier per year and will ensure that every third party certifier undergoes a full compliance review every three years.

(2) At the conclusion of each compliance review SBA will provide the third party certifier with a written report detailing SBA's findings with regard to the third party certifier's compliance with SBA's requirements. The report will include recommendations for possible improvements, and detailed explanations for any deficiencies identified by SBA.

(c) If SBA determines that a third party certifier is not meeting the requirements, SBA may revoke the approval of that third party certifier.

§ 127.356 How does a concern obtain certification from an approved certifier?

(a) A concern that seeks WOSB or EDWOSB certification from an SBA-approved third party certifier must submit its application directly to the approved certifier in accordance with the specific application procedures of the particular certifier.

(b) The concern must register in the System for Award Management (SAM), or any successor system.

(c) The approved certifier must ensure that all documents used to determine that a firm is approved for certification are uploaded in *https://certify.sba.gov* or any successor system.

§ 127.357 What happens if a firm is found not eligible by a third party certifier?

(a) The concern may request, at no additional cost to the applicant, a redetermination within 30 calendar days from the third party certifier that initially declined its application and cannot represent itself as a qualified WOSB or EDWOSB unless and until it receives a determination of eligibility.

(b) The third party certifier must complete the redetermination within 60 calendar days of request. If the applicant is declined, the third party certifier shall notify SBA.

(c) The concern must wait one year to request a reexamination from either SBA or a third party certifier.

(d) The concern may not seek certification from any other third party certifier during this waiting period.

■ 5. Revise subpart D to read as follows:

Subpart D—Maintaining WOSB and EDWOSB Status and Eligibility Examinations

Sec.

Subpart D—Maintaining WOSB and EDWOSB Status and Eligibility Examinations

§ 127.400 How does a concern maintain its WOSB or EDWOSB certification?

(a) A certified WOSB or EDWOSB must recertify every three years to SBA that it continues to meet all of the WOSB and EDWOSB eligibility requirements. Concerns wishing to remain in the program without any interruption must recertify their continued eligibility to SBA within 30 calendar days before the third anniversary date of their initial certification and each subsequent three-year period. Failure to do so will result in the concern being decertified. The process for completing the recertification can be found on SBA's website at *https://certify.sba.gov* (or successor system).

(b) A concern certified by a third party certifier prior to the effective date of SBA's certification may maintain that status for three years from the date of its certification or most recent recertification by the third party certifier.

§ 127.401 What are an EDWOSB's and WOSB's ongoing obligations to SBA?

Once certified, a WOSB or EDWOSB must immediately notify SBA of any material changes that could affect its eligibility. Material change includes, but is not limited to, a change in the ownership, business structure, or management. The notification must be in writing, and must be uploaded into the firm's profile with SBA. The method for notifying SBA can be found on *https://certify.sba.gov.* A concern's failure to notify SBA of such a material change may result in decertification and removal from SAM and DSBS (or any successor system) as a designated certified WOSB/EDWOSB concern. In addition, SBA may seek the imposition of penalties under § 127.700.

§ 127.402 What happens if a concern fails to recertify?

If a WOSB or EDWOSB fails to recertify its status on *https://certify.sba.gov* (or successor system) pursuant to § 127.400 or SBA determines that a concern has not notified SBA of a change that could affect its WOSB or EDWOSB eligibility, SBA will decertify the concern from the program. In the case of a concern failing to recertify its status as a WOSB or EDWOSB, SBA will decertify the firm from the program on the day after the third anniversary date of initial certification or recertification. SBA will issue a written notice explaining why the concern has been decertified. This decertification will be SBA's final decision and may not be appealed.

§ 127.403 What is a program examination, who will conduct it, and what will SBA examine?

(a) A program examination is an investigation by SBA officials, which verifies the accuracy of any certification of a concern issued by a third party certifier or other Federal or State agency or in connection with a WOSB or EDWOSB contract. Thus, examiners may verify that the concern currently meets the program's eligibility requirements, and that it met such requirements at the time of its application for certification, its most recent recertification, or its certification in connection with a WOSB or EDWOSB contract.

(b) Examiners may review any information related to the concern's eligibility requirements. SBA may also conduct site visits.

(c) It is the responsibility of program participants to ensure the information provided to SBA is kept up to date and is accurate. SBA considers all required information and documents material to a concern's eligibility, and assumes that all information and documentation submitted are up to date and accurate unless SBA has information that indicates otherwise.

§ 127.404 When may SBA conduct program examinations?

SBA may conduct a program examination at any time after a concern has been certified as a WOSB or EDWOSB.

§ 127.405 May SBA require additional information from a WOSB or EDWOSB during a program examination?

At the discretion of the D/GC, SBA has the right to require that a WOSB or EDWOSB submit additional information as part of the certification process, or at any time thereafter. SBA may draw an adverse inference from the failure of a concern to cooperate with a program examination or provide requested information.

§ 127.406 What happens if SBA determines that the concern is no longer eligible for the program?

If SBA believes that a concern does not meet the program eligibility requirements, the concern has not provided or maintained all the required certifications and documentation, or the concern has failed to notify SBA of a material change, SBA will propose the concern for decertification from the program.

(a) *Proposed Decertification.* The D/GC or designee will notify the concern in writing that it has been proposed for decertification. This notice will state the reasons why SBA has proposed decertification, and that the WOSB or EDWOSB must respond to each of the reasons set forth.

(1) The WOSB or EDWOSB must respond in writing to a proposed decertification within 20 calendar days from the date of the proposed decertification.

(2) If the initial certification was done by a third party, SBA will also notify the third party certifier of the proposed decertification in writing.

(b) *Decertification.* The D/GC or designee will consider the reasons for proposed decertification and the concern's response before making a written decision whether to decertify. The D/GC may draw an adverse inference where a concern fails to cooperate with SBA or provide the information requested. The D/GC's decision is the final Agency decision.

(c) *Reapplication.* A concern decertified pursuant to this section may reapply to the program pursuant to § 127.306.

§ 127.505 [Removed and reserved]

■ 6. Remove and reserve § 127.505.

§ 127.602 [Amended]

■ 7. Amend § 127.602 by removing the last sentence.

§ 127.603 [Amended]

■ 8. Amend § 127.603 by removing the second to last sentence in paragraph (d).

■ 9. Revise § 127.604(f)(4) to read as follows:

§ 127.604 How will SBA process an EDWOSB or WOSB status protest?

* * * * *

(f) * * *

(4) A concern that has been found to be ineligible will be decertified from the program and may not submit an offer as a WOSB or EDWOSB on another procurement until it is recertified. A concern may be recertified by reapplying to the program pursuant to § 127.306.

Christopher M. Pilkerton,

Acting Administrator.

[FR Doc. 2019–09684 Filed 5–13–19; 8:45 am]

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Test Program described in DFARS 219.702–70, if the subcontract is expected to exceed the applicable threshold specified in Federal Acquisition Regulation 19.702(a), and to have further subcontracting opportunities.

* * * * *

■ 8. Amend section 252.219–7004 by—
Revising the section heading;
■ a. Removing the clause date of ''(APR 2018)'' and adding ''(MAY 2019)'' in its place;
■ b. Revising paragraph (g) introductory text.
■ c. In paragraph (g)(1), removing ''252.219–7003'' and adding ''Defense Federal Acquisition Regulation Supplement (DFARS) 252.219–7003'' in its place;
■ d. In paragraph (g)(2), removing ''252.219–7003'' and adding ''DFARS 252.219–7003'' in its place; and
■ e. In paragraph (g)(3), removing ''252.219–7004'' and adding ''DFARS 252.219–7004'' in its place.

The revisions read as follows:

252.219–7004 Small Business Subcontracting Plan (Test Program).

* * * * *

(g) *Subcontracts.* The Contractor shall include in subcontracts that offer subcontracting opportunities, are expected to exceed the applicable threshold specified in FAR 19.702(a) on the date of subcontract award, and are required to include the clause at FAR 52.219–8, Utilization of Small Business Concerns, the clauses at—

* * * * *

■ 9. Amend section 252.225–7004 by—
■ a. Removing the clause date of ''(OCT 2015)'' and adding ''(MAY 2019)'' in its place;
■ b. Revising paragraphs (a) and (b)(1).

The revisions read as follows:

252.225–7004 Report of Intended Performance Outside the United States and Canada—Submission after Award.

* * * * *

(a) *Definition.* As used in this clause—
United States means the 50 States, the District of Columbia, and outlying areas.

(b) * * *

(1) Exceeds the threshold specified in Defense Federal Acquisition Regulation Supplement 225.870–4(c)(2)(i)(A)(*1*) on the date of award of this contract; and

* * * * *

■ 10. Amend section 252.249–7002 by—
■ a. Revising the section heading;
■ b. Removing the clause date of ''(OCT 2015)'' and adding ''(MAY 2019)'' in its place;
■ c. Revising paragraph (a); and
■ d. Revising paragraphs (d)(1) and (d)(2).

The revisions read as follows:

252.249–7002 Notification of Anticipated Contract Termination or Reduction.

* * * * *

(a) *Definition.* As used in this clause—
Major defense program means a program that is carried out to produce or acquire a major system (as defined in 10 U.S.C. 2302(5)).

* * * * *

(d) * * *

(1) Provide notice of the anticipated termination or reduction to each first-tier subcontractor with a subcontract that equals or exceeds the threshold specified in Defense Federal Acquisition Regulation Supplement (DFARS) 225.870–4(c)(2)(i)(A)(*1*) at the time of the notice; and

(2) Require that each such subcontractor—

(i) Provide notice to each of its subcontractors with a subcontract that equals or exceeds the threshold specified in DFARS 225.870–4(c)(2)(i)(C) at the time of the notice; and

(ii) Impose a similar notice and flowdown requirement to subcontractors with subcontracts that equal or exceed the threshold specified in DFARS 225.870–4(c)(2)(i)(C) at the time of the notice.

* * * * *

[FR Doc. 2019–11308 Filed 5–30–19; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, 225, and 252

[Docket DARS–2018–0060]

RIN 0750–AJ82

Defense Federal Acquisition Regulation Supplement: Foreign Commercial Satellite Services and Certain Items on the Commerce Control List (DFARS Case 2018–D020)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act for Fiscal Years 2017 and 2018. One section imposes additional prohibitions with regard to acquisition of certain foreign commercial satellite services, such as cybersecurity risk and source of satellites and launch vehicles used to provide the foreign commercial satellite services, and expands the definition of ''covered foreign country'' to include Russia. Another section prohibits purchase of items originating in the People's Republic of China that meet the definition of goods and services controlled as munitions items when moved to the Commerce Control List of the Export Administration Regulations of the Department of Commerce.

DATES: Effective May 31, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 83 FR 66066 on December 21, 2018, to implement section 1603 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91) and section 1296 of the NDAA for FY 2017 (Pub. L. 114–328). Section 1603 amends 10 U.S.C. 2279 to impose additional prohibitions with regard to acquisition of certain foreign commercial satellite services, such as cybersecurity risk and source of satellites and launch vehicles used to provide the foreign commercial satellite services. Section 1603 also expands the definition of ''Covered foreign country'' to include Russia. Section 1296 prohibits purchase of items from a Communist Chinese military company. One respondent submitted a public comment in response to the interim rule.

II. Discussion and Analysis

DoD reviewed the public comment received. It was favorable to implementation of the rule. No changes from the interim rule are made in the final rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

A. The Interim Rule Amended the Applicability of Existing DFARS Solicitation Provisions and Contract Clauses and Added a New Clause as Follows

• To implement section 1603 of the NDAA for FY 2018, this rule amended the provision at DFARS 252.225–7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—Representation, and added a clause to

enforce compliance with the representations in the associated provisions. This provision and clause apply to acquisitions not greater than the simplified acquisition threshold (SAT) and acquisitions of commercial items.

• To implement section 1296 of the NDAA for FY 2017, this rule modified the clause at DFARS 252.225–7007, Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies, to prohibit contractors or subcontractors from acquiring items listed on the 600 series of the CCL that are to be delivered under the contract from any Communist Chinese military company. The rule continues to prescribe the use of this clause for use in solicitations and contracts for items valued at or below the SAT. However, the clause now applies to the acquisition of commercial items, including Commercially Available Off-the-Shelf (COTS) items, if the items are 600 series items on the CCL, or USML items. Although most 600 series items are not commercial items, and USML items are even less likely to be commercial items, it is possible that some of these covered items will be commercial items and must not be purchased from a Communist Chinese military company.

B. Determinations

• *Section 1603 of the NDAA for FY 2018.* A determination and finding was signed by the Director, Defense Procurement and Acquisition Policy, on June 23, 2014, that due to potential risk to national security it would not be in the best interest of the United States to exempt acquisitions not greater than the SAT and acquisitions of commercial items from the applicability of 10 U.S.C. 2279.

• *Section 1296 of the NDAA for FY 2017.* A determination under 41 U.S.C. 1905 was not required to prescribe DFARS 252.225–7012 for use in solicitations and contracts valued at or below the SAT, because this is consistent with the current applicability of the clause DFARS 252.225–7007, which prohibits acquisitions of items on the USML from Communist Chinese Military companies. The Principal Director, DPC, determined that it is in the best interest of the Government to apply the requirements of section 1296 to contracts for the acquisition of commercial items, including COTS items, to prevent insertion of malicious items into U.S. weapons platforms, information technology systems, and other areas, presenting a threat to our warfighters and their ability to defend national security.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The reason for this rule is to implement section 1603 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 and section 1296 of the NDAA for FY 2017. Section 1603 of the NDAA for FY 2018 amends 10 U.S.C. 2279, which prohibits acquisition of certain foreign commercial satellite services. Section 1296 of the NDAA for FY 2017 amends section 1211 of the NDAA for FY 2006 to prohibit purchase from any Communist Chinese military company, through a contract or subcontract (at any tier), of goods and services controlled as munitions items on the 600 series of the Commerce Control List (CCL) of the Export Administration Regulations of the Department of Commerce.

The objectives of the rule are as follows:

• *Section 1603.* To prohibit award of contracts for commercial satellite services to a foreign entity if entering into such contract would create an unacceptable cybersecurity risk. In addition, the definition of covered foreign country is expanded to include Russia (other covered foreign countries are China, North Korea, Iran, Sudan, and Syria). New restrictions are also added with regard to the satellites and launch vehicles to be used to provide the satellite services, but these restrictions do not apply to launches that occur prior to December 31, 2022.

• *Section 1296.* To prohibit purchase of items originating in the People's Republic of China that meet the definition of goods and services controlled as munitions items when moved to the 600 series of the CCL of the Export Administration Regulations of the Department of Commerce.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

DoD estimates that this rule applies to small entities as follows:

• *Section 1603.* This part of the rule applies to less than 86 small entities. According to Federal Procurement Data System (FPDS) data for FY 2016, 86 small entities were awarded contracts or orders for services under Product Service Code D304 (ADP Telecommunications and Transmission Services), of which commercial satellite services are a subset. Although the focus of the Regulatory Flexibility Act is protection of domestic small business entities that are eligible for assistance from the Small Business Administration, there may be domestic small business entities in the United States that offer the satellite services of a foreign entity that would be restricted by this rule.

• *Section 1296.* This part of the rule applies to any small entities that intend to provide items on the 600 series of the Commerce Control List under a DoD contract or subcontract. The 600 series consists of items on the Commerce Control List that have an export control classification number of which the third character is a ''6''. These items were transitioned from the United States Munitions List (USML) to the 600 series, because they have less than a critical military or intelligence capability than the items that remain on the USML, but they are not currently in normal commercial use. Data on the number of entities that can provide such items, and whether they are small or other than small entities, is not available in FPDS, because these items are not readily identifiable in FPDS and are often acquired through subcontracts.

Projected reporting or recordkeeping requirements of this rule are as follows:

• *Section 1603.* In addition to the current annual representations as to whether the offeror is, or is not, a foreign entity subject to the prohibitions of the statute; or is, or is not, offering commercial satellite services provided by such a foreign entity, this rule adds five more annual representations as to whether the offeror—

○ Is, or is not offering commercial satellite services using satellites, launched on or after December 31, 2022, that will be designed or manufactured in a covered foreign country;

○ Is, or is not offering commercial satellite services using satellites, launched on or after December 31, 2022, that will be designed or manufactured by an entity controlled in whole or in part by, or acting on behalf of, the government of a covered foreign country;

○ Is, or is not offering commercial satellite services using satellites, launched outside the United States on or after December 31, 2022, using a launch vehicle that is designed or manufactured in a covered foreign country;

○ Is, or is not offering commercial satellite services using satellites, launched outside the United States on or after December 31, 2022, using a launch vehicle that is provided by the government of a covered foreign country; and

○ Is, or is not offering commercial satellite services using satellites, launched outside the United States on or after December 31, 2022, using a launch vehicle that is provided by an entity controlled in whole or in part by, or acting on behalf of, the government of a covered foreign country.

Further information is required if the offeror provides an affirmative response to any of the representations, but such affirmative response and further submission is expected to be extremely rare because of the statutory prohibition and the expected rarity of a waiver by the Under Secretary of Defense for Acquisition and Sustainment or for Policy. Furthermore, this prohibition is only applicable to launches on or after December 31, 2022.

If the satellite service provider responded affirmatively to any of the new representations regarding launch vehicles, if such launches are covered in whole or in part by a contract or other agreement relating to launch services that, prior to June 10, 2018, was either fully paid by the satellite service provider or covered by a legally binding commitment of the satellite service provider to pay for such services, a de minimis amount of information is required with regard to such contract or agreement in order to establish an exception to the associated prohibitions.

• *Section 1296.* There are no projected reporting or recordkeeping requirements relating to implementation of section 1296. The only compliance requirements are to not purchase 600 series items that originate in the People's Republic of China.

This rule will not have a significant economic impact on any small entities, unless they are offering commercial satellite services subject to the restrictions of this rule or providing 600 series items that originate in the Peoples Republic of China. DoD was not able to identify any alternatives that would reduce the burden on small entities and meet the objectives of the rule.

VI. Paperwork Reduction Act

The interim rule affected the information collection requirements in the provision at DFARS 252.225–7049, currently approved through March 31, 2021, under OMB Control Number 0704–0525, entitled Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible at this time, because the prohibition on use of certain foreign satellites and launch vehicles only applies to launches outside the United States on or after December 31, 2022. The information collection will be updated to reflect these changes when renewed.

List of Subjects in 48 CFR Parts 201, 212, 225, and 252

Government procurement.

■ Accordingly, the interim rule amending 48 CFR parts 201, 212, 225, and 252, which was published at 83 FR 66066 on December 21, 2018, is adopted as final without change.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2019–11306 Filed 5–30–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 206, 211, and 213

[Docket DARS–2018–0052]

RIN 0750–AJ50

Defense Federal Acquisition Regulation Supplement: Brand Name or Equal (DFARS Case 2017–D040)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that requires the use of brand name or equal descriptions, or proprietary specifications or standards, in solicitations to be justified and approved.

DATES: Effective May 31, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 83 FR 54696 on October 31, 2018, to implement section 888(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328), which requires that competition on DoD contracts not be limited through the use of brand name or equal descriptions, or proprietary specifications or standards, in solicitations, unless a justification for such specification is provided and approved in accordance with 10 U.S.C. 2304(f). Six respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

The paragraphs at DFARS 211.104 and DFARS 211.170 have been updated to clarify that the use brand name or equal descriptions or proprietary specifications and standards shall be justified and approved when using sealed bidding procedures, negotiated procedures, or simplified procedures for certain commercial items.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Several respondents expressed support for the rule.

Response: DoD acknowledges the support for the rule.

2. Restrictions on Brand Name or Equal Descriptions

Comment: A respondent expressed concern that subjecting brand name or equal descriptions to the justification and approval process will discourage the use of solicitations that signal a preference for, but do not require, a specific brand or product.

Response: The language in the rule meets the intent of the statute at section 888(a) of the NDAA for FY 2017. When contracting without providing for full and open competition (*e.g.,* requiring a specific brand or product particular to one manufacturer, or requiring specifications or standards that are

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175. This action only applies to state and local monitoring agencies operating NCore monitoring sites in Core Based Statistical Areas of 1,000,000 people or more. No tribal governments will be subject to the PAMS monitoring requirements. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

List of Subjects in 40 CFR Part 58

Ambient air monitoring, Ozone, Photochemical Assessment Monitoring Stations, Precursor monitoring.

Dated: May 23, 2019.

Andrew R. Wheeler,

Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency proposes to amend part 58 of title 40, chapter I, of the Code of Federal Regulations as follows:

PART 58—AMBIENT AIR QUALITY SURVEILLANCE

■ 1. The authority citation for part 58 continues to read as follows:

Authority: 42 U.S.C. 7403, 7405, 7410, 7414, 7601, 7611, 7614, and 7619.

■ 2. Section 58.13 is amended by revising paragraph (h) to read as follows:

§ 58.13 Monitoring network completion.

* * * * *

(h) The Photochemical Assessment Monitoring sites required under 40 CFR part 58 Appendix D, section 5(a) must be physically established and operating under all of the requirements of this part, including the requirements of appendix A, C, D, and E of this part, no later than June 1, 2021.

* * * * *

[FR Doc. 2019–11406 Filed 5–30–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 232, and 252

[Docket DARS–2019–0025]

RIN 0750–AK25

Defense Federal Acquisition Regulation Supplement: Prompt Payments of Small Business Contractors (DFARS Case 2018–D068)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019 that provides for accelerated payments to small business contractors and subcontractors.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before July 30, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D068, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2018–D068.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2018–D068'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2018–D068 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Jennifer D. Johnson, OUSD(A–S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to revise the DFARS to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 852 provides for accelerated payments to small business contractors and to small business subcontractors by accelerating payments to their prime contractors. Specifically, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if: (1) A specific payment date is not established by contract, and (2) the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The requirements of section 852 are similar to current DoD policy and practice regarding payments to small business contractors and subcontractors. DFARS 232.903 states DoD's policy of assisting small businesses by paying them as quickly as possible after receipt of invoices and proper documentation, and before normal payment due dates established in the contract. In practice, the Defense Financial Accounting Service (DFAS) currently provides accelerated payments to nearly all DoD contractors, as permitted by law.

II. Discussion and Analysis

This rule proposes to amend DFARS parts 212, 232, and 252 to implement section 852 of the NDAA for FY 2019. In part 232, this rule proposes to add section 232.009, Providing accelerated payments to small business subcontractors, to address compliance with section 852. The clause at Federal Acquisition Regulation (FAR) 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, already includes most of the requirements of section 852. Therefore, DoD will continue to use the FAR clause, in order to avoid unnecessary duplication. However, this rule proposes to add a new contract clause at DFARS 252.232–7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration. In accordance with section 852, this new clause prohibits contractors from requiring any further consideration from, or charging fees to, their small business subcontractors when making accelerated payments under FAR 52.232–40. The rule proposes to add this new clause to the list at section 212.301, Solicitation provisions and contract clauses for the acquisition of commercial items.

III. Expected Impact of the Proposed Rule

Current DoD policy, as stated in DFARS 232.903, is to pay small business contractors as quickly as possible after receipt of invoices and proper documentation. This rule proposes to specify that DoD will provide payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and documentation, and before normal payment due dates. For items that ordinarily require payment in less than 15 days (*e.g.,* perishable food), DoD will provide payment as quickly as possible after receipt of proper invoices and documentation, and before the normal payment due date.

With few exceptions, DoD will provide accelerated payments to small business contractors and to other contractors that agree to provide accelerated payments to their small business subcontractors without further consideration or fees. DoD will not be able to provide accelerated payments if such payments put DoD at risk of a violation of law.

DoD estimates that 40,282 contractors (including 30,498 small businesses) will receive accelerated payments each year, based on data obtained from the Federal Procurement Data System and input from subject matter experts. Specifically, DoD awarded contracts to an average of 40,689 unique entities (including 30,806 small businesses) each year from FY 2016 through FY 2018. Subject matter experts estimated that DoD would not provide accelerated payments to approximately 1 percent (407, including 308 small businesses) of these contractors because such payments would put DoD at risk of a violation of law. Therefore, approximately 40,282 contractors (including 30,498 small businesses) per year would receive accelerated payments.

The clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, currently requires contractors to provide accelerated payments to their small business subcontractors when the Government provides accelerated payments to the contractors. DoD contracting officers are required to include this clause in DoD contracts. As a result, DoD contractors should already be providing accelerated payments to small business subcontractors.

In accordance with section 852 of the NDAA for FY 2019, this rule proposes to prohibit contractors from requiring any further consideration from, or charging fees to, their small business subcontractors when making accelerated payments. This prohibition will be communicated to contractors in a new contract clause at DFARS 252.232–7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration. This prohibition would benefit small business subcontractors who have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments. Any costs for prime contractors to implement the prohibition on fees and consideration are expected to be de minimis since DoD expects that only a small number of contractors have required such consideration or fees from their small business subcontractors.

It is not possible for DoD to estimate the number of small business subcontractors who have been required to provide consideration or pay fees for accelerated payments from prime contractors, nor is it possible to estimate the dollar value of the consideration provided or fees paid. The lack of available data makes it difficult to predict the impact of the proposed rule. Depending on the extent to which small business subcontractors have been required to provide consideration or pay fees to receive accelerated payments, the proposed prohibition could result in cost savings. DoD invites public comment regarding the number of small businesses required to provide such consideration or fees to prime contractors, the basis for such estimates, and the cost impact of the consideration or fees.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

DoD intends to apply the requirements of section 852 of the NDAA for FY 2019 to contracts at or below the simplified acquisition threshold (SAT) and to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts at or Below the SAT

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since approximately 96 percent of DoD contracts are valued at or below the SAT, DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts at or below the SAT. An exception for contracts at or below the SAT would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the acquisition of

commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since more than half of DoD's contractors are small businesses providing commercial items, including COTS items, DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not expected to be subject to the requirements of E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VII. Regulatory Flexibility Act

DoD expects that this proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Therefore, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if—(1) a specific payment date is not established by contract and (2) the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The objective of the rule is to provide accelerated payments to small business contractors and subcontractors. The legal basis is section 852 of the NDAA for FY 2019.

According to data obtained from the Federal Procurement Data System, DoD awarded contracts to an average of 30,806 unique small entities each year from FY 2016 through FY 2018. DoD estimates that it may not be possible to provide accelerated payments to approximately 308 small contractors (1%) because such payments would put DoD at risk of a violation of law. Therefore, approximately 30,498 small contractors per year would receive accelerated payments.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2018–D068), in correspondence.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 232, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 232, and 252 are proposed to be amended as follows:

■ 1. The authority citations for 48 CFR part 212, 232, and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 ad 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by adding paragraph (f)(xiii)(G) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(xiii) * * *

(G) Use the clause at 252.232–7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, as prescribed in 232.009–2(2).

* * * * *

PART 232—CONTRACT FINANCING

■ 3. Add sections 232.009, 232.009–1, and 232.009–2 to read as follows:

232.009 Providing accelerated payments to small business subcontractors.

232.009–1 General.

Section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) requires DoD to provide accelerated payments to small business contractors and subcontractors, to the fullest extent permitted by law, with a goal of 15 days.

232.009–2 Contract clause.

Use the clause at 252.232–7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, that include the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

Subpart 232.9—Prompt Payment

■ 4. Revise section 232.903 to read as follows:

232.903 Responsibilities.

In accordance with section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), DoD shall assist small business concerns by providing payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and all required documentation, including acceptance, and before normal payment due dates established in the contract (see 232.906(a)).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 252.232–7XXX to read as follows:

252.232–7XXX Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration.

As prescribed in 232.009–2, use the following clause:

ACCELERATING PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS—PROHIBITION ON FEES AND CONSIDERATION (DATE)

(a) In accordance with section 852 of Public Law 115–232, the contractor shall not require any further consideration from or charge fees to the small business subcontractor when making accelerated payments to subcontractors under the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

(b) Include the substance of this clause, including this paragraph (b), in all subcontracts with small business concerns, including those for the acquisition of commercial items.

(End of clause)

[FR Doc. 2019–11309 Filed 5–30–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 244

[Docket DARS–2019–0024]

RIN 0750–AJ48

Defense Federal Acquisition Regulation Supplement: Contractor Purchasing System Review Threshold (DFARS Case 2017–D038)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to establish a DoD contractor purchasing system review dollar threshold that provides a regulatory basis for allowing DoD personnel to support other essential priorities and missions of greater contractual risk, while reducing regulatory impact on contractors.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before July 30, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017–D038, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2017–D038.'' Select ''Comment Now'' and follow the instructions to submit a comment. Please include your name, company name (if any), and ''DFARS Case 2017–D038'' on any attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2017–D038 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Kimberly Bass, OUSD(A&S)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Instructions: Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Kimberly Bass, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

This proposed rule implements a recommendation from the Defense Contract Management Agency (DCMA) to raise the contractor purchasing system review (CPSR) threshold at Federal Acquisition Regulation 44.302(a) from $25 million to $50 million. Currently, FAR 44.302(a) requires the administrative contracting officer (ACO) to determine whether a contractor's sales to the Government are expected to exceed $25 million during the next 12 months and, if so, perform a review to determine if a CPSR is needed. The ACO uses this dollar threshold in conjunction with the surveillance criteria cited at FAR 44.302(a), *i.e.,* contractor past performance, and the volume, complexity, and dollar value of subcontracts. DCMA performs the preponderance of DoD CPSRs. Competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjustment contracts and sales of commercial items pursuant to Part 12 are excluded from this requirement.

FAR 44.302(a) specifically authorizes the head of the agency responsible for contract administration to raise or lower the $25 million CPSR threshold if it is considered to be in the Government's best interest. The dollar threshold of $25 million cited at FAR 44.302(a) has been unchanged since 1996. In 2016, the DCMA CPSR Group conducted an analysis to determine if raising the CPSR threshold would be beneficial. Based on the Group's findings, it was determined that adjusting the threshold upward to $50 million would appropriately account for inflation, reduce burden on small contractors, and allow a more efficient and effective use of CSPR resources to review larger contractors where more taxpayer dollars are at risk.

II. Discussion and Analysis

This rule proposes to amend DFARS 244.302, Requirements, to establish within the DFARS a DoD CPSR dollar threshold of $50 million. With this threshold in place, it is estimated that DCMA ACOs can reduce the number of contractor reviews by approximately 20 percent, while reducing by only 2% the value of contract dollars covered by CSPRs. Thus, the Government will be adequately protected by the $50 million threshold.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new provisions or clauses or impact any existing provisions or clauses. The rule merely increases the DoD dollar threshold for conducting CPSRs to $50 million.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety

Subpart 232.9—Prompt Payment

■ 4. Revise section 232.903 to read as follows:

232.903 Responsibilities.

In accordance with section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), DoD shall assist small business concerns by providing payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and all required documentation, including acceptance, and before normal payment due dates established in the contract (see 232.906(a)).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 252.232–7XXX to read as follows:

252.232–7XXX Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration.

As prescribed in 232.009–2, use the following clause:

ACCELERATING PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS—PROHIBITION ON FEES AND CONSIDERATION (DATE)

(a) In accordance with section 852 of Public Law 115–232, the contractor shall not require any further consideration from or charge fees to the small business subcontractor when making accelerated payments to subcontractors under the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

(b) Include the substance of this clause, including this paragraph (b), in all subcontracts with small business concerns, including those for the acquisition of commercial items.

(End of clause)

[FR Doc. 2019–11309 Filed 5–30–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 244

[Docket DARS–2019–0024]

RIN 0750–AJ48

Defense Federal Acquisition Regulation Supplement: Contractor Purchasing System Review Threshold (DFARS Case 2017–D038)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to establish a DoD contractor purchasing system review dollar threshold that provides a regulatory basis for allowing DoD personnel to support other essential priorities and missions of greater contractual risk, while reducing regulatory impact on contractors.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before July 30, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017–D038, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2017–D038.'' Select ''Comment Now'' and follow the instructions to submit a comment. Please include your name, company name (if any), and ''DFARS Case 2017–D038'' on any attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2017–D038 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Kimberly Bass, OUSD(A&S)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Instructions: Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Kimberly Bass, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

This proposed rule implements a recommendation from the Defense Contract Management Agency (DCMA) to raise the contractor purchasing system review (CPSR) threshold at Federal Acquisition Regulation 44.302(a) from $25 million to $50 million. Currently, FAR 44.302(a) requires the administrative contracting officer (ACO) to determine whether a contractor's sales to the Government are expected to exceed $25 million during the next 12 months and, if so, perform a review to determine if a CPSR is needed. The ACO uses this dollar threshold in conjunction with the surveillance criteria cited at FAR 44.302(a), *i.e.,* contractor past performance, and the volume, complexity, and dollar value of subcontracts. DCMA performs the preponderance of DoD CPSRs. Competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjustment contracts and sales of commercial items pursuant to Part 12 are excluded from this requirement.

FAR 44.302(a) specifically authorizes the head of the agency responsible for contract administration to raise or lower the $25 million CPSR threshold if it is considered to be in the Government's best interest. The dollar threshold of $25 million cited at FAR 44.302(a) has been unchanged since 1996. In 2016, the DCMA CPSR Group conducted an analysis to determine if raising the CPSR threshold would be beneficial. Based on the Group's findings, it was determined that adjusting the threshold upward to $50 million would appropriately account for inflation, reduce burden on small contractors, and allow a more efficient and effective use of CSPR resources to review larger contractors where more taxpayer dollars are at risk.

II. Discussion and Analysis

This rule proposes to amend DFARS 244.302, Requirements, to establish within the DFARS a DoD CPSR dollar threshold of $50 million. With this threshold in place, it is estimated that DCMA ACOs can reduce the number of contractor reviews by approximately 20 percent, while reducing by only 2% the value of contract dollars covered by CSPRs. Thus, the Government will be adequately protected by the $50 million threshold.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new provisions or clauses or impact any existing provisions or clauses. The rule merely increases the DoD dollar threshold for conducting CPSRs to $50 million.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety

effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* based on a review of historical data concerning the purchasing system, business system program. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to establish a DoD contractor purchasing system review (CPSR) dollar threshold.

The objective of this rule is to create a new DFARS section at 244.302 to establish a CPSR dollar threshold of $50 million. The threshold will be used in conjunction with other surveillance criteria cited at Federal Acquisition Regulation (FAR) 44.302(a), to include contractor past performance and the volume, complexity, and dollar value of subcontracts. The proposed rule establishes a DoD dollar threshold of $50 million for a formal CPSR; in effect, raising the current surveillance threshold of $25 million cited at FAR 44.302(a) for DoD contractors.

In 2014, there were there were 667 unique entities for which administrative contracting officers (ACO) had recorded approved CPSR decisions in the Contract Business Analysis Repository. A 20% reduction in the number of CPSRs is expected to result from increasing the CPSR threshold from $25 million to $50 million for a total reduction of approximately 133 firms no longer meeting the criteria for a CPSR review. Contractor purchasing systems are eligible for a comprehensive follow-on review every three years. Based on this three-year review cycle, approximately 45 fewer contractors would be reviewed each year (133 firms/3-year cycle = 44.3, rounded to 45 fewer reviews conducted each year). Of the 45 entities, it is estimated that 35 of these contractors are large businesses and 10 are small entities.

The $50 million dollar threshold should reduce the compliance burden for approximately 133 contractors, and permit a more prudent and efficient use of resources, prioritizing surveillance to the larger firms.

For the approximately 133 contractors affected by this rule, there could be additional requirements for those firms to request consent to contract from the ACO, pursuant to FAR clause 52.244–2, Subcontracts. It is estimated that the annual number of consent to contract requests are approximately 12 per contractor.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no significant alternatives to the proposed rule that accomplish the stated objectives.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2017–D038), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements cleared by the Office of Management and Budget under OMB control number 9000–0149, entitled ''Subcontract Consent and Contractor's Purchasing System Review.'' The current clearance for OMB control number 9000–0149 already accounts for the reduction in burden associated with raising the DoD threshold for conducting CPSRs.

List of Subjects in 48 CFR Part 244

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 244 is proposed to be amended as follows:

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

■ 1. The authority citation for 48 CFR part 244 continues to read as follows:

Authority: 41 U.S.C. 1303 ad 48 CFR chapter 1.

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

■ 2. Section 244.302 is added to read as follows:

244.302 Requirements.

(a) In lieu of the threshold at FAR 44.302(a), the ACO shall determine the need for a CPSR if a contractor's sales to the Government are expected to exceed $50 million during the next 12 months.

[FR Doc. 2019–11304 Filed 5–30–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Chapter III, Subchapter B

[Docket No. FMCSA–2018–0037]

RIN 2126–AC17

Safe Integration of Automated Driving Systems-Equipped Commercial Motor Vehicles; Correction

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM); correction.

SUMMARY: FMCSA is correcting an advanced notice of proposed rulemaking (NPRM) that published in the **Federal Register** on May 28, 2019. The document requests public comment about Federal Motor Carrier Safety Regulations (FMCSRs) that may need to be amended, revised, or eliminated to facilitate the safe introduction of automated driving systems (ADS) equipped commercial motor vehicles (CMVs) onto our Nation's roadways. The ANPRM contained an erroneous date for closure of the comment period.

DATES: The comments due date for the ANPRM published on May 28, 2019 (84 FR 24449), is corrected as of May 28, 2019. Comments on the ANPRM must be received on or before July 29, 2019.

ADDRESSES: You may submit comments identified by Docket Number FMCSA–2018–0037 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2019–0002, Sequence No. 2]

Federal Acquisition Regulation; Federal Acquisition Circular 2019–03; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of a final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2019–03. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the internet at *http://www.regulations.gov.*

DATES: For effective date, see the separate document, which follows.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2019–03, FAR case 2017–006.

RULE LISTED IN FAC 2019–03

Subject	FAR case	Analyst
Exception from Certified Cost or Pricing Data Requirements—Adequate Price Competition	2017–006	Jackson.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR Case, refer to the specific subject set forth in the document following this item summary. FAC 2019–03 amends the FAR as follows:

Exception From Certified Cost or Pricing Data Requirements—Adequate Price Competition (FAR Case 2017–006)

This final rule amends the FAR to provide guidance to DoD, NASA, and the Coast Guard, consistent with section 822 of the National Defense Authorization Act for Fiscal Year 2017 that addresses the exception from certified cost or pricing data requirements when price is based on adequate price competition. Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received. The standard of adequate price competition that is based on a reasonable expectation of competition is now applicable only to agencies other than DoD, NASA, and the Coast Guard.

This final rule will not have a significant economic impact on a substantial number of small entities.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2019–03 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2019–03 is effective June 12, 2019 except for FAR Case 2017–006, which is effective July 12, 2019.

Kim Herrington,

Acting Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

William G. Roets, II,

Acting Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.

[FR Doc. 2019–12267 Filed 6–11–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2019–03; FAR Case 2017–006; Docket No. 2017–0006; Sequence No. 1]

RIN 9000–AN53

Federal Acquisition Regulation: Exception From Certified Cost or Pricing Data Requirements—Adequate Price Competition

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to provide guidance to DoD, NASA, and the Coast Guard, consistent with a section of the National Defense Authorization Act for Fiscal Year 2017 that addresses the exception from certified cost or pricing data requirements when price is based on adequate price competition

DATES: *Effective* July 12, 2019.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory

Secretariat Division at 202–501–4755. Please cite FAC 2019–03, FAR Case 2017–006.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 83 FR 27303 on June 12, 2018, to revise the standard for ''adequate price competition'' applicable to DoD, NASA, and the Coast Guard, as required by section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received. The standard of adequate price competition that is based on a reasonable expectation of competition is now applicable only to agencies other than DoD, NASA, and the Coast Guard. Ten respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

Instead of providing a separate standard for DoD, NASA, and the Coast Guard, the final rule states first what is common to all agencies, and then makes the standard relating to expectation of competition applicable only to agencies other than DoD, NASA, and the Coast Guard. This clarification is not intended to reflect a substantive change from the proposed rule; rather, it is intended as a drafting improvement.

For simplicity, the final rule does not use the terms ''responsive'' and ''viable,'' but expresses the new requirements using the existing FAR terminology.

B. Analysis of Public Comments

1. Statutory Requirement for the Rule.

Comment: One respondent found it unclear what problem this rule is trying to resolve. The respondent urged reconsideration of this regulation until the actual problem can be identified and targeted with an expected outcome that provides an acceptable solution. The respondent further recommended that contracting officers should be allowed wide latitude to exercise business judgment, and that any regulatory changes should be focused on training and appointment of contracting officers Governmentwide. Another respondent stated that the ability to utilize ''the expectation of competition'' is a valuable tool that should not be removed for DoD, NASA, and the Coast Guard.

Response: This rule is required to partially implement section 822 of the NDAA for FY 2017, which excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received.

2. Applicability

a. All Federal Agencies

Comment: One respondent recommended that the rule should also apply to all Federal agencies.

Response: Section 822 of the NDAA for FY 2017 only applies to DoD, NASA, and the Coast Guard (see 10 U.S.C. 2306a).

b. Below Simplified Acquisition Threshold and Commercial Items

Comment: One respondent recommended that the rule should apply to all noncompetitive contracts and subcontracts at or below the simplified acquisition threshold (SAT) and to the acquisition of commercial products and services.

Response: Section 822 of the NDAA for FY 2017 only addressed when contractors need to provide cost or pricing data for DoD, NASA, and the Coast Guard. Certified cost or pricing data is not required below the SAT or for the acquisition of commercial products or services. See 10 U.S.C. 2306a and 41 U.S.C. 3502 and 3503. These sections set the threshold at $2 million (section 811 of Pub. L. 115–91) and exempt commercial items.

3. Terminology

a. Responsive and Viable Offer

Comment: Several respondents requested a definition of ''responsive offer.'' Another respondent stated that the term, ''responsive'' is not appropriate to define ''adequate price competition'' under FAR part 15. This respondent cited a Government Accountability Office ruling that responsiveness is applicable to FAR part 14 sealed bidding acquisitions and not FAR part 15 contracting by negotiation. Two respondents recommended including a definition of ''viable offer.''

Response: The terms ''responsive'' and ''viable'' have been removed from the final rule. The concept is conveyed through current FAR language at FAR 15.403–1(c)(1), *i.e.,* ''responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement.''

b. Competing Independently

Comment: One respondent sought elaboration on the use of the phrase ''competing independently,'' specifically if it were to be used in the context of a contractor's affiliate or long-term agreement holder entering a price competition.

Response: The first standard for adequate price competition in FAR 15.403–1(c)(1)(i) already includes the requirement that two or more responsible offerors, competing independently, submit price offers that satisfy the Government's expressed requirements, where award will be made in a best-value competition and there is no finding that the price of the otherwise successful offeror is unreasonable. Whether two offerors are competing independently is specific to the particular circumstances.

4. Impact on Burden and Procurement Action Lead Time

Comment: Several respondents commented on the increased burdens that will result from this rule and potential impact on procurement action lead time (PALT). One respondent stated that this change will increase the burden on the contracting officer in obtaining certified cost or pricing data and conducting additional proposal analysis. Another respondent was concerned that the new statutory framework will likely generate costly and time-consuming rework of proposals by requiring a bidder to provide a second, TINA-compliant proposal when it is learned that they are the only responsive bidder.

Response: This rule provides to DoD, NASA, and the Coast Guard the revised standard on how to determine adequate price competition. The principle will not have an impact on offerors/contractors or contracting officers until implemented at the agency level by DoD, NASA, and the Coast Guard. There are no projected reporting, recordkeeping, or other compliance requirements of this rule. However, the corollary of this FAR change is that DoD, NASA, and the Coast Guard will be required, by statute, to obtain certified cost or pricing data from an offeror when only one offer is received and no other exception applies, which will likely increase burden and PALT (*e.g.,* see DoD proposed rule published under DFARS Case 2017–D009 at 83 FR 30656 on June 29, 2018).

5. Subcontracts

Comment: Several respondents raised issues relating to subcontracts.

One respondent asked whether this rule intends for subcontracts under DoD, NASA, and Coast Guard contracts to be competed at the same standard as is being applied to prime contracts.

Another respondent was concerned that the FAR rule did not implement 10 U.S.C. 2306a(b)(6), which requires a prime contractor required to submit cost or pricing data to determine whether a subcontract under such contract qualifies for an exception under paragraph (b)(1)(A) (adequate price competition) from such requirement. One respondent expressed concern about restarts of subcontract competitions when a prime contractor receives only one offer for a subcontract. This respondent also speculated that prime contractors may take on more evaluation risks to avoid finding suppliers unacceptable, so as not to end up with only one responsive and viable offer.

Response: This FAR rule lays out the general principle of what constitutes adequate price competition for DoD, NASA, and the Coast Guard. The details of applicability to subcontracts and responsibilities of the prime contractor will be addressed at the agency level (*e.g.,* see DoD proposed rule published under DFARS Case 2017–D009 at 83 FR 30656 on June 29, 2018). The concern about potential impact on subcontract awards cannot be resolved, because this change is required by statute.

6. Edits

Comment: One respondent requested insertion of the word ''or'' between 15.403–1(c)(1)(i)(A)(*2*) and section (c)(1)(i)(B) to clarify that the two options are separate and distinct and are not both required to meet the standard for adequate price competition.

Response: The language in the proposed rule text between FAR 15.403–1(c)(1)(i)(A) and (B) is structured consistent with the FAR drafting convention for vertical lists of items separated by semi-colons: Namely, in a vertical list of more than two items, the conjunction ''and'' or ''or'' only appears between the last two items in the list. However, as noted in section II.A. of this preamble, FAR 15.403–1(c)(1) is revised in this final rule to provide a drafting improvement and clarification, which obviates the request to modify the proposed rule language.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not contain any solicitation provision or contract clause that applies to contracts or subcontracts at or below the simplified acquisition threshold or contracts or subcontracts for the acquisition of commercial items, including commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is not an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The reason for this action is to implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). The objective of this rule is to provide a separate standard for ''adequate price competition'' as the basis for an exception to the requirement to provide certified cost or pricing data. The statutory basis is 10 U.S.C. 2306a, as amended by section 822 of the NDAA for FY 2017.

Section 822 modifies 10 U.S.C. 2306a, the Truth in Negotiations Act, which is applicable only to DoD, NASA, and the Coast Guard.

No significant issues were raised by the public with regard to the initial regulatory flexibility analysis.

This rule only provides a statement of internal guidance to DoD, NASA, and the Coast Guard. This principle will not have impact on small entities until implemented at the agency level by DoD, NASA, and the Coast Guard.

There are no projected reporting, recordkeeping, or other compliance requirements of the rule. The rule amends the standards for adequate price competition for DoD, NASA, and the Coast Guard. However, the corollary of this FAR change is that DoD, NASA, and the Coast Guard will be required to obtain certified cost or pricing data from an offeror when only one offer is received, and no other exception applies.

Since this rule does not impose a burden on small entities, DoD, GSA, and NASA were unable to identify any alternatives that would reduce burden on small business and still meet the requirements of the statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 15

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA and NASA are amending 48 CFR part 15 as set forth below:

PART 15—CONTRACTING BY NEGOTIATION

■ 1. The authority citation for part 15 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

■ 2. Amend section 15.305 by revising the third sentence of paragraph (a)(1) to read as follows:

15.305 Proposal evaluation.

(a) * * *

(1) * * * In limited situations, a cost analysis may be appropriate to establish reasonableness of the otherwise successful offeror's price (see 15.403–1(c)(1)(i)(C)). * * *

* * * * *

■ 3. Amend section 15.403–1 by revising paragraph (c)(1) to read as follows:

15.403–1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

* * * * *

(c) * * *

(1) *Adequate price competition.* (i) A price is based on adequate price competition when—

(A) Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement;

(B) Award will be made to the offeror whose proposal represents the best value (see 2.101) where price is a substantial factor in source selection; and

(C) There is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer.

(ii) For agencies other than DoD, NASA, and the Coast Guard, a price is also based on adequate price competition when–

(A) There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers in response to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror and if—

(*1*) Based on the offer received, the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition, *e.g.,* circumstances indicate that—

(*i*) The offeror believed that at least one other offeror was capable of submitting a meaningful offer; and

(*ii*) The offeror had no reason to believe that other potential offerors did not intend to submit an offer; and

(*2*) The determination that the proposed price is based on adequate price competition and is reasonable has been approved at a level above the contracting officer; or

(B) Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.

* * * * *

15.404–1 [Amended]

■ 4. Amend section 15.404–1 by removing from paragraph (b)(2)(i) ''(see 15.403–1(c)(1)(i))'' and adding ''(see 15.403–1(c)(1))'' in its place.

[FR Doc. 2019–12263 Filed 6–11–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2019–0002, Sequence No. 2]

Federal Acquisition Regulation; Federal Acquisition Circular 2019–03; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2019–03, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2019–03, which precedes this document. These documents are also available via the internet at *http://www.regulations.gov.*

DATES: June 12, 2019.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson at 202–208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2019–03, FAR Case 2017–006.

RULE LISTED IN FAC 2019–03

Subject	FAR case	Analyst
*Exception From Certified Cost or Pricing Data Requirements—Adequate Price Competition	2017–006	Jackson.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR Case, refer to the specific subject set forth in the document following this item summary. FAC 2019–03 amends the FAR as follows:

Exception From Certified Cost or Pricing Data Requirements—Adequate Price Competition (FAR Case 2017–006)

This final rule amends the FAR to provide guidance to DoD, NASA, and the Coast Guard, consistent with section 822 of the National Defense Authorization Act for Fiscal Year 2017 that addresses the exception from certified cost or pricing data requirements when price is based on adequate price competition. Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received. The standard of adequate price competition that is based on a reasonable expectation of competition is now applicable only to agencies other than DoD, NASA, and the Coast Guard.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2019–12264 Filed 6–11–19; 8:45 am]

BILLING CODE 6820–EP–P

finds that consumer-driven call blocking is an enhancement of service, not a discontinuance or impairment of ''service'' to a ''community, or part of a community,'' within the meaning of section 214(a) of the Act. In any event, because the Commission's discussion in the *2015 TCPA Order* focusing on opt-in call blocking programs created uncertainty as to the call-blocking tools that voice service providers can offer their customers, the Commission is expressly authorized to issue a declaratory ruling here to clarify that voice service providers' long-recognized ability to block unlawful calls encompasses the right to block calls where the customer chooses on an informed opt-out basis. In short, as stated above, the Commission finds that opt-out call-blocking programs are generally just and reasonable practices (not unjust and unreasonable practices) under section 201 of the Act and enhancements of service (not impairments of service) under section 214 of the Act.

Reports on Deployment and Implementation of Call Blocking and Caller ID Authentication

19. In order to measure the effectiveness of efforts of the Commission and industry to thwart illegal robocalls and empower consumers, the Commission directs CGB, in consultation with the WCB and PSHSB, to prepare two reports on the state of deployment of advanced methods and tools to eliminate such calls, including the impact of call blocking on 911 and public safety. The reports shall be submitted to the Commission no later than June 23, 2020, for the first report, and no later than June 23, 2021, for the second report.

20. Specifically, the Commission adopts the recommendation of its Consumer Advisory Committee dated September 18, 2017, to study the implementation and effectiveness of blocking measures, to include:

[T]he availability to consumers of call blocking solutions; the fees charged, if any, for call blocking tools available to consumers; the proportion of subscribers whose providers offer and/or enable call blocking tools; the effectiveness of various categories of call blocking tools; and an assessment of the number of subscribers availing themselves of available call blocking tools.

21. The Commission recognizes that to determine the ''effectiveness of various categories of call blocking tools,'' as the Consumer Advisory Committee recommended, it may be necessary for CGB to collect additional information and data from voice service providers. The Commission explicitly delegates authority to CGB, in consultation with WCB and PSHSB, to collect any and all relevant information and data from voice service providers necessary to complete these reports. Following delivery of the first report, the Commission will assess whether, contrary to expectation, consumers are being charged and, if so, the Commission will seek comment on rules requiring providers that offer these services to do so for free.

Ordering Clause

22. Pursuant to sections 4(i), 4(j), 201, and 214 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 201, 214, and §§ 1.2 and 64.1200 of the Commission's rules, 47 CFR 1.2, 64.1200, the *Declaratory Ruling* in CG Docket No. 17–59 *is adopted.*

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2019–13270 Filed 6–21–19; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF VETERANS AFFAIRS

48 CFR Part 808

[Docket VA–2019–VACO–0018]

Issuance of Class Deviation From VA Acquisition Regulation (VAAR) Part 808—Required Sources of Supplies and Services and Conforming Amendments

AGENCY: Department of Veterans Affairs (VA).

ACTION: Temporary rule; request for comments.

SUMMARY: VA provides notification that the agency has issued a class deviation from VA Acquisition Regulation (VAAR) Part 808—Required Sources of Supplies and Services. VA is amending the VAAR to implement the Federal Circuit's mandate. VA has determined that publication of this notification in the **Federal Register** would be beneficial to both the agency's acquisition workforce and industry stakeholders. The class deviation, which is effective May 20, 2019, was issued to immediately implement the Federal Circuit's mandate, and this publication is to further notify the public in order to avoid confusion regarding applicable policy and to make conforming amendments to the CFR. The public is invited to submit comments on VA's approach to implementing the Federal Circuit mandate, as set forth in the class deviation and the conforming amendments to the CFR set forth in this publication.

DATES: The rule is effective June 24, 2019 through July 1, 2021. The class deviation is effective as of May 20, 2019. Comments: Interested parties are invited to submit comments in writing by July 24, 2019.

ADDRESSES: Written comments may be submitted through *http://www.regulations.gov;* by mail or hand delivery to the Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1064, Washington DC 20420; or by fax to 202–273–9026. Comments should indicate that they are submitted in response to Docket #VA–2019–VACO–0018, titled—''Issuance of Class Deviation from VA Acquisition Regulation (VAAR) Part 808 — Required Sources of Supplies and Services.'' During the comment period, comments may also be viewed online through the Federal Docket Management System at *www.regulations.gov.* The full class deviation text is available at: *https://www.va.gov/oal/docs/business/pps/deviationVaar20190520.PDF.*

FOR FURTHER INFORMATION CONTACT: Sheila P. Darrell, Ph.D., CFCM, Office of Acquisition and Logistics (003A), Procurement Policy and Warrant Management Service (003A2A) via email at *VA.Procurement.Policy@va.gov* or (202) 632–5288. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: On October 17, 2018, the Federal Circuit, which has nationwide appellate jurisdiction over challenges to federal agency procurement decisions, issued a decision in *PDS Consultants, Inc.,* v. *The United States, Winston-Salem Industries for the Blind* (PDS Consultants), 907 F.3d 1345 (Fed. Cir. 2018). In the decision, the Federal Circuit noted that in 2016 the United States Supreme Court, in its decision in *Kingdomware Technologies, Inc.* v. *United States,* held that, ''[e]xcept when the [VA] uses the noncompetitive and sole-source contracting procedures in subsections (b) and (c), § 8127(d) requires the [VA] to use the Rule of Two before awarding a contract to another supplier.'' However, the Federal Circuit acknowledged that *Kingdomware* did not directly address the interaction between 38 U.S.C. 8127 and the Javits-Wagner O'Day Act (JWOD), 41. U.S.C. 8504, and, instead focused on whether VA had the discretion to place orders under a preexisting Federal Supply

Schedule before resorting to the Rule of Two.

The Federal Circuit further found that, under 38 U.S.C. 8128(a), the Secretary of Veterans Affairs, when ''procuring goods and services pursuant to a contracting preference under [title 38] or any other provision of law . . . shall give priority to a small business concern owned and controlled by veterans, if such business concern meets the requirements of that contracting preference.'' (emphasis added). The Federal Circuit found that the phrase ''or any other provision of law'' by its terms encompasses the JWOD. Therefore, the Federal Circuit found that where a product or service is on the Procurement List and ordinarily would result in the contract being awarded to a nonprofit qualified under the JWOD, 38 U.S.C. 8127(d) would require VA to apply the VA Rule of Two before awarding a contract to a qualified nonprofit organization.

VA provides notice that the agency has issued a class deviation from VA Acquisition Regulation (VAAR) Part 808—Required Sources of Supplies and Services on May 20, 2019. The class deviation from the VAAR supersedes and effectively updates the language previously set forth in Class Deviation from 808.002, Priorities for Use of Mandatory Government Sources, dated February 9, 2018. On May 20, 2019, the United States Court of Appeals for the Federal Circuit (the Federal Circuit) issued a mandate effectuating the October 17, 2018 decision in *PDS Consultants, Inc.,* v. *The United States, Winston-Salem Industries for the Blind,* (PDS Consultants) and creating a binding circuit precedent which necessitated immediate policy change. Accordingly, the class deviation authorizes contracting officers to deviate from VAAR 808.002 and 808.603 to reflect language consistent with the decision of the Federal Circuit.

Specifically, the class deviation requires VA contracting officers to apply the VA Rule of Two, as implemented in VAAR subpart 819.70, before awarding a contract to a qualified nonprofit organization under the Javits-Wagner O'Day Act (JWOD) or making a contract award to Federal Prison Industries, Inc. (FPI). The deviation clarifies that if VA is unable to award to a Vendor Information Pages (VIP)-listed and verified service-disabled veteran-owned small business (SDVOSB) or a veteran-owned small business (VOSB) using the procedures set forth in VAAR subpart 819.70, AbilityOne nonprofit organization and FPI would retain their mandatory source status.

VA has determined that this publication in the **Federal Register** is necessary to make conforming edits to the CFR in order to clarify existing requirements to both the agency's acquisition workforce and industry stakeholders.

This document provides a comment period of 30 days in which commenters may address VA's approach to implementing the Federal Circuit mandate, as set forth in the class deviation and the conforming amendments to the CFR set forth in this publication. VA believes 30 days is sufficient to provide comments given the litigation history and the information being requested. As discussed above, the Federal Circuit's mandate required that the agency's acquisition workforce immediately comply with the binding precedent. This demonstrates that a delay of the effective date of the rule on the public would be unnecessary. Accordingly, the Secretary finds good cause to dispense with the opportunity for advanced notice and opportunity for public comment and to publish this temporary rule with an effective date of June 24, 2019.

Executive Orders 12866

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined not be a significant regulatory action under E.O. 12866.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. Section 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. Section 804(2).

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on June 13, 2019, for publication.

Dated: June 18, 2019.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons set forth in the preamble, we amend 48 CFR part 808 as follows:

PART 808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 1. The authority citation for part 808 continues to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304.

■ 2. In § 808.002, revise the section heading and paragraphs (a) and (b) to read as follows:

§ 808.002 Priorities for use of mandatory Government sources.

(a) *Sources.* Contracting activities shall satisfy requirements for supplies and services from or through the mandatory sources listed below in descending order of priority:

(1) *Supplies.* (i) VA inventories including the VA supply stock program (41 CFR 101–26.704) and VA excess.

(ii) Excess from other agencies (see FAR subpart 8.1).

(iii) Federal Prison Industries, Inc. (see VAAR 808.603). Prior to considering award of a contract to Federal Prison Industries, Inc, contracting officers shall apply the VA Rule of Two to determine whether a requirement should be awarded to veteran-owned small businesses under the authority of 38 U.S.C. 8127–28, by using the preferences and priorities in subpart 819.70. If an award is not made to a VIP-listed and verified service disabled veteran-owned small business (SDVOSB)/veteran-owned small business (VOSB) as provided in subpart 819.70, FPI remains a mandatory source in accordance with FAR 8.002.

(iv) Supplies that are on the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled, known as AbilityOne (FAR subpart 8.7). Prior to considering award of a contract under the AbilityOne program, contracting officers shall apply the VA Rule of Two to determine whether a requirement should be awarded to veteran-owned small businesses under the authority of 38 U.S.C. 8127–28, by using the preferences and priorities in subpart 819.70. If an award is not made to a VIP-listed and verified SDVOSB/VOSB as provided in subpart 819.70, AbilityOne remains a mandatory source in accordance with FAR 8.002. All new VA requirements must be approved by the Chief Acquisition Officer, via the Senior Procurement Executive, before contacting the Committee to request addition of new items to the Procurement List.

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101–

26.3), the Defense Logistics Agency (see 41 CFR 101–26.6), the Department of Veterans Affairs (see 41 CFR 101–26.704), and military inventory control points.

(2) *Services that are on the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled, known as AbilityOne (FAR subpart 8.7).* Prior to considering award of a contract under the AbilityOne program, contracting officers shall apply the VA Rule of Two to determine whether a requirement should be awarded to veteran-owned small businesses under the authority of 38 U.S.C. 8127–28, by using the preferences and priorities in subpart 819.70. If an award is not made to a VIP-listed and verified SDVOSB/VOSB as provided in subpart 819.70, AbilityOne remains a mandatory source in accordance with FAR 8.002. All new VA requirements must be approved by the Chief Acquisition Officer, via the Senior Procurement Executive, before contacting the Committee to request addition of new items to the Procurement List.

(b) *Unusual and compelling urgency.* The contracting officer may use a source other than those listed in paragraph (a) of this section when the need for supplies or services is of an unusual and compelling urgency (see FAR 6.302–2, 8.405–6 and 13.106–1 for justification requirements).

* * * * *

■ 3. Revise § 808.603 to read as follows:

§ 808.603 Purchasing priorities.

A waiver from FPI is not needed when comparable supplies and services are procured in accordance with subpart 819.70.

[FR Doc. 2019–13217 Filed 6–21–19; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

48 CFR Parts 817 and 852

RIN 2900–AQ19

VA Acquisition Regulation: Special Contracting Methods

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending and updating its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies. These changes seek to align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors. The VAAM incorporates portions of the removed VAAR as well as other internal agency acquisition policy. VA will rewrite certain parts of the VAAR and VAAM, and as VAAR parts are rewritten, VA will publish them in the **Federal Register**. In particular, this rulemaking revises VAAR coverage concerning Special Contracting Methods as well as an affected part covering Solicitation Provisions and Contract Clauses.

DATES: This rule is effective on July 24, 2019.

FOR FURTHER INFORMATION CONTACT: Mr. Rafael N. Taylor, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street NW, Washington, DC 20001, (202) 382–2787. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On December 27, 2018, VA published a proposed rule in the **Federal Register** (83 FR 66662) which announced VA's intent to amend regulations for VAAR Case RIN 2900–AQ19—VA Acquisition Regulation: Special Contracting Methods. VA provided a 60-day comment period for the public to respond to the proposed rule and submit comments. The comment period for the proposed rule ended on February 25, 2019 and VA received one comment. VA makes no changes to this final rule as a result of the one comment received. However, this rule adopts as a final rule, the proposed rule that published in the **Federal Register** on December 27, 2018, along with two technical non-substantive changes to the proposed rule and minor formatting and/or grammatical edits. The two technical non-substantive changes to the proposed rule are described below.

In particular, this final rule revises part 817, Special Contracting Methods. This final rule removes subpart 817.1, Multi-year Contracting, in its entirety since it deals with internal procedures about the uses of multi-year contracting and internal approvals to be obtained. This final rule also removes subpart 817.2 in its entirety by removing 817.202, Use of options, and 817.204, Contracts. 817.202 consisted of internal procedures to develop solicitations and cost comparisons under Office of Management and Budget Circular A–76. Since there is currently a moratorium on public-private competitions this will not be moved to the VAAM. 817.204, Contracts, contained internal procedures and approvals to be obtained for contracts with option periods greater than five years, and this coverage was moved to the VAAM.

This rule removes subpart 817.4, Leader Company Contracting, and 817.402, Limitations, since they included internal procedures and approval requirements for leader company contracts. The coverage was moved to the VAAM.

This final rule revises the title of subpart 817.5 to read ''Interagency Acquisitions,'' and adds 817.501, General, which requires that any governmental entity that acquires goods and services on behalf of the Department of Veterans Affairs shall comply, to the maximum extent feasible, with the provisions of 38 U.S.C. 8127 and 8128, and the Veterans First Contracting Program as implemented at subpart 819.70.

This regulatory action removes 817.502, General, which is replaced with updated policy in 817.501. The coverage was moved to comport with the numbering in the FAR.

This rule adds subpart 817.70, Undefinitized Contract Actions, to provide policy and procedures for the use of undefinitized contract actions (UCAs) as UCAs are a high-risk method of procurement. This final rule adds 817.7000, Scope, which describes the material being introduced in this subpart, and 817.7001, Definitions, to provide definitions of four terms used in the subpart: contract action, definitization, definitization proposal, and undefinitized contract action.

This final rule also adds 817.7002, Exceptions, which exempts simplified acquisitions and congressionally mandated long-lead procurement contracts from this policy but requires the contracting officer to apply the policy and procedures to the maximum extent practicable.

817.7003, Policy, was added to clearly convey that undefinitized contract actions should be limited to situations where it is not possible to negotiate a definitive contract action in time to meet the government's requirements, and where the interests of the government demand that the contractor be given a commitment so that contract performance can begin immediately.

This final rule adds 817.7004, Limitations, with no text, and the following sections: 817.7004–1, Authorization, which provides guidance as to when the contracting officer must obtain approval to use an undefinitized contract action; and 817.7004–2, Price ceiling, which requires all undefinitized

Proposed Rules

Federal Register
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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AH16

Small Business Size Standards: Calculation of Annual Average Receipts

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) proposes to modify its method for calculating annual average receipts used to prescribe size standards for small businesses. Specifically, consistent with a recent amendment to the Small Business Act, SBA proposes to change its regulations on the calculation of annual average receipts for all receipts-based SBA size standards and other agencies' proposed size standards for service-industry firms from a 3-year averaging period to a 5-year averaging period.

DATES: SBA must receive comments to this proposed rule on or before August 23, 2019.

ADDRESSES: Identify your comments by RIN 3245–AH16 and submit them by one of the following methods: (1) Federal eRulemaking Portal: *https://www.regulations.gov,* follow the instructions for submitting comments; or (2) Mail/Hand Delivery/Courier: Khem R. Sharma, Ph.D., Chief, Office of Size Standards, U.S. Small Business Administration, 409 Third Street SW, Mail Code 6530, Washington, DC 20416.

SBA will post all comments to this proposed rule on *https://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *https://www.regulations.gov,* you must submit such information to Khem R. Sharma, Ph.D., Chief, Office of Size Standards, U.S. Small Business Administration, 409 Third Street SW, Mail Code 6530, Washington, DC 20416, or send an email to *sizestandards@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should withhold this information as confidential. SBA will review your information and determine whether it will make it public.

FOR FURTHER INFORMATION CONTACT: Khem R. Sharma, Ph.D., Chief, Office of Size Standards, (202) 205–6618 or *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information

Public Law 115–324 (the ''Small Business Runway Extension Act of 2018'') amended section 3(a)(2)(C)(ii)(II) of the Small Business Act, 15 U.S.C. 632(a)(2)(C)(ii)(II), to modify the requirements for proposed small business size standards prescribed by an agency without separate statutory authority to issue size standards.

Under section 3(a)(2)(C)(ii) of the Small Business Act as amended, an agency without separate statutory authority to issue size standards must satisfy three requirements to prescribe a size standard. First, the agency must propose the size standard with an opportunity for public notice and comment. Second, the agency must provide for determining the size of a manufacturing concern based on a 12-month average of the concern's employment, the size of a services concern based on a 5-year average of gross receipts, and the size of another business concern on the basis of data of not less than 3 years. Third, the agency must obtain approval of the size standard from the SBA Administrator.

In contrast to agencies subject to section 3(a)(2)(C), SBA has independent statutory authority to issue size standards. Under section 3(a)(2)(A) of the Small Business Act, the SBA Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of SBA's programs or any other Federal Government program. Section 3(a)(2)(B) of the Small Business Act further provides that such definitions may utilize the number of employees, dollar volume of business, net worth, net income, a combination thereof, or other appropriate factors. To determine eligibility for Federal small business assistance, SBA establishes detailed size definitions for small businesses (usually referred to as ''size standards'') that vary from industry to industry reflecting differences among the various industries. SBA typically uses two primary measures of business size for size standards purposes: (i) Annual average gross receipts for businesses in services, retail trade, agricultural, and construction industries, and (ii) average number of employees for businesses in all manufacturing and most mining and utilities industries. SBA uses financial assets for certain financial industries and refining capacity, in addition to employees, for the petroleum refining industry to measure business size.

The SBA's size standards establish eligibility for a variety of Federal small business assistance programs, including Federal government contracting and business development programs designed to assist small businesses in obtaining Federal contracts, and for SBA's loan guarantee programs, which provide access to capital for small businesses that are unable to qualify for conventional loans elsewhere. The government contracting programs that use SBA's size standards include the SBA's 8(a) Business Development (BD) program, the Historically Underutilized Business Zones (HUBZone) program, the Service Disabled Veteran-Owned Small Business (SDVOSB) program, the Woman-Owned Small Business (WOSB) program, and the Economically Disadvantaged Woman-Owned Small Business (EDWOSB) program. In fiscal year 2017, small businesses received $105.7 billion in Federal contracts, including $42.0 billion in set-aside contracts for small businesses. Small businesses received $25.6 billion in Federal set-aside contracts in fiscal year 2017 through the SBA's 8(a), HUBZone, SDVOSB, WOSB, and EDWOSB programs. (In addition to using SBA's size standards, SBA's Small Business Investment Company (SBIC), Certified Development Company (CDC/504), and 7(a) loan programs use either the industry-based size standards or tangible net worth and net income based alternative size standards to determine eligibility for those programs.)

SBA has long interpreted section 3(a)(2)(C) of the Small Business Act as not applying to SBA's size standards issued under section 3(a)(2)(A). In the preambles to the proposed and final rules implementing 3(a)(2)(C), SBA explained that the Small Business Act

requires that other Federal agencies use SBA's size standards *or* else use their own size standards that meet the requirements as set forth in that section. 65 FR 4176 (Jan. 26, 2000) and 67 FR 13714 (March 26, 2002). In the final implementation in 2002, SBA interpreted section 3(a)(2)(C) as applying only to non-SBA agencies, stating, ''Unless a statute specifies size standards for an agency's program or gives an agency direct authority to establish size standards, the agency must use the applicable size standards established by SBA.'' However, the Act allows an agency to ''prescribe a size standard for categorizing a business concern as a small business concern (*see* sec. 3(a)(2)(C) of the Act) provided that the contemplated size standard meets certain criteria and the agency obtains approval of the SBA Administrator.'' 67 FR 13714. Since 2002, SBA has repeated this interpretation of section 3(a)(2)(C) in the **Federal Register** 52 times: 67 FR 48423; 67 FR 61835; 68 FR 74841; 70 FR 68373; 70 FR 72582; 71 FR 28610; 72 FR 41242; 72 FR 61577; 73 FR 41241; 73 FR 42519; 74 FR 53953; 74 FR 53923; 74 FR 53937; 75 FR 61596; 75 FR 61602; 75 FR 61608; 76 FR 14339; 76 FR 27950; 76 FR 63524; 76 FR 63228; 76 FR 70693; 76 FR 70679; 77 FR 7513; 77 FR 11016; 77 FR 10945; 77 FR 42211; 77 FR 42224; 77 FR 42453; 77 FR 55753; 77 FR 55767; 77 FR 58746; 77 FR 58754; 77 FR 58759; 77 FR 72775; 77 FR 72701; 77 FR 72707; 78 FR 37415; 78 FR 37403; 78 FR 37421; 78 FR 37408; 78 FR 77342; 78 FR 77350; 79 FR 28645; 79 FR 33654; 79 FR 53665; 79 FR 54170; 81 FR 3947; 81 FR 3955; 81 FR 4466; 81 FR 4485; 82 FR 18263; 82 FR 44893. Additionally, in the final Size Standards Methodology that SBA issued in April 2009, SBA stated, ''Paragraph 3(a)(2)(C) refers to the establishment of size standards by other Federal agencies. SBA generally applies these same provisions when it establishes its size standards, but the Agency is not legally bound by them. On the other hand, Paragraphs 3(a)(2)(A) and 3(a)(2)(B) give the Administrator the flexibility to evaluate and establish size standards using a broader range of criteria, depending on what the Administrator determines will serve small businesses the best.'' Thus, section 3(a)(2)(C) pertains to special size standards that agencies prescribe for defining small businesses for their programs when they determine that SBA's size standards are not appropriate for such programs.

SBA grounds this long-standing interpretation of section 3(a)(2)(C) on the following facts. First, SBA has applied a 3-year average for receipts-based size standards since January 1956, *see* 21 FR 80, and the requirement in section 3(a)(2)(C) for an agency lacking specific authority to use a 3-year average was not passed into law until 38 years later on October 22, 1994 through the Small Business Administration Reauthorization and Amendments Act of 1994, Public Law 103–403, section 301. Second, the legislative history from the U.S. Senate Committee on Small Business and Entrepreneurship specifically excepts SBA from section 3(a)(2)(C) by stating that the 1994 amendment ''clarifies that a Federal Department or agency, *other than the Administration,* may issue a size standard set in terms of number of employees, average annual gross receipts, or otherwise, only under certain conditions. Those conditions are that the standard is set by rulemaking, including a proposal and an opportunity for public comment, and that the SBA Administrator has approved the standard.'' S. Rpt. No. 103–332 (emphasis added). Third, the predecessor statutory provision to section 3(a)(2)(C), which is set forth in section 222(a) of Public Law 102–366, explicitly stated that the specified averaging period applied only ''for the use of such department or agency'' where the department or agency had issued its own size standard, and the 1994 amendment did not evince any intent to change this rule of limited applicability. Fourth, based on a literal reading of the Small Business Act, section 3(a)(2)(C) only applies where an agency is not specifically authorized by statute to issue size standards, but SBA has specific authorization to issue SBA's size standards in section 3(a)(2)(A) of the Small Business Act. As such, section 3(a)(2)(C) requires that a non-SBA agency obtain approval from the SBA's Administrator for adopting its own size standard.

Nevertheless, to promote consistency government-wide on small business size standards, SBA proposes to change its own size standards to provide for a 5-year averaging period for calculating annual average receipts for all receipts-based size standards. It would be confusing for a service-industry business to use a 3-year average for SBA's receipts-based size standards and switch to a 5-year average for another agency's receipts-based size standards. Similarly, it would be confusing to apply SBA's size standards for a business that is engaged in both service- and non-service industries to use a 5-year average for determining small business status in a service industry but switch to a 3-year average for a non-service industry. Thus, although section 3(a)(2)(C), as amended, permits any agency to use a 3-year average outside of the service industries, SBA proposes to adopt a 5-year averaging period for calculating the annual receipts of businesses for all industries that are subject to receipts-based size standards, including the retail trade, agricultural, and construction industries.

SBA's proposed rule carries out the intent of Public Law 115–324, as expressed in the Report of the House Committee on Small Business, H. Rpt. 115–939. The Committee report states that, to help advanced small businesses successfully navigate the middle market as they reach their small business size thresholds, the bill would lengthen the time in which the SBA measures size through revenue, from the average of the past 3 years to the average of the past 5 years. The Committee report states that the bill would reduce the impact on small businesses from rapid-growth years which would result in spikes in revenue that may prematurely eject a small business out of their small size standard. The Committee report adds that the bill would allow small businesses at every level more time to grow and develop their competitiveness and infrastructure, before entering the open marketplace. The bill, as the report states, would also protect Federal investment in SBA's small business programs by promoting greater chances of success in the middle market for newly graduated firms, resulting in enhanced competition against large prime contractors.

As stated in the Committee report, during the period when annual revenues are rising, the 5-year average will generally be lower than the 3-year average, thereby allowing: (i) Mid-sized businesses who have just exceeded size standards to regain their small business status, and (ii) advanced small businesses close to exceeding the size standard to retain their small business status for a longer period. It is notable that, when annual revenues are declining, the 5-year average may be higher than the 3-year average. This would cause small businesses near the size thresholds to lose their small business status sooner under the 5-year average than under the 3-year average. This is more likely to happen during economic downturns. Businesses that lose their small business status under the 5-year average may be disadvantaged further because they may have to wait several years more to regain their small business status, as compared to under a 3-year average. Newly established firms that have been in business for less than 5 years will

receive no benefit from a change to a 5-year average. A firm that has been in business for less than the averaging period simply annualizes the receipts from its full existence.

Additionally, by enabling mid-size businesses to regain small business status and by lengthening the small business status of advanced and successful larger small businesses, the longer averaging period may disadvantage smaller small businesses in more need of Federal assistance than their more advanced and larger counterparts in competing for Federal opportunities. Similar to concerns from mid-size businesses that they lack necessary resources, past performance qualifications and expertise to be able to compete against very large businesses in the full and open market, SBA has also received concerns from smaller small businesses that they also lack resources, past performance qualifications and expertise to be able to compete against more resourceful, qualified, and experienced large small businesses for Federal opportunities for small businesses.

SBA's proposed rule satisfies the requirements of section 3(a)(6) of the Small Business Act, which requires that, to revise, modify, or establish size standards pursuant to section 3(a), SBA must issue a notice of proposed rulemaking that includes, among other things, the anticipated effect of the proposed rulemaking on industry. In this regard, the United States Supreme Court has ruled that agencies must ''use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.'' *Perez* v. *Mortgage Bankers Assn.,* 135 S. Ct 1199, 1206 (2015).

II. Section-by-Section Analysis

A. Section 121.104

The proposed rule removes ''Schedule K'' from the definition of receipts. SBA has found that reviewing Schedule K is generally not useful, but SBA reserves the ability to request a Schedule K as part of SBA's review of the other Internal Revenue Service (IRS) forms listed in section 121.104(a).

For consistency with the size standard averaging period being changed in § 121.104, for the purposes of applying SBA's receipts-based size standards, the proposed rule changes the averaging period for a business that has been in business for 5 or more fiscal years to a 5-year period, *i.e.,* the business calculates its total receipts over the 5-year period and divides by 5. Under the proposed rule, if a business has been in business for less than 5 complete fiscal years, the business calculates its total receipts, divides by the number of weeks in business, and multiplies by 52. This is the same process SBA currently uses when a business has less than 3 complete fiscal years. If a business has a short year as one of its 5 years, the business calculates its total receipts over the 5-year period, divides by the number of weeks in the short year and its other 4 fiscal years, and multiplies by 52. This too is the same process SBA currently uses.

SBA proposes that the 5-year averaging period in § 121.104 would not distinguish between firms in service industries and other firms subject to receipts-based size standards. Although section 3(a)(2)(C) of the Small Business Act, as amended, permits other agencies to use a 5-year averaging period for service-industry firms and a 3-year averaging period for other firms, SBA believes that, in applying SBA's own size standards, separating out service-industry firms would cause confusion and create a greater compliance burden on firms that participate in both services industries and non-services industries (such as agriculture, construction, and retail trade) with receipts-based size standards.

This proposed rule only would affect the application of SBA's size standard rules after the effective date of a final rule. Thus, until the effective date of a final rule, SBA will continue to apply the 3-year averaging period in the present § 121.104 for calculating annual average receipts for all SBA's receipts-based size standards. Since size is determined as of the date when a firm certifies its size as part of its initial offer which includes price, the 3-year calculation period will apply to any offer submitted prior to the effective date of a final rule. Thus, even if SBA receives a request for a size determination or size appeal after the effective date of the final rule, SBA will still use a 3-year calculation period if the determination or appeal relates to a certification submitted prior to the final rule's effective date.

SBA also proposes to clarify how it believes annual receipts should be calculated in connection with the acquisition or sale of a division. Specifically, the proposed rule would provide that the annual receipts of a concern would not be adjusted where the concern sells or acquires a segregable division during the applicable period of measurement or before the date on which it self-certified as small. This would be different from how SBA treats the sale or acquisition of a subsidiary. In the case of a subsidiary, SBA's regulations provide that ''[t]he annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size. This exclusion of annual receipts of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.'' 13 CFR 121.104(d)(4).

SBA believes that the sale or acquisition of a division is different from buying or selling a separate legal entity and, as such, should be treated differently. Any receipts attributable to a specific division of a concern are certainly receipts earned by the concern. Even if that division is later sold, its receipts were always part of the receipts directly received by the concern itself, and SBA believes that those receipts should remain a part of the concern's receipts after the sale for purposes of determining the concern's size. Similarly, where a concern acquires a segregable division from another business entity during the applicable period of measurement, the proposed rule would not increase the concern's overall receipts by the amount of receipts attributable to that division. This proposal is consistent with decisions of SBA's Office of Hearings and Appeals (OHA). *See, e.g. Size Appeal of Global, A 1st Flagship Co.,* SBA No. SIZ–5462 (2013) (''OHA has repeatedly held that a firm which acquires most of the assets of a subsidiary or division of a larger firm is affiliated only with that subsidiary or division, and not with the entire parent company.'').

SBA understands that some may feel that distinguishing the sale of a division from that of a subsidiary would elevate form over substance, and would merely require a seller to move assets into a separate subsidiary and then sell that subsidiary in order to bring the transaction under the rule. However, SBA believes that there really is an important distinction between a division and a separate legal entity. SBA specifically requests comments on this issue.

B. Section 121.903

As required by Public Law 115–324, SBA is proposing to amend the requirements for agencies that seek to propose and adopt size standards for their own programs, instead of applying SBA's size standards. Under the proposed rule, a non-SBA agency's receipts-based size standard applying to services-industry firms must be proposed with an averaging period of at least 5 years.

SBA is not proposing to change the requirement that other agency's size

standards for firms other than service and manufacturing firms use data over a period of at least 3 years. Such a change is not mandated by Public Law 115–324. Section 3(a)(2)(ii)(III) of the Small Business Act still provides that other agencies prescribe size standards for industries other than services or manufacturing using ''data over a period of not less than 3 years.'' Because Congress did not change this statutory language, SBA is reluctant to change it administratively. However, SBA believes that it could also require other agencies establishing size standards for industries other than services or manufacturing to use data over a 5-year period. Since requiring 5 years instead of 3 is not inconsistent with the statutory provision (*i.e.,* 5 years is ''not less than 3 years''), SBA specifically requests comments on whether SBA should require other agencies to use 5 years' worth of data for all industries.

This new calculation period does not affect existing non-SBA size standards. The averaging period for existing non-SBA size standards is not changed unless the responsible agency proposes and finalizes changes to such size standards. This is consistent with the change in Public Law 115–324 to the requirements for prescribing a non-SBA size standard, given the lack of any restrictions in the Small Business Act or Public Law 115–324 on applying an existing size standard. In proposing a change to the averaging period for its existing size standard, the responsible agency should coordinate with SBA using the procedure in § 121.903.

III. Request for Comments

SBA invites comments, input, or suggestions from interested parties on its proposal to change the period for the calculation of annual average receipts for all receipts-based size standards from 3 years to 5 years. The comments should address the following specific issues pertaining to the SBA's proposal.

1. SBA seeks feedback, along with supporting facts and analyses, on whether the Agency should calculate annual average receipts over 5 years for all industries subject to receipts-based size standards or on whether it should use a 5-year annual receipts average for businesses in services industries only and continue using a 3-year annual average for other businesses. SBA is concerned that the latter option may create confusion for both businesses in reporting their size based on annual average receipts and contracting personnel in verifying the size of bidders to Federal contracts.

2. SBA invites input on how the use of annual average receipts over 5 years instead of 3 years would impact both smaller small businesses and more advanced, larger small businesses in terms of getting access to Federal opportunities for small businesses.

IV. Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

A. Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is not a significant regulatory action for purposes of Executive Order 12866. However, in the next section, SBA provides a benefit-cost analysis of this proposed rule, including: (1) A statement of the need for the proposed action, and (2) an evaluation of the benefits and costs—both quantitative and qualitative—of the proposed action and alternatives considered. This rule is also not a ''major rule'' under the Congressional Review Act, 5 U.S.C. 800, *et seq.*

a. Benefit-Cost Analysis

1. What is the need for this regulatory action?

As stated elsewhere, the Small Business Act delegates to SBA's Administrator the responsibility for establishing small business size definitions (usually referred to as ''size standards''). Recently, Public Law 115–324 modified the requirements for proposed small business size standards prescribed by an agency without separate statutory authority to issue size standards.

The need of this proposed rule is to carry out Public Law 115–324 and to ensure consistency in the calculation of annual average receipts for SBA's size standards. In addition to the averaging requirements, size standards prescribed under section 3(a)(2)(C)(ii) of the Small Business Act must meet two other requirements: (1) Be proposed with an opportunity for public notice and comment, and (2) be approved by the Administrator. Public Law 115–324 does not undo these 2 requirements, and this proposed rule satisfies these requirements.

SBA's mission is to aid and assist small businesses through a variety of financial, procurement, business development and counseling, and disaster assistance programs. This regulatory action promotes the Administration's goals and objectives and meets the SBA's statutory responsibility to implement a new law impacting size definitions for small businesses. One of SBA's goals in support of promoting the Administration's objectives is to help small businesses succeed through access to capital, Federal Government contracts and purchases, and management, technical and disaster assistance.

2. What are the potential benefits and costs of this regulatory action?

Changing the period for calculating annual average receipts from 3 years to 5 years may enable some mid-size businesses that have just exceeded size standards to regain small business status. Similarly, it could also allow some advanced and larger small businesses about to exceed size standards to retain their small status for a longer period. However, it could also result in some advanced small businesses having a 5-year receipts average that happens to be higher than the 3-year receipts average, thus ejecting them out of their small business status sooner. Detailed impacts of the proposed change are discussed below.

It is difficult to determine the actual number of small and mid-size businesses that would be impacted by Public Law 115–324 and this regulatory action because there is no data on annual receipts of businesses. The annual receipts data from the Economic Census special tabulation are only available once every 5 years. Similarly, the System for Award Management (SAM) only records the data on 3-year annual average receipts of businesses over their three preceding fiscal years, but not their annual receipts for each fiscal year. For example, the receipts data for year 2018 is an average of annual receipts for 2017, 2016, and 2015. Similarly, the receipts data for 2017 is an average of annual receipts for 2016, 2015, and 2014, and so on. A 5-year receipts average for 2018 would be an average of annual receipts for 2017, 2016, 2015, 2014, and 2013.

Given the lack of annual receipts for each year, SBA approximates a firm's 5-year annual average revenue for 2018 as follows:

$$AvgRevenue_{2013-17} = \frac{1}{5} * \{(2 * AvgRevenue_{2015\,(SAM)}) + (3 * AvgRevenue_{2018\,(SAM)})\}$$

where:

$$AvgRevenue_{2015\,(SAM)} = AvgRevenue_{2012-14} = \frac{1}{3} * (Revenue_{2012} + Revenue_{2013} + Revenue_{2014})$$

and

$$AvgRevenue_{2018\,(SAM)} = AvgRevenue_{2015-17} = \frac{1}{3} * (Revenue_{2015} + Revenue_{2016} + Revenue_{2017}).$$

This result may slightly underestimate the 5-year revenue average when annual revenues are rising (*i.e.,* 2014 revenue > 2013 revenue > 2012 revenue) and overestimate it if annual revenues are declining (*i.e.,* 2014 revenue < 2013 revenue < 2012 revenue).

To estimate the 5-year receipts average for 2018 using the above formula, SBA analyzed the 2018 SAM extracts (as of September 1, 2018) and 2015 SAM extracts (as of September 1, 2015). The above 5-year annual average receipts formula would only work for businesses that were present in both 2015 and 2018 SAM extracts. One challenge was that some businesses found in 2018 SAM could not be found in 2015 SAM and vice versa. Excluding entities registered in SAM for purposes other than government contracting and entities ineligible for small business consideration (such as foreign governments and state-controlled institutions of higher learning), there were a total of 346,958 unique business concerns in SAM subject to at least one receipts-based size standard. Of these concerns, 293,524 (or about 84.6 percent) were ''small'' in all North American Industry Classification System (NAICS) industries, 9,990 (or 2.9 percent) were ''small'' in some industries and ''not small'' in other industries, and 43,444 (or 12.5 percent) were ''not small'' in any industry.

Excluding entities with ''null'' or ''zero'' receipts values, 194,686 firms (or about 56 percent) appeared both in 2018 SAM and in 2015 SAM and were included in the 5-year annual average receipts approximation and calculation of number of businesses impacted. Of those 194,686 matched firms subject to a receipts-based size standard, 154,220 (or about 79 percent) were ''small'' in all NAICS industries, 8,049 (or 4.1 percent) were ''small'' in some industries and other than small (''not small'') in other industries, and 32,417 (or about 17 percent) were ''not small'' in any industry. In other words, 303,514 (or 87.5 percent) of 346,958 total concerns in SAM 2018 and 162,269 (or 83.3 percent) of 194,686 total matched firms were small in at least one NAICS industry with a receipts-based size standard. These results are summarized in Table 1, ''Size Status of Businesses in Industries Subject to Receipts-Based Size Standards,'' below.

TABLE 1—SIZE STATUS OF BUSINESSES IN INDUSTRIES SUBJECT TO RECEIPTS-BASED SIZE STANDARDS

Size status	Total firms in 2018 SAM subject to at least one receipts-based standard		Firms in both 2015 SAM and 2018 SAM (matched)		% Matched	Total to matched ratio *
	Number of firms	%	Number of firms	%		
Small in at least one industry	303,514	87.5	162,269	83.3	53.5	1.809
Small in all industries	293,524	84.6	154,220	79.2	52.5	1.903
Small in some and not small in others	9,990	2.9	8,049	4.1	80.6	1.241
Large in all industries	43,444	12.5	32,417	16.7	74.6	1.340
Total	346,958	100.0	194,686	100	56.1	1.782

*To be used to translate the results from the matched data to overall 2018 SAM data.

According to Table 2, ''Distribution of Business Concerns Subject to Receipts-Based Size Standards by Number of NAICS Codes,'' below, the distribution of firms by the number of NAICS codes in the matched data is very similar to that for the overall 2018 SAM data. About 42–44 percent of firms were in only one NAICS code that has a receipts-based size standard, about 35 percent in 2–5 NAICS codes, about 12 percent in 6–10 NAICS codes, and about 8–10 percent in more than 10 NAICS codes. In other words, 56–58 percent of firms were in multiple NAICS codes with receipts-based size standards. Thus, it is quite possible that the proposed change may impact a firm's

small business status in multiple industries. For purposes of this analysis, an impacted firm is defined as one that would be impacted by the change in terms of gaining, regaining, extending, or losing small business status in at least one industry with a receipts-based size standard.

TABLE 2—DISTRIBUTION OF BUSINESS CONCERNS SUBJECT TO RECEIPTS-BASED SIZE STANDARDS BY NUMBER OF NAICS CODES

Number of NAICS codes	Total firms in 2018 SAM with at least one receipts-based NAICS code		Matched firms between 2018 and 2015 SAM	
	Count	%	Count	%
1 NAICS code	153,184	44.2	82,082	42.2
2 to 5 NAICS codes	123,277	35.5	68,458	35.2
6 to 10 NAICS codes	41,518	12.0	24,529	12.6
> 10 NAICS codes	28,979	8.4	19,617	10.1
Total	346,958	100.0	194,686	100.0

Note: A business concern is defined in terms of a unique local (vendor) DUNS number.

A central premise of Public Law 115–324 is that a 5-year annual receipts average (as opposed to a 3-year annual receipts average) would enable some mid-size businesses who have recently exceeded the size standard to regain small business status and some advanced small businesses close to exceeding the size standard to retain their small business status for a longer period. However, this premise would only hold true when businesses' annual revenues are rising. When businesses' annual revenues are declining, due to economic downturns or other factors, the 5-year annual receipts average could be higher than the 3-year annual receipts average, thereby causing small businesses close to their size standards to lose their small business status sooner.

b. Impacts on Businesses From the Proposed Change

By comparing the approximated 5-year annual receipts average with the current receipts-based size standard for each of the 194,686 matched business concerns in each NAICS code subject to a receipts-based size standard, SBA first estimated the following:

i. The number of mid-size businesses that have exceeded the size standard and would regain small business status in at least one NAICS industry with a receipts-based size standard (*i.e.,* 3-year average > size standard ≥ 5-year average)—positive impact;

ii. the number of advanced small businesses within 10 percent below the size standard that would have their small business status extended for a longer period in at least one NAICS industry with a receipts-based standard (5-year average < 3-year average ≤ size standard *and* 0.9*size standard < 3-year average ≤ size standard)—positive impact;

iii. the number of currently small businesses that would lose their small business status in at least one NAICS industry subjected to at least one receipts-based size standard (*i.e.,* 3-year average ≤ size standard < 5-year average)—negative impact; and

iv. the number of advanced small businesses within 10 percent below the size standard that would have their small status shortened in at least one NAICS industry subject to a receipts-based standard (3-year average < 5-year average ≤ size standard *and* 0.9*size standard < 3-year average ≤ size standard)—negative impact.

In this proposed rule, SBA is changing the period for calculation of average annual receipts for all of its receipts-based size standards from 3 years to 5 years. The purpose of Public Law 115–324 is to allow small businesses more time to grow and develop competitiveness and infrastructure so that they are better prepared to succeed under full and open competition once they outgrow the size threshold. However, as stated previously, a longer 5-year averaging period may not always and necessarily provide relief to every small business concern. As discussed previously, when annual revenues are declining or when annual revenues for the latest 3 years are lower than those for the earliest 2 years of the 5-year period, the 5-year average would be higher than the 3-year average, thereby ejecting some advanced small businesses out of their small business status sooner or rendering some small businesses under the 3-year average not small immediately.

As discussed earlier, the change in the averaging period for annual receipts from 3 years to 5 years results in four different types of impacts on small businesses: (i) Enabling current large or mid-size businesses to gain small business status (impact i); (ii) enabling current advanced small businesses to lengthen their small business status (impact ii); (iii) causing current small businesses to lose their small business status (impact iii); and (iv) causing current small businesses to shorten their small business status (impact iv). Table 3, 'Percentage Distribution of Impacted Firms by the Number of NAICS Codes,' below, provides these results based on the 2018 SAM—2015 SAM matched firms.

TABLE 3—PERCENTAGE DISTRIBUTION OF IMPACTED FIRMS BY THE NUMBER OF NAICS CODES

Impact *	Number of impacted firms	% Distribution of impacted firms by number of NAICS codes				
		1 NAICS code	2–5 NAICS codes	6–10 NAICS codes	>10 NAICS codes	Total
Currently small in all NAICS codes:						
Impact (ii)	1,255	25.3	39.6	16.3	18.8	100.0
Impact (iii)	1,176	35.5	32.5	14.9	17.2	100.0
Impact (iv)	112	20.5	33.9	25.0	20.5	100.0

TABLE 3—PERCENTAGE DISTRIBUTION OF IMPACTED FIRMS BY THE NUMBER OF NAICS CODES—Continued

Impact *	Number of impacted firms	% Distribution of impacted firms by number of NAICS codes				
		1 NAICS code	2–5 NAICS codes	6–10 NAICS codes	>10 NAICS codes	Total
Currently large business in all NAICS codes:						
Impact (i)	914	36.0	36.1	13.6	14.3	100.0
Currently small in some NAICS and not small in others:						
Impact (i)	1,640	0.0	24.6	24.2	51.2	100.0
Impact (ii)	1,138	0.0	25.0	26.0	49.0	100.0
Impact (iii)	497	0.0	23.7	20.9	55.3	100.0
Impact (iv)	108	0.0	23.1	23.1	53.7	100.0
Total Impact by Impact Type:						
Impact (i)	2,554	12.9	28.7	20.4	38.0	100.0
Impact (ii)	2,393	13.3	32.6	20.9	33.2	100.0
Impact (iii)	1,673	24.9	29.9	16.7	28.5	100.0
Impact (iv)	220	10.5	28.6	24.1	36.8	100.0
Overall Impact:						
Positive	4,687	13.8	31.8	20.7	33.8	100.0
Negative	1,890	23.3	29.8	17.6	29.4	100.0
Both	6,577	16.5	31.2	19.8	32.5	100.0

* Impact (i) = Current large businesses gaining small status; Impact (ii) = Current small businesses extending small status; Impact (iii) = Current small businesses losing small status; Impact (iv) = Current small businesses shortening small status.

It is highly notable that the distribution of impacted firms by the number of NAICS codes, as shown in Table 3, is very different as compared to a similar distribution based on the overall matched and total 2018 SAM data (*see* Table 2), especially with respect to firms with only one NAICS code and those with more than 5 NAICS codes. For example, more than 40 percent of all firms in the overall data were associated with only one NAICS code, as compared to less than 20 percent among impacted firms. Similarly, firms with more than 5 NAICS codes accounted for about 20 percent of all firms in the original data, as compared to more than 50 percent among impacted firms. It is also notable that NAICS Sectors 54, 56, and 23 together accounted for more than 70 percent of impacted firms (both negatively and positively impacted), with Sector 54 (Professional, Scientific and Technical Services) accounting for about 35 percent, Sector 23 (Construction) about 25 percent, and Sector 56 (Administrative and Support, Waste Management and Remediation Services) about 12–13 percent.

Each of these impacts was then multiplied by an applicable factor or ratio, as shown in the last column of Table 1, to obtain the respective impacts corresponding to all firms in 2018 SAM subject to at least one receipts-based size standard. These results are presented below in Table 4, ''Impacts from Changing the Averaging Period for Receipts from 3 Years to 5 Years.'' The last column of the table shows the percent of firms impacted relative to all business concerns in 2018 SAM.

Because the SAM data only captures businesses that are primarily interested in Federal procurement opportunities, the SAM-based results do not capture the impacts the proposed change may have on businesses participating in various non-procurement programs that apply to SBA's receipts-based size standards, such as SBA loan programs and exemptions from compliance with paperwork and other regulatory requirements.

TABLE 4—IMPACTS FROM CHANGING THE AVERAGING PERIOD FOR RECEIPTS FROM 3 YEARS TO 5 YEARS

Impact [1]	Firms impacted in matched dataset	Total to matched ratio	Total firms impacted in 2018 SAM	Total firms in 2018 SAM	% Impacted
Entities only small under all NAICS code(s):					
Impact (ii)	1,255	1.903	2,389	293,524	0.8
Impact (iii)	1,176	1.903	2,238	293,524	0.8
Impact (iv)	112	1.903	213	293,524	0.1
Entities other than small under all NAICS code(s):					
Impact (i)	914	1.340	1,225	43,444	2.8
Entities small in some NAICS code(s) and other than small in other(s):					
Impact (i)	1,640	1.241	2,035	9,990	20.4
Impact (ii)	1,138	1.241	1,412	9,990	14.1
Impact (iii)	497	1.241	617	9,990	6.2
Impact (iv)	108	1.241	134	9,990	1.3
Total impact by impact type:					
Impact (i)	2,554	.....	3,260	53,434	6.1
Impact (ii)	2,393	.....	3,801	303,514	1.3
Impact (iii)	1,673	.....	2,855	303,514	0.9
Impact (iv)	220	.....	347	303,514	0.1
Overall total by positive or negative impact: [2]					

TABLE 4—IMPACTS FROM CHANGING THE AVERAGING PERIOD FOR RECEIPTS FROM 3 YEARS TO 5 YEARS—Continued

Impact [1]	Firms impacted in matched dataset	Total to matched ratio	Total firms impacted in 2018 SAM	Total firms in 2018 SAM	% Impacted
Positive *[impact (i) or impact (ii)]*	4,687		6,690	346,958	1.9
Negative *[impact (iii) or impact (iv)]*	1,890		3,197	346,958	0.9
Total impact	6,577		9,887	346,958	2.8

[1] Impact (i) = Current large businesses gaining small business status; Impact (ii) = Current small businesses extending small status; Impact (iii) = Current small businesses losing small status; Impact (iv) = Current small businesses shortening small status.
[2] Number of firms under overall positive, negative and total impacts refer to the number of unique firms. Some firms could appear in multiple impact types and hence individual impacts may not add up to overall impact.

The Economic Census, combined with the Census of Agriculture and County Business Patterns Reports, provides for each NAICS code information on the number of total small and large businesses subjected to a receipts-based size standard. Based on the matched SAM data, SBA computed percentages of businesses impacted under each impact category for each NAICS industry subject to a receipts-based size standard. By applying such percentages to the 2012 Economic Census tabulation, SBA estimated the number of all businesses impacted under each impact type for each NAICS code subject to a receipts-based size standard. These results are presented in Table 5, ''Impacts from Changing the Averaging Period for Receipts from 3 Years to 5 Years (2012 Economic Census),'' below.

TABLE 5—IMPACTS FROM CHANGING THE AVERAGING PERIOD FOR RECEIPTS FROM 3 YEARS TO 5 YEARS

[2012 Economic Census]

Impact [1]	Total firms (in million)	Estimate of impacted firms	% Impacted
Impact (i)	271,505	7,822	2.9
Impact (ii)	6,896,633	62,822	0.9
Impact (iii)	6,896,633	62,662	0.9
Impact (iv)	6,896,633	5,945	0.1
Overall impact:			
Positive *[impact (i) or impact (ii)]*	7,168,138	70,644	1.0
Negative *[impact (iii) or impact (iv)]*	7,168,138	68,607	1.0
Total impact	7,168,138	139,251	1.9

[1] Impact (i) = Current large businesses gaining small status; Impact (ii) = Current small businesses extending small status; Impact (iii) = Current small businesses losing small status; Impact (iv) = Current small businesses shortening small status.

Currently large or mid-size businesses regaining small business status would get various benefits as small business concerns, including access to Federal set-aside contracts, SBA's guaranteed loans and disaster assistance, reduced patent fees, and exemptions from various compliance and paperwork requirements. With their small business status extended, advanced small businesses would continue to receive such benefits for a longer period. However, the proposed change may also cause some small businesses to lose their small business status in at least one receipts-based size standard and access to small business assistance, especially Federal set-aside opportunities.

c. The Baseline

OMB directs agencies to establish an appropriate baseline to evaluate benefits, costs, or transfer impacts of regulatory actions and alternative approaches considered, if any. The baseline should represent the agency's best assessment of what the world would look like absent the regulatory action. For a new regulatory action modifying an existing regulation (such as changing the annual average receipts calculation from 3 years to 5 years), a baseline assuming no change to the regulation (*i.e.,* maintaining the status quo) generally provides an appropriate benchmark for evaluating benefits, costs, or transfer impacts of proposed regulatory changes and their alternatives.

Based on the 2012 Economic Census special tabulations (the latest available), 2012 County Business Patterns Reports (for industries not covered by the Economic Census), and 2012 Agricultural Census tabulations (for agricultural industries), of a total of about 7.2 million firms in all industries with receipts-based size standards, about 96 percent are considered small and 4 percent other than small under the 3-year annual receipts average. Similarly, of 346,958 businesses that were subject to at least one receipts-based size standard and eligible for Federal contracting, 87.5 percent were small in at least one NAICS code and 12.5 percent other than small in all NAICS codes.

Based on the data from the Federal Procurement Data System—Next Generation (FPDS–NG) for fiscal years 2015–2017, on average, about 88,770 unique firms in industries subject to receipts-based size standards received at least one Federal contract during that period, of which 83 percent were small. Businesses subject to receipts-based standards received $182 billion in annual average Federal contract dollars during that period, of which nearly $64 billion or about 35 percent went to small businesses. Of total dollars awarded to small businesses subject to receipts-based size standards, $45 billion or 71 percent was awarded through various small business set-aside programs and another 29 percent was awarded through non-set aside contracts.

Based on SBA's internal data on its loan programs, small businesses subject to receipts-based size standards received, on an annual basis, a total of nearly 58,600 7(a) and 504 loans for fiscal years 2016–2018, totaling $24.5 billion, of which 85 percent was issued through the 7(a) program and 15 percent was issued through the CDC/504 program. During fiscal year 2018, small businesses in those industries also received about 11,350 loans through the SBA's Economic Injury Disaster Loan (EIDL) program, totaling about $1.0 billion on an annual basis. Table 6, ''Baseline Analysis of Receipts-Based Size Standards,'' below, provides these baseline results.

Besides set-aside contracting and financial assistance discussed above, small businesses also benefit through reduced fees, less paperwork, and fewer compliance requirements that are available to small businesses through Federal agencies that use SBA's size standards. However, SBA has no data to estimate the number of small businesses receiving such benefits. Similarly, due to the lack of data, SBA is not able to determine impacts the proposed rule will have on small businesses participating in other agencies' programs that are subject to their own size standards based on annual average receipts.

TABLE 6—BASELINE ANALYSIS OF RECEIPTS-BASED SIZE STANDARDS

Measure	Value
Total industries subject to receipts-based standards	518
Total firms subject to at least one receipts-based standard (million)—2012 Economic Census	7.17
Total small firms subject to at least one receipts-based standard (million)—2012 Economic Census	6.9
Total small firms subject to at least one receipts-based standard as % of total firms—2012 Economic Census	96.2
Total business concerns in SAM [1] (as of September 1, 2018)	420,381
Total business concerns subject to a receipts-based size standard in at least one NAICS code [2] (SAM)	346,958
Total businesses that are small in at least one NAICS code subject to a receipts-based size standard	303,514
Small business concerns as % of total business concerns subject to receipts-based standards (2018 SAM)	87.5
Average total number of unique Eligible vendors getting Federal contracts [1]—FPDS–NG (2015–2017)	126,500
Average total number of unique firms with receipts-based size standards getting Federal contracts [2]—FPDS–NG (2015–2017)	88,770
Average total contract dollars awarded to business concerns, subject to receipts-based standards ($ billion)	$182
Average total small business contract dollars awarded to businesses subject to receipts-based standards ($ billion)	$63.7
Small business dollars as % of total dollars awarded to firms subject to receipts-based standards	34.9
Annual average number of 7(a) and 504 loans to businesses subject to receipts-based standards (2015–2018)	58,569
Annual average amount of 7(a) and 504 loans ($ billion) (2015–2018)	$24.5
Number of EIDL loans to businesses subject to receipts-based size standards (2018)	11,345
Amount of EIDL loans ($ billion)	$1.0

[1] Entities in SAM and FPDS–NG presented above only include business concerns that can be eligible to qualify as small for Federal contracting. That is, entities that can never qualify as small (*e.g.,* foreign, not-for-profit and government entities) are excluded as they are not impacted by this rule.

[2] A business concern could appear in multiple NAICS industries involving both receipts-based and size standards and those based on other measures (such as employees). Similarly, a business could be small in some industries and other than small in others.

As mentioned previously, businesses that would regain or lose small business status can be identified by comparing their 5-year receipts average with the size standard. That is, if the 5-year receipts average of a firm currently above the size standard is lower than the applicable size standard, that firm will gain or regain small business status. Similarly, if the 5-year annual receipts average of a currently small business is higher than the size standard, that business will lose its small business status. However, to estimate the number of small businesses that would benefit by having their small business status extended for a longer period or would be penalized by having their small size status shortened, SBA considered small businesses whose 3-year annual average receipts average was within 10 percent below their receipts-based size thresholds. Small businesses that are not immediately impacted may be impacted either negatively or positively someday as they continue to grow and approach the size standard threshold.

d. Benefits

The most significant benefits to businesses from the proposed change in the period for calculation of annual average receipts from 3 years to 5 years include: (i) Enabling some mid-size businesses currently categorized above their corresponding size standards to gain or regain small business size status and thereby qualify for participation in Federal assistance intended for small businesses, and (ii) allowing some advanced and larger small businesses close to their size thresholds to lengthen their small business status for a longer period and thereby continue their participation in Federal small business programs. These include SBA's loan programs, EIDL program, and Federal procurement programs intended for small businesses. Federal procurement programs provide targeted, set-aside opportunities for small businesses under SBA's various business development and contracting programs, including 8(a)/BD, HUBZone, WOSB, EDWOSB, and SDVOSB programs. Benefits accruing to businesses gaining and extending small status are presented below in Table 7, ''Positive Impacts of Changing the Averaging Period for Receipts from 3 Years to 5 Years.'' The results in Table 7 pertain to businesses and industries subject to receipts-based size standards only.

As shown in Table 7, of 43,444 firms not currently considered small in any receipts-based size standards, 3,260 (or 7.5 percent) would benefit from the proposed change by gaining or regaining small status under the 5-year receipts average in at least one NAICS industry that is subject to a receipts-based size standard. Additionally, about 3,800 or 1.3 percent of small businesses within 10 percent below size standards would see their annual receipts decrease under the 5-year averaging period, consequently enabling them to keep their size status for a longer period.

Using the 2012 Economic Census, SBA estimated that about 7,800 or 2.9 percent of currently large businesses would gain or regain small status and more than 62,800 or 0.9 percent of total small businesses would see their small business status extended for a longer period as the result of this proposed

rule. These results are shown in Table 7, below.

With more businesses qualifying as small under the proposed change, Federal agencies will have a larger pool of small businesses from which to draw for their small business procurement programs. Growing small businesses that are close to exceeding the current size standards will be able to retain their small business status for a longer period under the 5-year receipts average, thereby enabling them to continue to benefit from the small business programs.

TABLE 7—POSITIVE IMPACTS OF CHANGING THE AVERAGING PERIOD FOR RECEIPTS FROM 3 YEARS TO 5 YEARS

Impact of proposed change	Large firms gaining small status	Small firms extending small status	Total positive impact
No. of impacted industries	372	361	[1] 420
No. of large firms becoming small or/and small firms extending small status—SAM (as of Sept 1, 2018)	3,260	3,801	[2] 6,690
Large firms becoming small or/and small firms with extended small status as % of total large or/and small firms in the baseline—SAM (as of Sept 1, 2018)	7.5	1.3	1.9
No. of large firms becoming small or/and small firms extending small status—2012 Economic Census	7,822	62,822	70,644
Large firms becoming small or/and small firms extending small status as % of total large or/and small firms in the baseline—2012 Economic Census	2.9	0.9	1.0
No. of large firms becoming small or/and small firms extending small status for small business contracts (FPDS–NG)	910	838	[2] 1,700
Additional small business dollars available to newly qualified firms or/and current small firms with extended small status ($ million)	$961	$133	$1,094
Additional small business dollars as % total small business contract dollars in the baseline	1.5	0.2	1.7
No. of additional 7(a) and 504 loans to newly qualified firms or/and current small firms extending small status	54	478	532
Additional 7(a) and 504 loan amount to newly qualified firms or/and current small firms extending small status ($ million)	$22	$189	$211
Additional 7(a) and 504 loan amount as % of total EIDL loan amount in the baseline	0.1	0.8	0.9
No. of additional EIDL loans to newly qualified for/firms and small firms extending small status	21	84	105
Additional EIDL loan amount to newly qualified firms or/and small firms with extended small status ($ million)	$2.2	$7.8	$10.0
Additional EIDL loan amount as % of total loan amount in the baseline	0.2	0.8	1.0

[1] Total impact represents total unique industries impacted to avoid double counting as some industries have large firms gaining small status and small firms extending small status.

[2] Total impact represents total unique firms impacted to avoid double counting as some firms may gain small business status in at least one NAICS code, while extending small business status in at least one other NAICS code.

Based on the FPDS–NG data for fiscal years 2015–2017, as shown in Table 7, SBA estimates that those newly qualified small businesses (*i.e.,* large businesses gaining small status) under the proposed rule, if adopted, could receive $961 million in small business contract dollars annually under SBA's small business, 8(a)/BD, HUBZone, WOSB, EDWOSB, and SDVOSB programs. That represents a 1.5 percent increase to total small business contract dollars from the baseline. Additionally, small businesses could receive approximately $133 million in additional small business contract dollars because of extension of their small business status, which is about a 0.2 percent increase from the total small business contract dollars in the baseline. That is, businesses gaining or extending small business status could receive about $1.1 billion in additional small business contract dollars, which is a 1.7 percent increase to the total small business dollars in the baseline.

Under SBA's 7(a) and 504 loan programs, based on the data for fiscal years 2016–2018, SBA estimates up to about 54 SBA 7(a) and 504 loans totaling nearly $22.0 million could be made to these newly qualified small businesses under the proposed change. Additionally, small businesses could receive up to 478 SBA 7(a) and 504 loans totaling $189 million due to the extension of their size status. These are, respectively, 0.1 percent and 0.8 percent increases to the loan amount in the baseline.

Newly qualified small businesses and those with extended small business status will also benefit from the SBA's EIDL program. Since the benefit provided through this program is contingent on the occurrence and severity of a disaster in the future, SBA cannot make a meaningful estimate of this impact. However, based on the historical trends of the EIDL data, SBA estimates that, on an annual basis, the newly defined small businesses under the proposed change could receive about 21 EIDL loans, totaling about $21 million. Similarly, extending small business status for a longer period could result in small businesses receiving 84 EIDL loans, totaling about $7.8 million. These results are presented in Table 7, above.

The added competition from more businesses qualifying as small may result in lower prices to the Federal Government for procurements set aside or reserved for small businesses, but SBA cannot quantify this impact. Costs could be higher when full and open contracts are awarded to HUBZone businesses that receive price evaluation preferences. However, with agencies likely setting aside more contracts for small businesses in response to a larger pool of small businesses under the proposed change, HUBZone firms might actually end up getting more set-aside contracts and fewer full and open contracts, thereby resulting in some cost savings to agencies. While SBA cannot estimate such costs savings, as it is impossible to determine the number and value of unrestricted contracts to be otherwise awarded to HUBZone firms that will be awarded as set-asides, such cost savings are likely to be relatively small as only a small fraction of full and open contracts are awarded to HUBZone businesses.

Additionally, the newly defined small businesses, as well as those with a longer small business status, would also

benefit from reduced fees, less paperwork, and fewer compliance requirements but SBA has no data to quantify this impact.

The proposed change will also address some of the challenges and uncertainties small businesses face in the open market once they graduate from their small business status. Small and mid-size businesses experience a considerable disadvantage in competing for full and open contracts against large businesses, including the largest in the industry. These large businesses have several competitive advantages over small and mid-size firms, including vast past performance qualifications and experience, strong brand-name recognition, a plethora of professional certifications, security clearances, and greater financial and marketing resources. Small and mid-size businesses cannot afford to maintain these resources, leaving them at a considerable disadvantage.

With contracts getting bigger, one large set-aside contract could throw a firm out of its small business size status, thereby subjecting it to certain requirements that apply to other-than-small firms, such as developing subcontracting plans. That firm may not have the infrastructure, existing business processes, and/or other resources in place in order to comply with such requirements. This may also result in constant shuffling between small and other-than-small status.

By allowing smaller mid-size companies that have just exceeded the size threshold to regain small business status and advanced small businesses close to size standards to prolong their small business status for a longer period, this proposed rule can expand the pool of qualified small firms for agencies to draw upon to meet their small business requirements.

e. The Costs

As stated previously, the change enacted under Public Law 115–324 may not always and necessarily benefit every small business concern. When businesses' annual revenues are declining or when annual revenues for the latest 3 years are lower than those for the earliest 2 years of the 5-year period, the 5-year average would be higher than the 3-year average, thereby ejecting small businesses out of their small status sooner or rendering some small businesses other than small immediately. Such small businesses would no longer be eligible for Federal small business opportunities, such as SBA's loans, Federal small business contracts, and other Federal assistance available to small businesses. These impacts are provided in Table 8, ''Negative Impacts from Changing the Averaging Period for Receipts from 3 Years to 5 Years,'' below.

TABLE 8—NEGATIVE IMPACTS FROM CHANGING THE AVERAGING PERIOD FOR RECEIPTS FROM 3 YEARS TO 5 YEARS

Impact of proposed change	Small firms losing small status	Small firms shortening small status	Total negative impact
No. of industries impacted	370	184	[1] 383
No. of small firms losing or/and shortening small status—SAM (as of Sept 1, 2018)	2,855	347	[2] 3,197
Small firms losing or shortening small status as % of total small firms—SAM (as of Sept 1, 2018)	0.9	0.1	1.1
No. of small firms losing or extending small status—2012 Economic Census	62,662	5,945	68,607
Small firms losing or shortening small status as % of total small firms in the baseline—2012 Economic Census	0.9	0.1	1.0
No. of small firms losing or shortening small business eligibility for set-aside contracts—FPDS–NG (2015–17)	416	82	498
Small business dollars unavailable to small firms losing or shortening small status ($ million)	$289	$46	$335
Small business dollars as % of total small business dollars in the baseline	0.5	0.07	0.5
No. of 7(a) and 504 loans unavailable to small firms losing or shortening small status	565	52	617
7(a) and 504 loan amount unavailable to small firms losing or shortening ($ million)	$256	$22	$278
Unavailable 7(a) and 504 loan amount as % of total loan amount in the baseline (baseline = $24.5 billion)	1.0	0.1	1.1
No. of EIDL loans unavailable to small firms losing or shortening small status	100	21	121
Unavailable EIDL loan amount to small firms losing or extending small status ($ million)	$9.6	$2.2	$11.8
Unavailable EIDL loan amount as % of total EIDL loan amount in the baseline (baseline = $1.0 billion)	1.0	0.2	1.2

[1] Total impact represents total unique industries impacted to avoid double counting as some industries have small firms losing small status and small firms shortening small status.

[2] Total impact represents total unique firms impacted to avoid double counting as some firms may gain small business status in at least one NAICS code, while extending small business status in at least one other NAICS code.

SBA estimates that, of 303,514 firms in 2018 SAM that were small under at least one receipts-based size standard based on the 3-year receipts average, 2,855 firms (or 0.9 percent) would lose their small status and another 347 firms (or 0.1 percent) would see their size status shortened as a result of the proposed change. Similarly, based on the 2012 Economic Census data, about 62,650 firms would lose their small business status and about 5,950 firms would see their size status shortened, which represent, respectively, 0.9 percent and 0.1 percent of total small firms subject to a receipts-based size standard.

Based on the contract awards data from FPDS–NG for fiscal years 2015–2017, businesses losing or shortening small status would lose access to about $335 million in Federal small business contract collars, which is about a 0.5 percent decrease from the corresponding value in the baseline. Similarly, based on the SBA's loan data for fiscal years 2016–2018 and the number of impacted firms from the Economic Census, SBA estimates that businesses losing or shortening small status would also lose access to about $277 million in SBA 7(a) and 504 loans and $12 million in EIDL loans. These are, respectively, 1.1 percent and 1.2 percent of the corresponding baseline values.

Businesses losing small status and those with size status shortened would also be deprived of other Federal benefits available, including reduced fees and exemptions from certain paperwork and compliance

requirements. However, there exists no data to quantify this impact.

Additionally, by enabling mid-size businesses to regain small business status and lengthening the small business status of advanced and successful larger small businesses, the proposed rule may disadvantage smaller small businesses in more need of Federal assistance than their larger counterparts in competing for Federal opportunities. SBA frequently receives concerns from smaller small businesses that they also lack resources, past performance qualifications and expertise to be able to compete against more resourceful, qualified and experienced large small businesses for Federal opportunities for small businesses.

Besides having to register in SAM to be able to participate in Federal contracting and update the SAM profile annually, small businesses incur no direct costs to gain or retain their small business status. All businesses willing to do business with the Federal Government have to register in SAM and update their SAM profiles annually, regardless of their size status. SBA believes that a vast majority of businesses that are willing to participate in Federal contracting are already registered in SAM. Furthermore, this proposed rule does not establish the new size standards for the first time; rather, it merely proposes to modify the calculation of annual average receipts that apply to the existing size standards in accordance with a statutory requirement.

The proposed change may entail some additional administrative costs to the Federal Government because more businesses may qualify as small for Federal small business programs. For example, there will be more firms seeking SBA's loans; more firms eligible for enrollment in the Dynamic Small Business Search (DSBS) database or in *certify.sba.gov;* more firms seeking certification as 8(a)/BD or HUBZone firms or qualifying for small business, WOSB, EDWOSB, and SDVOSB status; and more firms applying for SBA's 8(a)/BD and All-Small Mentor-Protégé programs. With an expanded pool of small businesses, it is likely that Federal agencies will set aside more contracts for small businesses under the proposed change. One may surmise that this might result in a higher number of small business size protests and additional processing costs to agencies. However, the SBA's historical data on size protests actually shows that the number of size protests actually decreased after an increase in the number of businesses qualifying as small as a result of size standards revisions as part of the first 5-year review of size standards. Specifically, on an annual basis, the number of size protests dropped from about 600 during fiscal years 2011–2013 (review of most receipts-based size standards was completed by the end of fiscal year 2013) to about 500 during fiscal years 2014–2016. However, with more years of data to be reviewed, 5-year averaging may increase time needed by size specialists to process a size protest. Among those newly defined small businesses seeking SBA's loans, there could be some additional costs associated with compliance and verification of their small business status. However, small business lenders have an option of using the tangible net worth and net income based alternative size standard instead of using the industry-based size standard to establish eligibility for SBA's loans. For these reasons, SBA believes that these added administrative costs will be minor because necessary mechanisms are already in place to handle these added requirements.

Additionally, some Federal contracts may possibly have higher costs. With a greater number of businesses defined as small under the proposed change, Federal agencies may choose to set aside more contracts for competition among small businesses only instead of using full and open competition. The movement of contracts from unrestricted competition to small business set-aside contracts might result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers under the proposed change. However, the additional costs associated with fewer bidders are expected to be minor since, by law, procurements may be set aside for small businesses under the 8(a)/BD, HUBZone, WOSB, EDWOSB, or SDVOSB programs only if awards are expected to be made at fair and reasonable prices.

Costs may also be higher when full and open contracts are awarded to HUBZone businesses that receive price evaluation preferences. However, with agencies likely setting aside more contracts for small businesses in response to the availability of a larger pool of small businesses under the proposed increases to size standards, HUBZone firms might actually end up getting fewer full and open contracts, thereby resulting in some cost savings to agencies. However, such cost savings are likely to be minimal as only a small fraction of unrestricted contracts are awarded to HUBZone businesses.

f. Net Impact

As discussed elsewhere, the proposed rule would result in four primary impacts, which can be categorized as either having a 'positive impact' or 'negative impact' on size status of both currently large and small businesses. Allowing some currently large firms to gain small business status and some advanced small firms to remain small for a longer period represents the positive impact of the proposed rule. Causing some currently small firms to lose or shorten their small business is the negative impact.

Although businesses in a majority of industries with receipts-based size standards would be both positively and negatively impacted by this proposed rule, in totality the number firms with positive impacts was generally greater than the number of firms with negative impacts. The proposed rule would result in a net gain of about $759 million (or 1.2 percent) in Federal small business dollars. However, due to the relative sizes of the industries in terms of the number of firms, the net impact of the proposed rule on SBA loans was slightly negative. SBA estimates a net loss of 0.3 percent of 7(a) and 504 loans and 0.2 percent of EIDL loans to small firms as a result of changing the period for calculating annual average receipts from 3 years to 5 years. Net impacts of the proposed rule are summarized in Table 9, ''Net Impact from Changing the Averaging Period for Receipts from 3 Years to 5 Years,'' below.

TABLE 9—NET IMPACT FROM CHANGING THE AVERAGING PERIOD FOR RECEIPTS FROM 3 YEARS TO 5 YEARS

Impact of proposed change	Total positive impact	Total negative impact	Net impact
Total no. of impacted firms—SAM (as of Sept 1, 2018)	6,690	3,197	3,493
Impacted firms as % of total firms in the baseline—SAM (as of Sept 1, 2018)	1.9	0.9	1.0
Number of impacted firms—2012 Economic Census	70,644	68,607	2,037
Impacted firms as % of total firms in the baseline—2012 Economic Census	1.0	1.0	0.03

TABLE 9—NET IMPACT FROM CHANGING THE AVERAGING PERIOD FOR RECEIPTS FROM 3 YEARS TO 5 YEARS—Continued

Impact of proposed change	Total positive impact	Total negative impact	Net impact
Number of impacted firms eligible for set-aside contracts (FPDS–NG)	1,700	498	1,200
Small business dollars impacted ($ million)	$1,094	$335	$759
Small business dollars impacted as % total set-aside dollars in the baseline	1.7	0.5	1.2
Number of 7(a) and 504 loans impacted	532	617	−85
7(a) and 504 loan amount impacted ($ million)	$211	$277	−$66
7(a) and 504 loan amount impacted as % of total 7(a) and 504 loan amount in the baseline	0.9	1.1	−0.3
No. of EID loans impacted	105	121	−16
EID loan amount impacted ($ million)	$10.0	$11.8	−$1.8
EID loan amount impacted as % of total loan amount in the baseline	1.0	1.2	−0.2

g. Transfer Impacts

The proposed change may result in some redistribution of Federal contracts between businesses gaining or extending small status and large businesses, and between businesses gaining or extending small status and other existing small businesses. However, it would have no impact on the overall economic activity since the total Federal contract dollars available for businesses to compete for will not change. While SBA cannot quantify with certainty the actual outcome of the gains and losses from the redistribution of contracts among different groups of businesses, it can identify several probable impacts in qualitative terms. With the availability of a larger pool of small businesses under the proposed change, some unrestricted Federal contracts may be set aside for small businesses. As a result, large businesses may lose access to some Federal contracts. Similarly, some currently small businesses may obtain fewer set-aside contracts due to the increased competition from some large businesses qualifying as small and advanced small businesses remaining small for a longer period. This impact may be offset by a greater number of procurements being set aside for all small businesses. With large businesses qualifying as small and advanced larger small businesses remaining small for a longer period under the proposed rule, smaller small businesses could face some disadvantages in competing for set-aside contracts against their larger counterparts. However, SBA cannot quantify these impacts.

B. Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. This action does not have retroactive or preemptive effect.

C. Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this proposed rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

D. Executive Order 13563

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. A description of the need for this regulatory action and benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563 is included above in the Benefit-Cost Analysis under Executive Order 12866. Additionally, Executive Order 13563, Section 6, calls for retrospective analyses of existing rules.

Following the enactment of Public Law 115–324, SBA issued a public notice advising business and contracting communities that SBA must go through a rulemaking process to implement the new law and that businesses still must report their receipts based on a 3-year average until SBA changes its regulations. SBA updated the Small Business Procurement Advisory Council (SBPAC) at its March 26, 2019, and April 23, 2019, meetings about SBA's rulemaking process to implement Public Law 115–324. On April 18, 2019, SBA also presented an update on the implementation of Public Law 115–324 at the 2019 Annual Government Procurement Conference. Through phone calls and emails, SBA also advised business and contracting communities and other interested parties about the SBA's process to implement the new law.

Additionally, SBA issued a revised draft white paper titled ''Small Business Size Standards: Revised Size Standards Methodology'' and published a notice in the April 27, 2018, issue of the **Federal Register** (83 FR 18468) to advise the public that the document is available for public review and comments. The Revised Size Standards Methodology explains how SBA establishes, reviews, and modifies its receipts-based and employee-based small business size standards. On April 11, 2019, SBA published a **Federal Register** Notice (84 FR 14587) advising the public that the Agency has issued the revised final white paper.

E. Executive Order 13771

This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

F. Initial Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), this proposed rule, if adopted, may have a significant impact on a substantial number of small businesses in industries subject to receipts-based size standards. As described above, this rule may affect small businesses in those industries seeking Federal contracts, loans under SBA's 7(a), 504 and EIDL programs, and assistance under other Federal small business programs.

Immediately below, SBA sets forth an initial regulatory flexibility analysis (IRFA) of this proposed rule to address the following questions: (1) What is the need for and objective of the rule?; (2) What is SBA's description and estimate of the number of small businesses to which the rule will apply?; (3) What are the projected reporting, record-keeping, and other compliance requirements of the rule?; (4) What are the relevant Federal rules that may duplicate,

overlap, or conflict with the rule?; and (5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small businesses?

1. What are the need for and objective of the rule?

Recently, Public Law 115–324 amended section 3(a)(2)(C)(ii)(II) of the Small Business Act by modifying the period for calculating annual average receipts of business concerns providing services in a proposed size standard prescribed by an agency without separate statutory authority to issue size standards from 3 years to 5 years. This proposed rule is needed to implement Public Law 115–324 and to make consistent changes to SBA's definition of annual receipts by amending the SBA's regulations on the calculation of annual average receipts for all receipts-based standards from over 3 years to over 5 years.

2. What are SBA's description and estimate of the number of small businesses to which the rule will apply?

This proposed rule applies to all small businesses that are subject to a receipts-based size standard. Based on the 2012 Economic Census special tabulations, 2012 County Business Patterns Reports, and 2012 Agricultural Census tabulations, of a total of about 7.2 million firms in all industries with receipts-based size standards to which the rule will apply, 6.9 million or about 96.0 percent are considered small under the 3-year annual receipts average. Of 346,958 total concerns in SAM 2018 to which the rule will apply, about 303,500 or 87.5 percent were small in at least one NAICS industry with a receipts-based size standard. Similarly, based on the data from FPDS–NG for fiscal years 2015–2017, on average, about 88,770 unique firms in industries subject to receipts-based size standards received at least one Federal contract during that period, of which 83 percent, or 73,825 were small.

3. What are the projected reporting, record-keeping and other compliance requirements of the rule?

The proposed rule changes existing reporting or record-keeping requirements for small businesses. In reporting receipts to SBA for an SBA size determination, businesses will report a 5-year average rather than a 3-year average. To qualify for Federal procurement and a few other programs requires businesses to register in SAM and to self-certify that they are small at least once annually. Therefore, businesses opting to participate in those programs must comply with SAM requirements. There are no costs associated with SAM registration or certification. Changing size standards alters access to SBA's programs that assist small businesses but does not impose a regulatory burden because they neither regulate nor control business behavior.

4. What are the relevant Federal rules, which may duplicate, overlap or conflict with the rule?

Under section 3(a)(2)(C) of the Small Business Act, 15 U.S.C. 632(a)(2)(C), Federal agencies must use SBA's size standards to define a small business, unless specifically authorized by statute to do otherwise. In 1995, SBA published in the **Federal Register** a list of statutory and regulatory size standards that identified the application of SBA's size standards as well as other size standards used by Federal agencies (60 FR 57988 (November 24, 1995)). SBA is not aware of any Federal rule that would duplicate or conflict with establishing size standards.

However, the Small Business Act and SBA's regulations allow Federal agencies to develop different size standards if they believe that SBA's size standards are not appropriate for their programs, with the approval of SBA's Administrator (13 CFR 121.903). The Regulatory Flexibility Act authorizes an Agency to establish an alternative small business definition, after consultation with the Office of Advocacy of the U.S. Small Business Administration (5 U.S.C. 601(3)).

5. What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

By law, SBA is required to develop numerical size standards for establishing eligibility for Federal small business assistance programs. Other than varying size standards by industry and changing the size measures, no practical alternative exists to the systems of numerical size standards. As stated elsewhere, the objective of this proposed rule is to change SBA regulations on the calculation of business size in terms of annual average receipts to implement Public Law 115–324 and there are no other alternatives to achieve that objective.

G. Paperwork Reduction Act

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that this proposed rule would amend an information collection (SBA Form 355, Information for Small Business Size Determination, which was previously approved under OMB Control Number 3245–0101). In addition to seeking reinstatement of this information collection, SBA will also submit it to OMB for approval of the changes described below. Certain proposed revisions in Parts III and IV of Form 355 address the change from 3 years to 5 years for calculating annual average receipts. Other proposed revisions to the form would be to delete unnecessary questions, clarify certain previously approved requests for information, and in some instances, to request additional information where SBA has determined there is a programmatic need. The proposed deletions and clarifications, though not required by the statute, will alleviate the additional burden posed by changing from 3 years to 5 years for calculating annual average receipts.

First, SBA will amend the General Instructions section to define ''concern'' and ''principal stockholders''; state that separate affiliation rules apply in some of SBA's loan and research programs; remove the requirement to identify a labor surplus county, as well as obsolete information about industries with special size standards; and to include in the certification a statement that accompanying documentation is true and correct.

Second, in Part 1, SBA will clarify that the information relates to the applicant business; add a checkbox for the firm to identify its corporate organization structure; require a firm to disclose whether it is organized for profit; and remove various obsolete or unnecessary information regarding county/city, purpose of the size determination, the contracting agency, the business's major products or services and shares of sales, addresses of owners or officers, and recently completed mergers. Part 1 will also be amended to request ownership information for owners that are entities until the respondent identifies the ultimate owners that are natural persons.

Third, in Part II, SBA will limit the information requested about employees to businesses that are being evaluated under an employee-based size standard.

Fourth, in Part III, SBA will limit the information request about receipts to businesses that are being evaluated under a receipts-based size standard. SBA will add 2 additional lines to the entries for annual receipts so that a business that has been in business for 5 years provides information about its most recently competed 5 fiscal years.

Fifth, in Part IV, SBA will add that the business must provide information for any business that the applicant's owner

reports on a Schedule C or Schedule E of the owner's personal tax returns if the owner or an immediate family member has a controlling interest in the business, remove the request for addresses of individual owners and managers, request ownership information for owners that are entities until the respondent identifies the ultimate owners that are natural persons, limit the request for employee information to applicants being evaluated under an employee-based size standard, limit the information request for receipts information to applicants being evaluated under a receipts-based size standard, and add two rows to the receipts table so that the receipts of acknowledged affiliates are reported based on a 5-year average.

Sixth, in Part V, SBA will remove requests about acknowledged affiliates that are covered in Part IV; delete questions about performance of work on the contract, financial impact of termination for default, and specific terms and conditions of the contract; and add a question about actual or proposed subcontracts between the applicant and any of its alleged affiliates.

SBA determines that these changes to the information collection will cause the paperwork burden to remain at 4 hours. The changes will require a business in an industry with a receipts-based size standard to gather information about the business's 5 prior fiscal years and complete information about its 5 prior fiscal years and the 5 prior fiscal years for acknowledged affiliates. However, a business with a receipts-based size standard will not complete information about its number of employees. Similarly, a business with an employee-based size standard will not complete information about its receipts. Additionally, SBA has removed all requests for the addresses of individual owners and managers, and deleted 3 questions from Part V.

The deadline and method for submitting comments are as stated above in the **DATES** and **ADDRESSES** sections, respectively. The title, summary of the amended information collection, description of respondents, and an estimate of the reporting burden are discussed below. Included in the estimate is the time for reviewing instructions, searching existing data, and completing and reviewing each collection of information.

1. *Title and Description:* SBA Form 355, Information for Small Business Size Determination. The information provided in this form will be used by SBA for a size determination of a business applying for assistance available to small businesses under any program administered by this Agency, except for its SBIC Program which uses SBA Form 480, or at the request of another Federal agency for purposes of its small business program.

Need and Purpose: This information collection is necessary for SBA to, among other things, evaluate the eligibility of an applicant for SBA's small business programs.

OMB Control Number: 3245–0101.

Description of and Estimated Number of Respondents: This information will be collected from small businesses seeking an SBA determination of size. Based on historical information, SBA estimates this number to be between 500 and 600 each year.

Estimated Response Time: 4 hours.

Total Estimated Annual Hour Burden: 2,000–2,400.

SBA invites comments on: (1) Whether the proposed changes to this collection of information are necessary for the proper performance of SBA's functions, including whether the information will have a practical utility; (2) the accuracy of SBA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, SBA proposes to amend 13 CFR part 121 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

2. In § 121.104 revise the second sentence of paragraphs (a), paragraphs (c) and (d)(3) to read as follows:

§ 121.104 How does SBA calculate annual receipts?

(a) * * * Generally, receipts are considered ''total income'' (or in the case of a sole proprietorship ''gross income'') plus ''cost of goods sold'' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships) * * *

* * * * *

(c) *Period of measurement.* (1) Annual receipts of a concern that has been in business for 5 or more completed fiscal years means the total receipts of the concern over its most recently completed 5 fiscal years divided by 5.

(2) Annual receipts of a concern which has been in business for less than 5 complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Where a concern has been in business 5 or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the 4 full fiscal years divided by the total number of weeks in the short year and the 4 full fiscal years, multiplied by 52.

(d) *Annual receipts of affiliates.*

* * * * *

(3) If the business concern or an affiliate has been in business for a period of less than 5 years, the receipts for the fiscal year with less than a 12-month period are annualized in accordance with paragraph (c)(2) of this section. Receipts are determined for the concern and its affiliates in accordance with paragraph (c) of this section even though this may result in using a different period of measurement to calculate an affiliate's annual receipts.

* * * * *

■ 3. Amend by § 121.903 by revising paragraphs (a)(1)(ii) as follows:

§ 121.903 How may an agency use size standards for its programs that are different than those established by SBA?

(a) * * *

(1) * * *

(i) * * *

(ii) The size of a services concern by its average annual receipts over a period of at least 5 years, determined according to § 121.104;

* * * * *

Dated: June 6, 2019.

Christopher M. Pilkerton,

Acting Administrator.

[FR Doc. 2019–12754 Filed 6–21–19; 8:45 am]

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EPA-APPROVED MISSOURI REGULATIONS

Missouri citation	Title	State effective date	EPA Approval date	Explanation
Missouri Department of Natural Resources				
* *	*	*	* *	*
Chapter 6—Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations for the State of Missouri				
* *	*	*	* *	*
10–6.065	Operating Permits	3/30/2019	[Date of publication of the final rule in the **Federal Register**], [FEDERAL REGISTER citation of the final rule].	Section (5) contains provisions pertaining only to Missouri's Part 70 program and is not approved as a revision to the SIP.
* *	*	*	* *	*

* * * * *

PART 70—STATE OPERATING PERMIT PROGRAMS

■ 3. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 4. Appendix A to part 70, as proposed to be amended June 11, 2019, at 84 FR 27057, is further amended by adding paragraph (ii) under ''*Missouri*'' to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Missouri

* * * * *

(ii) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10–6.065, ''Operating Permits'' on March 7, 2019. The state effective date is March 30, 2019. The proposed revision effective date is [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

* * * * *

[FR Doc. 2019–13373 Filed 6–25–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19, 42, and 52

[FAR Case 2018–003; Docket No. 2018–0005, Sequence No. 1]

RIN 9000–AN61

Federal Acquisition Regulation: Credit for Lower-Tier Small Business Subcontracting

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2014 and regulatory changes made by the Small Business Administration (SBA).

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before August 26, 2019 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–003 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2018–003''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2018–003''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''FAR Case 2018–003'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite ''FAR Case 2018–003'', in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Marilyn Chambers, Procurement Analyst, at 202–285–7380 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite ''FAR Case 2018–003''.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the Federal Acquisition Regulation (FAR) to implement section 1614 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014 (Pub. L. 113–66), as implemented by the Small Business

Administration (SBA) in their final rule published in the **Federal Register** on December 23, 2016, at 81 FR 94246. SBA's final rule and section 1614 address credit for lower-tier small business subcontracting.

Section 1614 of the NDAA for FY 2014 amended the Small Business Act to provide that, where a prime contractor has an individual subcontracting plan for a contract with a single executive agency, the prime contractor shall receive credit towards its subcontracting goals for awards made to small business concerns at any tier by subcontractors with individual subcontracting plans. In addition, section 1614 also provided new assurances for offerors to include in subcontracting plans. The new assurances relate to activities to be performed by the contractor to monitor the performance of subcontractors with regard to subcontracting plans, and by subcontractors to monitor the performance of their subcontractors with regard to subcontracting plans. Section 1614 requires the contractor to demonstrate procedures established to ensure subcontractors at all tiers comply with their subcontracting plans. Section 1614 also revised the definition of ''subcontract'' in the Small Business Act.

SBA's final rule requires a prime contractor with an individual subcontracting plan to receive subcontracting credit for subcontracts awarded to small business concerns at any tier by subcontractors with individual subcontracting plans. Further, the changes require the prime contractor to have two sets of goals in its individual subcontracting plan: one set of goals includes the prime contractor's direct subcontract awards (*i.e.,* the first-tier goals), while the second set of goals includes subcontracts awarded at any tier by other than small business subcontractors with individual subcontracting plans (*i.e.,* lower-tier goals). The purpose of the lower-tier goals is to ensure maximum practicable opportunity for small business concerns at the prime contractor's first tier, as well as at all lower tiers, in the performance of the contract. This requirement to have two sets of subcontracting goals applies only to the prime contractor's individual subcontracting plan and does not apply to subcontractors' subcontracting plans.

Per SBA's final rule, the prime contractor's performance under the individual subcontracting plan must be evaluated based on its combined performance under the first-tier and lower-tier goals. In addition, the final rule implemented the statutory requirements related to the new assurances and written statement to be included in subcontracting plans.

The FAR currently requires other than small businesses with subcontracts valued over $700,000 ($1.5 million for construction) to have subcontracting plans and to report their subcontracting achievements in the Electronic Subcontracting Reporting System (eSRS). DoD, GSA, and NASA propose to use these existing subcontracting reports in eSRS as a way for the prime contractor to monitor subcontractors' achievements.

II. Discussion and Analysis

A. The proposed changes to the FAR are summarized in the following paragraphs.

1. Subpart 19.7, The Small Business Subcontracting Program. This subpart is amended to update the definition of subcontract and add definitions of first-tier and lower-tier subcontracts. The existing text at FAR 19.704 is reorganized to group together basic requirements for all subcontracting plans, special requirements for commercial plans, special requirements for individual subcontracting plans, and special requirements for master subcontracting plans. Existing text regarding the requirements for the current (*i.e.,* first-tier) goals is revised for clarity, but the requirements are unchanged. Text is added concerning the new assurances related to monitoring the performance of subcontractors with regard to subcontracting plans, and the written statement regarding the contractor's records to demonstrate procedures adopted to ensure subcontractors at all tiers comply with their subcontracting plans. A new paragraph (d) entitled ''Special requirements for individual subcontracting plans'' is added to address existing and new requirements specific to individual plans. This paragraph covers existing requirements such as individual subcontract reports in eSRS, as well as the new requirements related to lower-tier goals.

2. Subpart 42.15, Contractor Performance Information. This subpart is amended to include an additional element for the contracting officer to consider when assessing the contractor's combined performance under the first-tier and lower-tier subcontracting goals.

3. Subpart 52.2, Text of Provisions and Clauses. This rule proposes to amend the following contract clauses:

- 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, is amended to revise the dates of 52.219–9, Small Business Subcontracting Plan, and its Alternates.
- 52.219–9, Small Business Subcontracting Plan, is amended to update the definition of subcontract, to add definitions of first-tier and lower-tier subcontracts, to add the new assurances at 52.219–9(d)(9), and to add a written statement at 52.219–9(d)(12) to be included in the subcontracting plan. Paragraphs (d)(1) and (2) of 52.219–9 are combined for clarity. Further, this clause is amended to insert a new paragraph (e) applicable only to individual subcontracting plans that require the inclusion of separate goals for subcontracting at the lower tiers. The new paragraph addresses the requirement to have lower-tier goals; it also gives information on receiving credit toward those goals. In addition, a new paragraph (m) is added to provide guidance to contractors regarding when and how to include the clause in subcontracts. Conforming and editorial changes are made to the alternates for FAR 52.219–9.

B. In addition to comments on the revisions described sections A. 1. through 3. of this preamble, DoD, GSA, and NASA invite input on the following:

- To minimize public burden, the Government intends to use Individual Subcontract Reports (ISRs) submitted in eSRS by subcontractors with individual subcontracting plans to calculate a prime contractor's achievement for the lower-tier goals. Therefore, this proposed rule does not require any additional action by the prime contractor in eSRS to approve or acknowledge achievement for the lower-tier goals. If the lower-tier subcontractors do not submit ISRs in eSRS, this could impact the prime contractor's achievement toward the lower-tier goals, which could impact the evaluation of the prime contractor's performance rating when their combined performance is assessed under the first-tier and lower-tier subcontracting goals under FAR subpart 42.15, Contractor Performance Information. This potential outcome is no different than what could happen under current regulation, as the FAR currently requires an assessment of the prime contractor's performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219–9.

o Do prime contractors want or need to approve or acknowledge achievement for the lower-tier goals in eSRS?

o If so, what is the benefit of such an approval or acknowledgement in eSRS?

o If so, how much time should prime contractors have to approve or acknowledge the achievements?

- What non-proprietary data would prime contractors need to see in eSRS in order to monitor achievement for their lower-tier goals?
- Would a mandatory lower-tier goal inadvertently encourage more subcontracting at the first tier to other than small businesses, who would subcontract to small businesses, in order to meet the lower-tier goal?
- What alternative processes or methodologies, permitting prime contractors to take credit for subcontracts awarded to small business at tiers below the first tier, would be more efficient for prime contractors to manage?

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-The-Shelf Items

DoD, GSA, and NASA do not intend to apply the requirements of section 1614 of the NDAA for FY 2014 to contracts at or below the simplified acquisition threshold (SAT), and except for the new definitions, do not intend to apply the requirements to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. The clause at FAR 52.219–9 is prescribed for use in solicitations and contracts that are expected to exceed $700,000 ($1.5 million for construction of any public facility); this threshold is above the SAT. The proposed revisions on lower-tier subcontract goals do not apply to contracts using FAR clause 52.212–5, which provides the statutory terms and conditions that apply to commercial items (see the proposed text at 52.219–9(e) and (m)).

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This proposed rule is not expected to be an E.O. 13771 regulatory action, because this proposed rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* because the requirements of this rule apply to other than small entities. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the FAR to implement section 1614 of the NDAA for FY 2014, as implemented in the SBA regulations on December 23, 2016 at 81 FR 94246. Section 1614 requires prime contractors to receive small business subcontracting credit for subcontracts that their other than small business subcontractors award to small businesses, adds an assurance in subcontracting plans for approval and monitoring of subcontracting plans by the offeror and all subcontractors required to maintain subcontracting plans, and requires a written statement of the records the offeror will maintain to ensure compliance with the subcontracting plan at the lower tiers.

The objectives of this proposed rule are to implement statutory requirements. The authorizing legislation for this action is section 1614 of the NDAA for FY 2014.

This rule may have a positive economic impact on any small business entity that wishes to participate in Federal procurement as a subcontractor. Small businesses may see increased opportunities to compete for subcontracts, as prime contractors encourage their first-tier subcontractors who are other than small to improve their performance in support of the prime contractor's lower-tier goals. This potential increase in opportunities may increase the overall number of subcontracts awarded to small businesses. According to the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS), there are 19,596 unique entities who are subcontractors. Approximately 80 percent of the entities registered in the System for Award Management are small entities. Therefore, we estimate that 80 percent (15,677) of the subcontractors in FSRS are small entities. These small entities may benefit from this rule.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives which would accomplish the stated objectives of the applicable statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2018–003), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies as this proposed rule contains information collection requirements. Office of Management and Budget control number 9000–0007, Subcontracting Plans, will be revised to reflect the additional burden imposed by the proposed rule.

With this proposed rule, the public reporting burden for this collection is expected to increase from an average of 5 hours to 5.25 hours per response for subcontracting plans with first-tier subcontracting goals. The increase of 0.25 hour per response is to account for the additional assurances the offeror or contractor must provide in the subcontracting plan.

Plans that also require lower-tier subcontracting goals are estimated to take an additional 2 hours per response. The 2 hour estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information, and establishing the lower-tier subcontracting goals through negotiations with the contracting officer.

Based on this proposed rule, the revised annual reporting burden has been estimated as follows:

Commercial plan:
Respondents 542
Responses per respondent 1
Total annual responses 542
Hours per response 5.25 hrs.
Response burden hours 2,846

Individual plan:
Respondents 3,808
Responses per respondent 1
Total annual responses 3,808
Hours per response 5.25 hrs.
Response burden hours 19,992 hrs.

Individual plan with lower-tier goals:
Respondents 2,970
Responses per respondent 1

Total annual responses 2,970
Hours per response 2 hrs.
Response burden hours 5,940 hrs.

As part of this proposed rulemaking, the FAR Council is soliciting comments from the public in order to:

Evaluate whether the proposed revisions to this collection of information are necessary for the proper performance of the functions of the FAR Council, including whether the information will have practical utility;

Evaluate the accuracy of the FAR Council's estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;

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

Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate collection techniques.

Organizations and individuals desiring to submit comments on the information collection requirements associated with this rulemaking should submit comments not later than August 26, 2019 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB). The copy to GSA can be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. Go to *http://www.regulations.gov* and follow the instructions on the site.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, 2nd Floor, Washington, DC 20405. ATTN: Lois Mandell/IC 9000–0007, Subcontracting Plans.

Instructions: All items submitted must cite Information Collection 9000–0007, Subcontracting Plans. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

List of Subjects in 48 CFR Parts 19, 42, and 52

Government procurement.

Dated: June 10, 2019.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 19, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.701 by adding in alphabetical order the definitions of ''First-tier subcontract'' and ''Lower-tier subcontract'' and revising the definition of ''Subcontract'' to read as follows:

19.701 Definitions.

* * * * *

First-tier subcontract means any subcontract directly with the prime contractor.

* * * * *

Lower-tier subcontract means any subcontract other than a subcontract directly with the prime contractor.

* * * * *

Subcontract means a legally binding agreement—

(1) Between a contractor, that is under contract to another party to perform work, and a third party (*i.e.,* the subcontractor);

(2) For the subcontractor to perform a part of the work that the contractor has undertaken; and

(3) That is not an employer-employee relationship.

* * * * *

■ 3. Revise section 19.704 to read as follows:

19.704 Subcontracting plan requirements.

(a) *General.* When determining whether a subcontracting plan is necessary, consider the cumulative value of the basic contract and all options for multiyear contracts or contracts containing options.

(b) *Basic requirements.* Each subcontracting plan under 19.301–2(e) and 19.702(a)(1), (2), and (3) shall include the following:

(1) The total planned subcontracting dollars for the subcontracting plan.

(2) Separate goals expressed as dollars and as a percentage of total planned subcontracting dollars for each of the following categories:

(i) Small business concerns (including ANCs and Indian tribes).

(ii) Veteran-owned small business concerns.

(iii) Service-disabled veteran-owned small business concerns.

(iv) HUBZone small business concerns.

(v) Small disadvantaged business concerns (including ANCs and Indian tribes).

(vi) Women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted and an identification of types of supplies or services planned for subcontracting to small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including ANCs and Indian tribes), and women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals.

(5) A description of the method used to identify potential sources for solicitation purposes.

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including ANCs and Indian tribes), and women-owned small business concerns.

(7) The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the offeror will make to ensure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the offeror will include the clause at 52.219–8, Utilization of Small Business Concerns (see 19.708(a)), in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of $700,000 ($1.5 million for construction) to adopt a plan that complies with the requirements of the clause at 52.219–9, Small Business Subcontracting Plan (see 19.708(b)).

(10) Assurances at a minimum that the offeror, and all subcontractors

required to maintain subcontracting plans, will—

(i) Review and approve subcontracting plans submitted by their subcontractors;

(ii) Monitor their subcontractors' compliance with their approved subcontracting plans;

(iii) Ensure that subcontracting reports are submitted by their subcontractors when required;

(iv) Acknowledge receipt of their subcontractors' reports;

(v) Compare the performance of their subcontractors to their subcontracting plans and goals; and

(vi) Discuss performance with their subcontractors when necessary to ensure their subcontractors make a good faith effort to comply with their subcontracting plans. See 13 CFR 125.3(d)(3) for examples of good faith effort.

(11) Assurances that the offeror will do the following:

(i) Cooperate in any studies or surveys as may be required.

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan.

(iii) Submit the Summary Subcontract Report (SSR) using the Electronic Subcontracting Reporting System (eSRS) (*https://www.esrs.gov*), following the instructions in the eSRS. The SSR shall be submitted annually by October 30 for the twelve-month period ending September 30. When an SSR is rejected, the contractor is required to submit a revised SSR within 30 days of receiving the notice of SSR rejection.

(iv) Ensure that its subcontractors with subcontracting plans agree to submit the SSR using the eSRS.

(12) A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and to award subcontracts to them.

(13) A written statement of the types of records the offeror will maintain to demonstrate procedures that have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the subcontracting plan established in accordance with paragraph (b) of this section, including—

(i) The establishment of source lists of small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns;

(ii) The efforts to identify and award subcontracts to such small business concerns; and

(iii) The size or socioeconomic certifications or representations received in connection with each subcontract.

(14) Assurances that the offeror will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that the offeror used in preparing the bid or proposal, in the same or greater scope, amount, and quality used in preparing and submitting the bid or proposal. Responding to a request for a quote does not constitute use in preparing a bid or proposal. An offeror used a small business concern in preparing the bid or proposal if—

(i) The offeror identifies the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan, to furnish certain supplies or perform a portion of the contract; or

(ii) The offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract.

(15) Assurances that the contractor will provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as described in paragraph (b)(14) of this section. This written explanation will be submitted to the contracting officer within 30 days of contract completion.

(16) Assurances that the contractor will not prohibit a subcontractor from discussing with the contracting officer any material matter pertaining to payment to or utilization of a subcontractor.

(17) Assurances that the contractor will pay its small business subcontractors on time and in accordance with the terms and conditions of the subcontract, and notify the contracting officer if the contractor pays a reduced or an untimely payment to a small business subcontractor (see 52.242–5).

(c) *Special requirements for commercial plans.* A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. Once a contractor's commercial plan has been approved, the Government shall not require another subcontracting plan from the same contractor while the plan remains in effect, as long as the product or service being provided by the contractor continues to meet the definition of a commercial item.

(1) The commercial plan shall include the total projected sales, expressed in dollars.

(2) Total planned subcontracting dollars (see paragraph (b)(1) of this section) is equal to the total value of projected subcontracts to support the sales for a commercial plan.

(3) The contractor shall—

(i) Submit the commercial plan to either the first contracting officer awarding a contract subject to the plan during the contractor's fiscal year, or, if the contractor has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date. The contracting officer shall negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the contractor's fiscal year for all Government contracts in effect during that period;

(ii) Submit a new commercial plan, 30 working days before the end of the contractor's fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan;

(iii) When the new commercial plan is approved, provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan; and

(iv) Comply with the reporting requirements stated in paragraph (b)(11) of this section by submitting one SSR in eSRS, for all contracts covered by its commercial plan. This report will be acknowledged or rejected in eSRS by the contracting officer who approved the plan. The report shall be submitted within 30 days after the end of the Government's fiscal year.

(d) *Special requirements for individual subcontracting plans.* (1) *Base and option periods.* In addition to the elements required by paragraph (b) of this section, an individual

subcontracting plan shall contain separate statements and goals based on total subcontract dollars for the base period and for each option.

(2) *Lower-tier goals.* (i) Additional separate goals shall be expressed as dollars and as a percentage of total planned subcontracting dollars for subcontracts at lower tiers awarded by other than small business subcontractors with individual subcontracting plans, for each of the categories in paragraph (b)(2) of this section.

(ii) These goals are not required in individual subcontracting plans for—

(A) Contracts intended for use by multiple executive agencies; or

(B) Contracts that include the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items.

(3) *Percentage of total contract dollars.* A contracting officer may require the goals referenced in paragraph (b)(2) of this section to be calculated as a percentage of total contract dollars, in addition to the goals established as a percentage of total planned subcontracting dollars.

(4) *Reporting in eSRS.* The individual subcontracting plan shall include contractor assurances regarding the following:

(i) Compliance with the reporting requirements stated in paragraph (b)(11) of this section by submission in eSRS of one SSR for each agency.

(ii) Submission of the Individual Subcontract Report (ISR), using eSRS, semiannually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 30 days of contract completion. Reports are due 30 days after the close of each reporting period, unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period. When a contracting officer rejects an ISR, the contractor is required to submit a revised ISR within 30 days of receiving the notice of the ISR rejection.

(iii) Include subcontracting data for each order when reporting subcontracting achievements for indefinite-delivery, indefinite-quantity contracts where the contract is intended for use by multiple agencies.

(iv) Ensuring that its subcontractors with subcontracting plans agree to submit the ISR using the eSRS.

(v) Providing its prime contract number, its unique entity identifier, and the email address of the offeror's official responsible for acknowledging receipt of or rejecting the ISRs to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS when submitting their ISRs.

(vi) Requiring that each subcontractor with a subcontracting plan provide the prime contract number, its own unique entity identifier, and the email address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans.

(e) *Special requirements for master subcontracting plans.* Contractors may establish, on a plant or division-wide basis, a master subcontracting plan (see 19.701) that contains all the elements required by the clause at 52.219–9, Small Business Subcontracting Plan, except goals. Master subcontracting plans shall be effective for a 3-year period after approval by the contracting officer; however, it is incumbent upon contractors to maintain and update master subcontracting plans. Changes required to update master subcontracting plans are not effective until approved by the contracting officer. A master subcontracting plan, when incorporated in an individual plan, shall apply to that contract throughout the life of the contract.

19.705–4 [Amended]

■ 4. Amend section 19.705–4 by—

■ a. In paragraph (b) removing ''15''; and

■ b. In paragraph (c) removing ''the 15 elements'' and adding ''the required elements'' in its place.

■ 5. Amend section 19.705–6 by revising paragraph (f)(2) to read as follows:

19.705–6 Postaward responsibilities of the contracting officer.

* * * * *

(f) * * *

(2) Review ISRs, SSRs, and where applicable, additional standard reports, in eSRS within 60 days of the report ending date (*e.g.,* by November 30th for a report submitted for the fiscal year ended September 30th).

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 6. Amend section 42.1501 by redesignating paragraphs (a)(5) through (a)(7) as paragraph (a)(6) through (a)(8); and adding a new paragraph (a)(5) to read as follows:

42.1501 General.

(a) * * *

(5) Good faith effort to comply with the requirements of the small business subcontracting plan (see 19.705–7(d)). See 13 CFR 125.3(d)(3) for examples of good faith effort;

* * * * *

■ 7. Amend section 42.1503 by—

■ a. Revising paragraph (b)(2)(v); and

■ b. In the Table 42–2, under the heading ''Evaluation Ratings Definitions [For the small business subcontracting evaluation factor, when 52.219–9 is used]'' by—

■ i. Removing from the entry for (a) Exceptional, in the first sentence of the ''Definition'' column, ''goals as negotiated'' and adding ''goals as negotiated, including lower-tier goals as applicable'' in its place;

■ ii. Removing from the entry for (b) Very Good, in the first sentence of the ''Definition'' column, ''goals as negotiated'' and adding ''goals as negotiated, including lower-tier goals as applicable'' in its place;

■ iii. Removing from the entry for (c) Satisfactory, in the first sentence of the ''Definition'' column, ''subcontracting goals'' and adding ''subcontracting goals, including lower-tier goals as applicable,'' in its place;

■ iv. Removing from the entry for (d) Marginal, in the first sentence of the ''Definition'' column, ''plan elements'' and adding ''plan elements, including lower-tier goals as applicable,'' in its place; and

■ v. Removing from the entry for (e) Unsatisfactory, in the first sentence of the ''Definition'' column, ''contract/order'' and adding ''contract/order, including lower-tier goals as applicable,'' in its place.

The revision reads as follows.

42.1503 Procedures.

* * * * *

(b) * * *

(2) * * *

(v) Small business subcontracting, including—

(A) For an individual subcontracting plan that includes lower-tier goals, the contractor's combined performance under the first-tier and lower-tier goals; and

(B) Reduced or untimely payments to small business subcontractors when 19.702(a) requires a subcontracting plan (as applicable, see Table 42–2).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Amending paragraph (b) by—
■ i. Removing from paragraph (b)(17)(i) ''(AUG 2018)'' and adding ''([DATE])'' in its place;
■ ii. Removing from paragraph (b)(17)(ii) ''(NOV 2016)'' and adding ''([DATE])'' in its place;
■ iii. Removing from paragraph (b)(17)(iii) ''(NOV 2016)'' and adding ''([DATE])'' in its place;
■ iv. Removing from paragraph (b)(17)(iv) ''(NOV 2016)'' and adding ''([DATE])'' in its place; and
■ v. Removing from paragraph (b)(17)(v) ''(AUG 2018)'' and adding ''([DATE])'' in its place.

The revisions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items ([DATE])

* * * * *

■ 9. Amend section 52.219–9 by—
■ a. Revising the date of the clause;
■ b. Adding in paragraph (b) in alphabetical order, the definitions ''First-tier subcontract'' and ''Lower-tier subcontract'';
■ c. Revising the definition ''Subcontract'';
■ d. Revising the third sentence of paragraph (c)(1);
■ e. Revising paragraphs (d)(1) through (d)(9);
■ f. In paragraph (d)(10)(iii) removing ''After November 30, 2017, include'' and adding ''Include'' in its place;
■ g. In paragraph (d)(11) removing ''offeror's efforts'' and adding ''Offeror's efforts'' in its place;
■ h. In paragraph (d)(11)(vi) removing ''offeror'' and adding ''Offeror'' in its place;
■ i. Redesignating paragraphs (d)(12) through (d)(15) as paragraphs (d)(13) through (d)(16);
■ j. Adding a new paragraph (d)(12);
■ k. In newly redesignated paragraph (d)(14) removing ''(d)(12)'' and adding ''(d)(13)'' in its place;
■ l. Revising newly redesignated paragraph (d)(16);
■ m. Remove paragraph (j);
■ n. Redesignate paragraph (i) as paragraph (j);
■ o. Redesignate paragraphs (e) through (h) as paragraphs (f) through (i);
■ p. Add a new paragraph (e);
■ q. In newly redesignated paragraph (f)(4) removing ''with 52.219–8(d)(2)'' and adding ''with FAR 52.219–8(d)(5)'' in its place;
■ r. Revising newly redesignated paragraph (h);
■ s. In newly redesignated paragraph (i) removing ''offeror'' where it appears and adding ''Offeror'' in its places;
■ t. Revising the fifth sentence of the introductory paragraph of paragraph (l);
■ u. In paragraph (l)(1)(ii)(A) removing ''as prescribed by FAR 19.704(c)'' and adding ''(see paragraph (c)(1) of this clause)'' in its place;
■ v. In paragraph (l)(1)(ii)(B) removing ''19.702(a)(3) or 19.301–2(e)'' and adding ''FAR 19.702(a)(3) or 19.301–2(e)'' in its place;
■ w. In paragraph (l)(2)(ii)(B) removing ''within thirty days '' and adding ''within 30 days'' in its place;
■ x. Adding a new paragraph (m);
■ y. Revising the date of Alternate I and the third sentence of paragraph (c)(1);
■ z. Revising the date of Alternate II and the third sentence of paragraph (c)(1);
■ aa. Amending Alternate III by—
■ i. Revising the date of Alternate III;
■ ii. Removing from the introductory text ''(d)(10) and (l)'' and adding ''(d)(10),(e), and (l)'' in their places;
■ iii. Adding and reserving paragraph (e);
■ iv. Revising the fifth sentence of the introductory paragraph of paragraph (l);
■ v. Removing from paragraph (l)(1)(ii)(A) ''as prescribed by FAR 19.704(c)'' and adding ''(see paragraph (c)(1) of this clause) in its place; and
■ vi. Removing from paragraph (l)(1)(ii)(B) ''19.702(a)(3) or 19.301–2(e)'' and adding ''FAR 19.702(a)(3) or 19.301–2(e)'' in its place; and
■ bb. Amending Alternate IV by—
■ i. Revising the date of Alternate IV;
■ ii. Removing from the introductory text ''(c) and (d)'' and adding ''(c), (d) and (e)'' in its place;
■ iii. Revising the third sentence of paragraph (c)(1);
■ iv. Revising paragraph (d); and
■ v. Adding a new paragraph (e).

The revisions and additions read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan ([DATE])

* * * * *

(b) * * *

First-tier subcontract means any subcontract directly with the prime contractor.

* * * * *

Lower-tier subcontract means any subcontract other than a subcontract directly with the prime contractor.

* * * * *

Subcontract means a legally binding agreement—

(1) Between a contractor, that is under contract to another party to perform work, and a third party (*i.e.,* the subcontractor);

(2) For the subcontractor to perform a part of the work that the contractor has undertaken; and

(3) That is not an employer-employee relationship.

* * * * *

(c)(1) * * * The Contracting Officer will incorporate the subcontracting plan in the resultant contract.

* * * * *

(d) * * *

(1)(i) The total planned subcontracting dollars for an individual subcontracting plan; or total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan.

(ii) Separate goals, expressed as dollars and as a percentage of total planned subcontracting dollars, for each of the following categories:

(A) Small business concerns (including ANCs and Indian tribes).

(B) Veteran-owned small business concerns.

(C) Service-disabled veteran-owned small business concerns.

(D) HUBZone small business concerns.

(E) Small disadvantaged business concerns (including ANCs and Indian tribes).

(F) Women-owned small business concerns.

(iii) For individual subcontracting plans, and if required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total planned subcontracting dollars.

(iv) All subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(v) In accordance with 43 U.S.C. 1626—

(A) Subcontracts awarded to an ANC or Indian tribe shall be counted towards the subcontracting goals for small business and small disadvantaged business concerns, regardless of the size or Small Business Administration certification status of the ANC or Indian tribe; and

(B) Where one or more subcontractors are in the subcontract tier between the prime Contractor and the ANC or Indian tribe, the ANC or Indian tribe shall designate the appropriate contractor(s) to count the subcontract towards its small business and small disadvantaged business subcontracting goals.

(*1*) In most cases, the appropriate contractor is the contractor that awarded

the subcontract to the ANC or Indian tribe.

(*2*) If the ANC or Indian tribe designates more than one contractor to count the subcontract toward its goals, the ANC or Indian tribe shall designate only a portion of the total subcontract award to each contractor. The sum of the amounts designated to various contractors cannot exceed the total value of the subcontract.

(*3*) The ANC or Indian tribe shall give a copy of the written designation to the Contracting Officer, the prime Contractor, and the subcontractors in between the prime Contractor and the ANC or Indian tribe within 30 days of the date of the subcontract award.

(*4*) If the Contracting Officer does not receive a copy of the ANC's or the Indian tribe's written designation within 30 days of the subcontract award, the contractor that awarded the subcontract to the ANC or Indian tribe will be considered the designated contractor.

(2) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to—

(i) Small business concerns;

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns; and

(vi) Women-owned small business concerns.

(3) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(4) A description of the method used to identify potential sources for solicitation purposes (*e.g.,* existing company source lists, SAM, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in SAM as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of SAM as its source list does not relieve a firm of its responsibilities (*e.g.,* outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

(5) A statement as to whether or not the Offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with—

(i) Small business concerns (including ANCs and Indian tribes);

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns (including ANCs and Indian tribes); and

(vi) Women-owned small business concerns.

(6) The name of the individual employed by the Offeror who will administer the Offeror's subcontracting program, and a description of the duties of the individual.

(7) A description of the efforts the Offeror will make to assure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(8) Assurances that the Offeror will include the clause of this contract entitled ''Utilization of Small Business Concerns'' in all subcontracts that offer further subcontracting opportunities, and that the Offeror will require all subcontractors (except small business concerns and when paragraph (m)(2) applies) that receive subcontracts in excess of $700,000 ($1.5 million for construction of any public facility) with further subcontracting possibilities to adopt a subcontracting plan that complies with the requirements of this clause.

(9) Assurances at a minimum that the Offeror, and all subcontractors required to maintain subcontracting plans, will—

(i) Review and approve subcontracting plans submitted by their subcontractors;

(ii) Monitor their subcontractors' compliance with their approved subcontracting plans;

(iii) Ensure that subcontracting reports are submitted by their subcontractors when required;

(iv) Acknowledge receipt of their subcontractors' reports;

(v) Compare the performance of their subcontractors to their subcontracting plans and goals; and

(vi) Discuss performance with their subcontractors when necessary to ensure their subcontractors make a good faith effort to comply with their subcontracting plans; see 13 CFR 125.3(d)(3) for examples of good faith effort;

* * * * *

(12) A written statement of the types of records the Offeror will maintain to demonstrate procedures that have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the subcontracting plan established in accordance with this clause, including—

(i) The establishment of source lists of small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns;

(ii) The efforts to identify and award subcontracts to such small business concerns; and

(iii) The size or socioeconomic certifications or representations received in connection with each subcontract.

* * * * *

(16) Assurances that the Contractor will pay its small business subcontractors on time and in accordance with the terms and conditions of the underlying subcontract, and notify the Contracting Officer when the prime Contractor makes either a reduced or an untimely payment to a small business subcontractor (see the clause at FAR 52.242–5).

(e) The requirements of this paragraph (e) apply to an Offeror's individual subcontracting plan except for contracts intended for use by multiple executive agencies and contracts that include the clause at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

(1) The Offeror's subcontracting plan shall also include separate goals for subcontracts at lower tiers awarded by other than small business subcontractors with individual subcontracting plans—

(i) Expressed as dollars and as a percentage of total planned subcontracting dollars (see paragraph (d)(1)(ii) of this clause), for each of the following categories:

(A) Small business concerns (including ANCs and Indian tribes).

(B) Veteran-owned small business concerns.

(C) Service-disabled veteran-owned small business concerns.

(D) HUBZone small business concerns.

(E) Small disadvantaged business concerns (including ANCs and Indian tribes).

(F) Women-owned small business concerns.

(ii) If required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total planned subcontracting dollars; and

(iii) The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(2) The Contractor will receive credit towards the goals described in paragraph (e)(1) of this clause for achievements by subcontractors with individual subcontracting plans that are reported via the ISR and acknowledged in eSRS.

* * * * *

(h) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial items. The commercial plan shall relate to the Offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract. Once the Contractor's commercial plan has been approved, the Government will not require another subcontracting plan from the same Contractor while the plan remains in effect, as long as the product or service being provided by the Contractor continues to meet the definition of a commercial item. A contractor with a commercial plan shall comply with the reporting requirements stated in paragraph (d)(10) of this clause by submitting one SSR in eSRS for all contracts covered by its commercial plan. The SSR shall be acknowledged or rejected in eSRS by the Contracting Officer who approved the commercial plan. The SSR shall be submitted within 30 days after the end of the Government's fiscal year.

* * * * *

(l) * * * Subcontract award data shall not include awards made to lower-tier subcontractors, unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian tribe. * * *

* * * * *

(m) *Subcontracts.* (1) The Contractor shall include this clause, except for paragraph (e), in subcontracts that are required to have a subcontracting plan (but see paragraph (m)(2) of this clause). The Contractor shall not further alter this clause other than to identify the appropriate parties.

(2) The Contractor shall not include this clause in subcontracts when—

(i) The contract contains the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items; or

(ii) A subcontractor provides a commercial item subject to the clause at FAR 52.244–6, Subcontracts for Commercial Items.

Alternate I ([DATE]). * * *

* * * * *

(c)(1) * * * The Contracting Officer will incorporate the subcontracting plan in the resultant contract. * * *

* * * * *

Alternate II ([DATE]). * * *

* * * * *

(c)(1) * * * The Contracting Officer will incorporate the subcontracting plan in the resultant contract. * * *

* * * * *

Alternate III ([DATE]). * * *

* * * * *

(e) Reserved.

* * * * *

(l) * * * Subcontract award data shall not include awards made to lower-tier subcontractors, unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian tribe. * * *

* * * * *

Alternate IV ([DATE]). * * *

* * * * *

(c)(1) * * * The Contracting Officer will incorporate the subcontracting plan into the contract. * * *

* * * * *

(d) The Contractor's subcontracting plan shall include the following:

(1)(i) The total planned subcontracting dollars for an individual subcontracting plan; or the Contractor's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan.

(ii) Separate goals, expressed as dollars and as a percentage of total planned subcontracting dollars, for each of the following categories:

(A) Small business concerns (including ANCs and Indian tribes).

(B) Veteran-owned small business concerns.

(C) Service-disabled veteran-owned small business concerns.

(D) HUBZone small business concerns.

(E) Small disadvantaged business concerns (including ANCs and Indian tribes).

(F) Women-owned small business concerns.

(iii) For individual subcontracting plans, and if required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total planned subcontracting dollars.

(iv) All subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(v) In accordance with 43 U.S.C. 1626—

(A) Subcontracts awarded to an ANC or Indian tribe shall be counted towards the subcontracting goals for small business and small disadvantaged business concerns, regardless of the size or Small Business Administration certification status of the ANC or Indian tribe; and

(B) Where one or more subcontractors are in the subcontract tier between the prime Contractor and the ANC or Indian tribe, the ANC or Indian tribe shall designate the appropriate contractor(s) to count the subcontract towards its small business and small disadvantaged business subcontracting goals.

(*1*) In most cases, the appropriate contractor is the contractor that awarded the subcontract to the ANC or Indian tribe.

(*2*) If the ANC or Indian tribe designates more than one contractor to count the subcontract toward its goals, the ANC or Indian tribe shall designate only a portion of the total subcontract award to each contractor. The sum of the amounts designated to various contractors cannot exceed the total value of the subcontract.

(*3*) The ANC or Indian tribe shall give a copy of the written designation to the Contracting Officer, the prime Contractor, and the subcontractors in between the prime Contractor and the ANC or Indian tribe within 30 days of the date of the subcontract award.

(*4*) If the Contracting Officer does not receive a copy of the ANC's or the Indian tribe's written designation within 30 days of the subcontract award, the Contractor that awarded the subcontract to the ANC or Indian tribe will be considered the designated Contractor.

(2) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to—

(i) Small business concerns;

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns; and

(vi) Women-owned small business concerns.

(3) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(4) A description of the method used to identify potential sources for solicitation purposes (*e.g.,* existing company source lists, SAM, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). The Contractor may rely on the information contained in SAM as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of SAM as its source list does not relieve a firm of its responsibilities (*e.g.,* outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

(5) A statement as to whether or not the Contractor included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with—

(i) Small business concerns (including ANCs and Indian tribes);

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns (including ANCs and Indian tribes); and

(vi) Women-owned small business concerns.

(6) The name of the individual employed by the Contractor who will administer the Contractor's subcontracting program, and a description of the duties of the individual.

(7) A description of the efforts the Contractor will make to assure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(8) Assurances that the Contractor will include the clause of this contract entitled ''Utilization of Small Business Concerns'' in all subcontracts that offer further subcontracting opportunities, and that the Contractor will require all subcontractors (except small business concerns and when paragraph (m)(2) applies) that receive subcontracts in excess of $700,000 ($1.5 million for construction of any public facility) with further subcontracting possibilities to adopt a subcontracting plan that complies with the requirements of this clause.

(9) Assurances at a minimum that the Contractor, and all subcontractors required to maintain subcontracting plans, will—

(i) Review and approve subcontracting plans submitted by their subcontractors;

(ii) Monitor their subcontractors' compliance with their approved subcontracting plans;

(iii) Ensure that subcontracting reports are submitted by subcontractors when required;

(iv) Acknowledge receipt of their subcontractors' reports;

(v) Compare the performance of their subcontractors to their subcontracting plans and goals; and

(vi) Discuss performance with their subcontractors when necessary to ensure their subcontractors make a good faith effort to comply with their subcontracting plans; see 13 CFR 125.3(d)(3) for examples of good faith effort.

(10) Assurances that the Contractor will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the Contractor with the subcontracting plan;

(iii) Include subcontracting data for each order when reporting subcontracting achievements for an indefinite-delivery, indefinite-quantity contract with an individual subcontracting plan where the contract is intended for use by multiple agencies;

(iv) Submit the Individual Subcontract Report (ISR) and/or the Summary Subcontract Report (SSR), in accordance with paragraph (l) of this clause using the Electronic Subcontracting Reporting System (eSRS) at *https://www.esrs.gov*. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes that have not been certified by SBA as small disadvantaged businesses), women-owned small business concerns, and for NASA only, Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations;

(v) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or the SSR using eSRS;

(vi) Provide its prime contract number, its unique entity identifier, and the email address of the Contractor's official responsible for acknowledging receipt of or rejecting the ISRs, to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS when submitting their ISRs; and

(vii) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own unique entity identifier, and the email address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans.

(11) A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the Contractor's efforts to locate small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists (*e.g.,* SAM), guides, and other data that identify small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than $150,000, indicating—

(A) Whether small business concerns were solicited and, if not, why not;

(B) Whether veteran-owned small business concerns were solicited and, if not, why not;

(C) Whether service-disabled veteran-owned small business concerns were solicited and, if not, why not;

(D) Whether HUBZone small business concerns were solicited and, if not, why not;

(E) Whether small disadvantaged business concerns were solicited and, if not, why not;

(F) Whether women-owned small business concerns were solicited and, if not, why not; and

(G) If applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact—

(A) Trade associations;

(B) Business development organizations;

(C) Conferences and trade fairs to locate small, HUBZone small, small disadvantaged, service-disabled veteran-owned, and women-owned small business sources; and

(D) Veterans service organizations.

(v) Records of internal guidance and encouragement provided to buyers through—

(A) Workshops, seminars, training, etc.; and

(B) Monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the Contractor to the Government, including the name, address, and business size of each subcontractor. Contractors having commercial plans need not comply with this requirement.

(12) A written statement of the types of records the Contractor will maintain to demonstrate procedures which have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the subcontracting plan established in accordance with this clause, including—

(i) The establishment of source lists of small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns;

(ii) The efforts to identify and award subcontracts to such small business concerns; and

(iii) The size or socioeconomic certifications or representations received in connection with each subcontract.

(13) Assurances that the Contractor will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the proposal for the modification, in the same or greater scope, amount, and quality used in preparing and submitting the modification proposal. Responding to a request for a quote does not constitute use in preparing a proposal. The Contractor used a small business concern in preparing the proposal for a modification if—

(i) The Contractor identifies the small business concern as a subcontractor in the proposal or associated small business subcontracting plan, to furnish certain supplies or perform a portion of the subcontract; or

(ii) The Contractor used the small business concern's pricing or cost information or technical expertise in preparing the proposal, where there is written evidence of an intent or understanding that the small business concern will be awarded a subcontract for the related work when the modification is executed.

(14) Assurances that the Contractor will provide the Contracting Officer with a written explanation if the Contractor fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as described in (d)(13) of this clause. This written explanation must be submitted to the Contracting Officer within 30 days of contract completion.

(15) Assurances that the Contractor will not prohibit a subcontractor from discussing with the Contracting Officer any material matter pertaining to the payment to or utilization of a subcontractor.

(16) Assurances that the Contractor will pay its small business subcontractors on time and in accordance with the terms and conditions of the underlying subcontract, and notify the Contracting Officer when the prime Contractor makes either a reduced or an untimely payment to a small business subcontractor (see the clause at FAR 52.242–5).

(e) The requirements of this paragraph (e) apply to a Contractor's individual subcontracting plan except for contracts intended for use by multiple executive agencies and contracts that include the clause at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

(1) The Contractor's subcontracting plan shall also include separate goals for subcontracts at lower tiers awarded by other than small business subcontractors with individual subcontracting plans—

(i) Expressed as dollars and as a percentage of total planned subcontracting dollars (see paragraph (d)(1)(ii) of this clause), for each of the following categories:

(A) Small business concerns (including ANCs and Indian tribes).

(B) Veteran-owned small business concerns.

(C) Service-disabled veteran-owned small business concerns.

(D) HUBZone small business concerns.

(E) Small disadvantaged business concerns (including ANCs and Indian tribes).

(F) Women-owned small business concerns.

(ii) If required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total planned subcontracting dollars.

(iii) The Contractor shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(2) The Contractor will receive credit towards the goals described in paragraph (e)(1) of this clause for achievements by subcontractors with individual subcontracting plans that are reported via the ISR and acknowledged in eSRS.

[FR Doc. 2019–12481 Filed 6–25–19; 8:45 am]

BILLING CODE 6820–EP–P

List of Subjects in 48 CFR Parts 204 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 204 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE MATTERS

■ 2. Amend section 204.1202 by adding introductory text and revising paragraph (1) to read as follows:

204.1202 Solicitation provision.

When using the provision at FAR 52.204–8, Annual Representations and Certifications—

(1) Use the provision with 252.204–7007, Alternate A, Annual Representations and Certifications; and

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.204–7007 by—

■ a. Removing the clause date ''(APR 2019)'' and adding ''(JUN 2019)'' in its place;

■ b. Revising the provision introductory text;

■ c. Adding paragraph (b); and

■ d. In paragraph (d)(1) introductory text, removing ''System for Award Management (SAM)'' and adding ''SAM'' in its place.

The revision and addition read as follows:

252.204–7007 Alternate A, Annual Representations and Certifications.

* * * * *

Substitute the following paragraphs (b), (d), and (e) for paragraphs (b) and (d) of the provision at FAR 52.204–8:

(b)(1) If the provision at FAR 52.204–7, System for Award Management, is included in this solicitation, paragraph (e) of this provision applies.

(2) If the provision at FAR 52.204–7, System for Award Management, is not included in this solicitation, and the Offeror has an active registration in the System for Award Management (SAM), the Offeror may choose to use paragraph (e) of this provision instead of completing the corresponding individual representations and certifications in the solicitation. The Offeror shall indicate which option applies by checking one of the following boxes:

____ (i) Paragraph (e) applies.

____ (ii) Paragraph (e) does not apply and the Offeror has completed the individual representations and certifications in the solicitation.

* * * * *

[FR Doc. 2019–13745 Filed 6–27–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215 and 252

[Docket DARS–2018–0008]

RIN 0750–AJ19

Defense Federal Acquisition Regulation Supplement: Only One Offer (DFARS Case 2017–D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to partially implement a section of the National Defense Authorization Act for Fiscal Year 2017 that addresses the requirement for additional cost or pricing data when only one offer is received in response to a competitive solicitation.

DATES: Effective July 31, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 83 FR 30656 on June 29, 2018, to partially implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) to: (1) Address the potential requirement for additional cost or pricing data when only one offer is received in response to a competitive solicitation; and (2) make prime contractors responsible for determining whether a subcontract qualifies for an exception from the requirement for submission of certified cost based on adequate price competition. This DFARS rule supplements the Federal Acquisition Regulation (FAR) final rule published under FAR Case 2017–006, which modified the standards for adequate price competition at FAR 15.403–1(c) for DoD, National Air and Space Administration (NASA), and the Coast Guard (FAC 2019–03, 84 FR 27494). Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received. Three respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no significant changes from the proposed rule in the final rule in response to the public comments. However, changes were required at 252.215–7010, in order to conform to changes in the FAR final rule relating to elimination of the terms ''responsive'' and ''viable.''

B. Analysis of Public Comments

1. Effectiveness and Efficiency of the Acquisition Process

Comment: Several respondents indicated that the requirement for certification of cost or pricing data and potential submission of additional data when only one offer is received in response to a competitive solicitation would burden the effectiveness and efficiency of the acquisition process and delay timely execution. This may also delay subcontract competitions, requiring restart of the procurement process when only one offer is received for a subcontract.

Response: This rule is implementing the requirements of section 822 of the NDAA for FY 2017. DoD has no flexibility to remove the certification requirement from the rule, since it is required by statute.

2. Competition

Comment: One respondent noted that it is the expectation of offers that produces the competitive environment.

Response: This rule is implementing the requirements of section 822 of the NDAA for FY 2017. The Government cannot project with certainty which solicitations will receive multiple offers or only one offer. Furthermore, even though a solicitation is issued competitively, the Government does not know whether the single offeror expected competition.

3. Evaluation of Subcontractors

Comment: One respondent was concerned that contractors may take on more evaluation risks to avoid finding suppliers unacceptable, in order to avoid a situation in which only one viable and responsible offer is received.

Response: DoD has no flexibility to change the basic requirements of the rule, since it is required by statute. Furthermore, such behavior would indicate poor business judgment. If the contract contains the clause at FAR 52.244–2, Subcontracts, then the contractor must also comply with the clause at DFARS 252.244–7001, Contractor Purchasing System Administration, which includes the following requirements:

- Paragraph (c)(10) requires timely and adequate cost or price analysis and technical evaluation for each subcontractor and supplier proposal or quote to ensure fair and reasonable subcontract prices.
- Paragraph (c)(20) requires that the contractor provide for an organizational and administrative structure that ensures effective and efficient procurement of required quality materials and parts at the best value from responsible and reliable sources.

4. Commercial Items

Comment: One respondent stated that paragraph (3) of the clause at DFARS 252.215–7010 should also state that the offeror is responsible for determining the commercial item exception at FAR 15.403–1(c)(3), because the Conference Report for section 822 stated that the Senate Bill contained a provision that would clarify the definition of competition and the role of the prime contractor in determining whether a subcontract meets the competitive or commercial test under the section.

Response: DoD has fully implemented the law as enacted. Section 822 does not address determinations with regard to commercial items.

Comment: Another respondent stated that the proposed rule should apply to contracts and subcontracts for commercial item acquisitions.

Response: Both the provisions at DFARS 252.215–7009 and 252.215–7010, are prescribed for use in solicitations using FAR part 12 procedures for the acquisition of commercial items. However, the changes required in this rule will not affect acquisition of commercial items, because 10 U.S.C. 2306a(b)(1)(B) provides that submission of certified cost or pricing data shall not be required in the case of a contract, a subcontract, or modification of a contract or subcontract for the acquisition of a commercial item. Determination of whether items are commercial items is outside the scope of this rule.

5. Only Expected To Receive One Bid

Comment: One respondent stated that the rule was a step in the right direction, but considered that the rule did not implement the statutory language stating that certified cost or pricing data must be supplied by contractors in circumstances where DoD ''only expected to receive one bid.'' The respondent was concerned that shifting the focus of the rule to ''if only one offer is received'' could prevent DoD from obtaining that vital information during the award phase and could create obstacles to obtaining the information at a later date.

Response: Section 822 added the phrase ''that is only expected to receive one bid'' at 10 U.S.C. 2306a(a)(1)(A), which now reads as follows: ''An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures *that is only expected to receive one bid* shall be required to submit cost or pricing data before the award of a contract if—. . .'' [followed by cost or pricing data thresholds]. The exceptions at 10 U.S.C. 2306a(b) still apply, including the exception for adequate price competition. Section 822 also modified the standard for adequate price competition, an exception to the requirement for certified cost or pricing data, to require that the agreed upon price is based on adequate competition that results in at least two or more responsive and viable competing bids.

This DFARS rule must be read in conjunction with the changes made under FAR Case 2017–006, Exception from Certified Cost or Pricing Data Requirements—Adequate Price Competition. That final FAR rule made amendments to the standards for adequate price competition at FAR 15.403–1(b), stating first what is common to all agencies, and then making the standard relating to expectation of competition applicable only to agencies other than DoD, NASA, and Coast Guard. In stating the common requirements, the final FAR rule also did not use the terms ''responsive'' and ''viable,'' but expressed the requirements using the existing FAR terminology, *i.e.,* ''Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement.''

FAR 15.403–4 requires as follows: ''Unless an exception applies, certified cost or pricing data are required before accomplishing any of the following actions expected to exceed the current threshold . . . The award of any negotiated contract. . .''. Adding ''If the contracting officer only expects one bid, unless an exception applies. . .'' would be without effect, because whether or not the contracting officer expects one bid or multiple bids, if only one bid is received, that is determinative of the requirement for submission of certified cost or pricing data. If multiple bids were received from two or more responsible offerors, competing independently, that satisfy the Government's expressed requirement in accordance with FAR 15.403–1(c)(i), despite an erroneous expectation to the contrary, then that would constitute an exception (on the basis of adequate price competition) and no certified cost or pricing data would be required. The offeror does not provide the certificate of current cost or pricing data until agreement on price is reached, at which time it would be known how many offers had been received. According to FAR 15.406–2(e), if certified cost or pricing data are requested by the Government and submitted by an offeror, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified.

C. Other Changes

This final DFARS rule has made changes from the proposed rule at DFARS 252.215–7010(c)(3) in both the basic clause and Alternate I. For simplicity, the final FAR rule does not use the terms ''responsive'' and ''viable,'' but expresses the requirements of section 822 using existing FAR terminology, as a requirement that is applicable to all agencies at 15.403–1(c)(1)(i)(A), *i.e.,* ''Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement.'' In addition, due to the restructuring of FAR 15.403–1(c)(1), the FAR reference at both cites was changed to FAR 403–1(c)(1)(i).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not create a new provision, but amends the existing provisions at DFARS 252.215–7008 and 252.215–7010. Although the existing provisions apply to solicitations for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items, the changes due to this rule do not impact the

acquisition of commercial item, including COTS items, because the rule retains the exceptions to the requirements for certified cost or pricing data relating to acquisition of commercial items. In addition, DFARS 252.215–7010 already applies to contracts valued at or below the simplified acquisition threshold, while DFARS 252.215–7008 does not.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The reason for this rule is to further implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) to address the potential requirement for certified cost or pricing data when only one offer is received in response to a competitive solicitation, if no other exception to the requirements for certified cost or pricing data applies. This DFARS rule supplements the final rule published under FAR Case 2017–006 (FAC 2019–03, 84 FR 27494), which modified the standards for adequate price competition at FAR 15.403–1(c) for DoD, NASA, and the Coast Guard.

The objective of this rule is to implement the new more restrictive standard for ''adequate price competition'' as the basis for an exception to the requirement to provide certified cost or pricing data. The statutory basis is 10 U.S.C. 2306a, as amended by section 822 of the NDAA for FY 2017.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

According to data for FY 2016 from the Federal Procurement Data System, for DoD, there were 918 noncommercial, competitive new awards valued at greater than $750,000 (the certified cost or pricing data threshold) that were awarded on the basis of a solicitation that received only one offer. Of the 918 awards, 549 were awarded to small businesses and 369 were awarded to other than small businesses. DoD estimated the number of small entities to which the rule will apply as follows:

- Of these awards, all will require certification, but only 75 percent (277) may require additional data.
- When additional certified cost or pricing data are requested from the prime contractor, it will impact 1,836 subcontract awards; 1,505 to small businesses.
- 75 percent of the subcontract awards to small business (1,129) will be required to provide new certified cost or pricing data, and 25 percent (376) will only be required to certify the cost or pricing data previously provided.

DoD will now be required to obtain certified cost or pricing data from an offeror when only one offer is received, and no other exception applies. DoD estimates 1.3 responses per respondent, with an average of 55.5 hours per response. The average level of the entities completing these responses is estimated as equivalent to a Government General Schedule 12, step 5 employee.

DoD was unable to identify any alternatives that would reduce burden on small business and still meet the requirements of the statute. Impact on small businesses is lessened, because the requirement for certified cost or pricing data only applies to acquisitions that exceed $750,000 and there is an exception for the acquisition of commercial items, including COTS items.

VII. Paperwork Reduction Act

This rule contains information collection requirements that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0704–0574, entitled ''Defense Federal Acquisition Regulation Supplement (DFARS) Part 215; Only One Offer and Related Clauses at 252.215.''

List of Subjects in 48 CFR Parts 215 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

■ 2. Revise section 215.371–3 to read as follows:

215.371–3 Fair and reasonable price and the requirement for additional cost or pricing data.

For acquisitions that exceed the simplified acquisition threshold, if only one offer is received when competitive procedures were used and it is not necessary to resolicit in accordance with 215.371–2(a), then then the contracting officer shall comply with the following:

(a) If no additional cost or pricing data are required to determine through cost or price analysis that the offered price is fair and reasonable, the contracting officer shall require that any cost or pricing data provided in the proposal be certified if the acquisition exceeds the certified cost or pricing data threshold and an exception to the requirement for certified cost or pricing data at FAR 15.403–1(b)(2) through (5) does not apply.

(b) Otherwise, the contracting officer shall obtain additional cost or pricing data to determine a fair and reasonable price. If the acquisition exceeds the certified cost or pricing data threshold and an exception to the requirement for certified cost or pricing data at FAR 15.403–1(b)(2) through (5) does not apply, the cost or pricing data shall be certified.

(c) If the contracting officer is still unable to determine that the offered price is fair and reasonable, the contracting officer shall enter into negotiations with the offeror to establish a fair and reasonable price. The negotiated price should not exceed the offered price.

(d) If the contracting officer is unable to negotiate a fair and reasonable price, see FAR 15.405(d).

■ 3. Amend section 215.408 by—

■ a. Revising paragraph (3);

■ b. In paragraph (5) introductory text, removing ''required'' and adding

''required or when using the provision at 252.215–7008'' in its place; and

■ c. In paragraph (7) introductory text, removing ''FAR 52.215–20'' and adding ''252.215–7010'' in its place.

The revision reads as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) Use the provision at 252.215–7008, Only One Offer, in competitive solicitations that exceed the simplified acquisition threshold, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 252.215–7008 by—

■ a. Removing the provision date ''(OCT 2013)'' and adding ''(JUN 2019)'' in its place;

■ b. Revising paragraph (a);

■ c. Removing paragraphs (b) and (d);

■ d. Redesignating paragraph (c) as paragraph (b);

■ e. In the newly redesignated paragraph (b), adding a paragraph heading and removing ''225.870–4(c)'' and adding ''DFARS 225.870–4(c)'' in its place; and

■ f. Adding a new paragraph (c).

The revision and additions read as follows:

252.215–7008 Only One Offer.

* * * * *

(a) *Cost or pricing data requirements.* After initial submission of offers, if the Contracting Officer notifies the Offeror that only one offer was received, the Offeror agrees to—

(1) Submit any additional cost or pricing data that is required in order to determine whether the price is fair and reasonable or to comply with the statutory requirement for certified cost or pricing data (10 U.S.C. 2306a and FAR 15.403–3); and

(2) Except as provided in paragraph (b) of this provision, if the acquisition exceeds the certified cost or pricing data threshold and an exception to the requirement for certified cost or pricing data at FAR 15.403–1(b)(2) through (5) does not apply, certify all cost or pricing data in accordance with paragraph (c) of DFARS provision 252.215–7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, of this solicitation.

(b) *Canadian Commercial Corporation.* * * *

(c) *Subcontracts.* Unless the Offeror is the Canadian Commercial Corporation, the Offeror shall insert the substance of this provision, including this paragraph (c), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

* * * * *

■ 5. Amend section 252.215–7010 by—

■ a. In the basic provision—

■ i. Removing the provision date of ''(JAN 2018)'' and adding ''(JUN 2019)'' in its place; and

■ ii. Adding paragraph (c)(3);

■ b. In the Alternate I clause—

■ i. Removing the provision date of ''(JAN 2018)'' and adding ''(JUN 2019)'' in its place; and

■ ii. Adding paragraph (c)(3).

The additions read as follows:

252.215–7010 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

* * * * *

(c) * * *

(3) The Offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, *i.e.,* two or more responsible offerors, competing independently, submit priced offers that satisfy to Government's expressed requirement in accordance with FAR 15.403–1(c)(1)(i).

* * * * *

Alternate I. * * *

(c) * * *

(3) The Offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, *i.e.,* two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement in accordance with FAR 15.403–1(c)(1)(i).

* * * * *

[FR Doc. 2019–13739 Filed 6–27–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 247 and 252

[Docket DARS–2019–0028]

RIN 0750–AK63

Defense Federal Acquisition Regulation Supplement: Repeal of Transportation Related DFARS Provisions and Clauses (DFARS Case 2019–D020)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove several transportation-related provisions and clauses, as well as a clause reference, that are no longer necessary.

DATES: Effective June 28, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

The following DFARS provisions and clauses are included in solicitations and contracts for services to prepare personal property for movement or storage, or perform intra-city of intra-area movement of personal property—

- 252.247–7008, Evaluation of Bids, which provides offerors with information on how the Government will evaluate bids received in response to a solicitation;
- 252.247–7009, Award, which provides offerors with the basis upon which the Government will make a contract award;
- 252.247–7010, Scope of Contract, which identifies the scope of the contractor's responsibility to provide supplies and services under the contract;
- 252.247–7011, Period of Contract, which identifies the period of performance for the contract and the timeframes in which new orders may be placed or completed when the contract is close to its expiration date.
- 252.247–7013, Contract Areas of Performance, which identifies the area of performance for the contract;
- 252.247–7017, Erroneous Shipments, which identifies procedures for the contractor to follow in the event an incorrect shipment occurs under the contract;
- 252.247–7018, Subcontracting, which requires the contractor to obtain

List of Subjects in 48 CFR Parts 212 and 237

Government procurement.

Jennifer L. Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212 and 237 are amended as follows:

■ 1. The authority citation for 48 CFR parts 212 and 237 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Add section 212.272 to subpart 212.2 to read as follows:

212.272 Preference for certain commercial products and services.

(a) As required by section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92), for requirements relating to the acquisition of commercial information technology products and services, see 239.101.

(b)(1) As required by section 876 of the National Defense Authorization Act of Fiscal Year 2017 (Pub. L. 114–328), a contracting officer may not enter into a contract above the simplified acquisition threshold for facilities-related services, knowledge-based services (except engineering services), medical services, or transportation services that are not commercial services, unless the appropriate official specified in paragraph (b)(2) of this section determines in writing that no commercial services are suitable to meet the agency's needs as provided in section 10 U.S.C. 2377(c)(2).

(2) The following officials are authorized to make the determination specified in paragraph (b)(1) of this section:

(i) For contracts above $10 million, the head of the contracting activity, the combatant commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment (as applicable).

(ii) For contracts in an amount above the simplified acquisition threshold and at or below $10 million, the contracting officer.

PART 237—SERVICE CONTRACTING

■ 2. Amend section 237.102 by revising paragraph (b) to read as follows:

237.102 Policy.

(b)(1) *Preference for certain commercial services.* See 212.272 for procedures for implementation of the preference for commercial facilities-related services, knowledge-based services (except engineering services), medical services, or transportation services, as required by section 876 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328).

(2) *Public-private competitions.* See PGI 207.302 for information on the Governmentwide moratorium and restrictions on public-private competitions conducted pursuant to Office of Management and Budget (OMB) Circular A–76.

* * * * *

[FR Doc. 2019–16767 Filed 8–8–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215 and 217

[Docket DARS–2019–0004]

RIN 0750–AJ72

Defense Federal Acquisition Regulation Supplement: Undefinitized Contract Actions (DFARS Case 2018–D008)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act for Fiscal Years 2017 and 2018. This rule revises requirements for definitizing undefinitized contract actions.

DATES: Effective August 9, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 4429 on February 15, 2019, to implement section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 and section 815 of the NDAA for FY 2018. Section 811 modifies restrictions on undefinitized contractual actions (UCA) regarding risk-based profit, time for definitization, and Foreign Military Sales. Section 815 establishes limitations on unilateral definitizations of UCAs over $50 million. Three respondents provided public comments in response to the proposed rule.

II. Discussion and Analysis

A. Summary of Significant Changes From the Proposed Rule

There are changes to the definition of ''qualifying proposal'' at 217.7401 as a result of public comments. In addition, DoD has delegated some authorities to the head of the contracting activity.

B. Analysis of Public Comments

1. Support for the Rule

Comment: One respondent stated unqualified support for the rule.

Response: Noted.

2. Timely Definitization

Comment: One respondent indicated that the proposed rule impedes the ability of contracting officers to definitize UCAs timely and recommended that the rule be rescinded. The respondent asserted that the application of a higher profit factor after receipt of the qualifying proposal but prior to definitization of the UCA encourages contractors to stall until after the 180-day window has closed, since most contractors are motivated by profit.

Response: This rule modifies the requirements on UCAs related to the calculation of risk-based profit objectives. The language at DFARS 215.404–71–3(d)(2)(i) regarding profit allowed on the contract when a contracting officer definitizes the contract after the end of the 180-day period is consistent with section 811 of the NDAA for FY 2017. However, when definitizing within the 180-day period, the requirement for the contracting officer to assess the extent to which costs have been incurred prior to definitization when determining contract type risk remains unchanged in this rule. When costs have been incurred prior to definitization, DFARS 215.404–71–3(d)(2)(i) states the contracting officer generally regards the contract type risk to be in the low end of the designated range. As such, this rule encourages submission of timely qualifying proposals by contractors and timely definitization by contracting officers.

3. Unilateral Definitization

Comment: One respondent indicated that restricting the authority of a contracting officer to unilaterally definitize a UCA with a value greater than $50 million without the service acquisition executive for the military department approval ensures the UCA will not be definitized within the 180

day window. The respondent also stated that requiring the contracting officer to provide the written approval to the contractor implies that leadership does not trust the contracting officer to be truthful.

Response: The language at DFARS 217.7404(b)(2) and (3) regarding the limitations on unilateral definitization of UCAs over $50 million is a statutory requirement under 10 U.S.C. 2326(c) and is consistent with section 815 of the NDAA for FY 2018. The rule provides greater oversight on UCAs over $50 million in accordance with Congressional intent as set forth in statute.

4. Definition of ''Qualifying Proposal''

Comment: One respondent indicated that their central contention with the proposed rule is the incomplete revision of the definition of ''qualifying proposal'' at DFARS 217.7401(c) to match the statutory revisions of the definition at 10 U.S.C. 2326(g)(2). The respondent also recommended that DoD establish that a proposal submitted in compliance with the Proposal Adequacy Checklist shall be deemed a ''qualifying proposal.''

Response: DoD has revised the definition to conform to the statutory definition as follows: ''Qualifying proposal'' means a proposal that contains sufficient information to enable DoD to conduct meaningful analyses and audits of information contained in the proposal. Although compliance with the proposal adequacy checklist forms a good basis for an adequate proposal, it does not necessarily ensure that the proposal contains sufficient information to enable DoD to conduct meaningful analyses and audits of information contained in the proposal.

C. Other Changes

- At DFARS 217.7401, an editorial change removes paragraph number designations from the definitions.
- At DFARS 217.7402(b), an editorial change updates the titles and address for the Principal Deputy, Defense Pricing and Contracting (Contract Policy).
- At DFARS 217.7404(a), DoD specified the head of the contracting activity as the authority to waive the requirements with regard to entering into a UCA for a foreign military sale.
- At DFARS 217.7404(b)(2), DoD delegated to the head of the contracting activity, without power of redelegation, the authority to approve a unilateral definitization.
- At DFARS 217.7404–3, DoD delegated to the head of the contracting activity, without power of redelegation, the authority to extend the definitization schedule beyond an additional 90 days.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to create any new provisions or clauses or impact any existing provisions or clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify requirements on undefinitized contract actions (UCAs) regarding calculations of risk-based profit objectives, timing for definitizations, Foreign Military Sales, and limitations on unilateral definitizations of UCAs over $50 million, in accordance with recently enacted statutory requirements. The objective is to implement section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, and section 815 of the NDAA for FY 2018.

There were no issues raised by the public in response to the initial regulatory flexibility analysis.

The rule applies to all entities who do business with the Federal Government, including over 327,458 small business registrants in the System for Award Management database. However, DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule is primarily implementing internal DoD administrative requirements. With regard to potential profit impacts, DoD estimates that this rule will impact approximately 470 contracts per year, primarily awarded to other than small entities, where definitization is extended beyond 180 days after receipt of a qualifying proposal. This would equate to less than 1/10th of one percent of contracts awarded to small entities.

The rule does not include additional reporting or record keeping requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no available alternatives to the rule to accomplish the desired objective of the statute. We do not expect this rule to have a significant economic impact on a substantial number of small entities because the rule is not implementing any requirements with which small entities must comply.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 215 and 217

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215 and 217 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215 and 217 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

215.404–71–2 [Amended]

■ 2. In section 215.404–71–2 paragraph (e)(2)(iii), remove ''217.7401(c)'' and add ''217.7401'' in its place.

■ 3. In section 215.404–71–3, revise paragraph (d)(2)(i) to read as follows:

215.404–71–3 Contract type risk and working capital adjustment.

* * * * *

(d) * * *

(2) * * *

(i) The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (also see 217.7404–6(a) and 243.204–70–6). When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as zero percent, regardless of contract type. However, if a contractor submits a qualifying proposal to definitize an undefinitized contract action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal (as defined in 217.7401), the profit allowed on the contract shall accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

* * * * *

PART 217—SPECIAL CONTRACTING METHODS

■ 4. Amend section 217.7401 by—

■ a. Removing the alphabetical paragraph designations for each definition and arranging the definitions in alphabetical order;

■ b. In the definition for ''Contract action'', paragraph (3), removing ''Subpart 217.77'' and adding ''subpart 217.77'' in its place; and

■ c. Revising the definition of ''Qualifying proposal'' to read as follows:

217.7401 Definitions.

* * * * *

Qualifying proposal means a proposal that contains sufficient information to enable DoD to conduct meaningful analyses and audits of the information contained in the proposal.

* * * * *

■ 5. Amend section 217.7402 by—

■ a. Removing paragraph (a)(1);

■ b. Redesignating paragraphs (a)(2) through (4) as paragraphs (a)(1) through (3);

■ c. In redesignated paragraphs (a)(1) and (2), removing the semicolons and replacing them with periods; and

■ d. Revising paragraph (b).

The revision reads as follows:

217.7402 Exceptions.

* * * * *

(b) If the contracting officer determines that it is impracticable to adhere to the procedures of this subpart for a particular contract action that falls within one of the categories in paragraph (a)(1), (3), or (4) of this section, the contracting officer shall provide prior notice, through agency channels, electronically via email to the Principal Director, Defense Pricing and Contracting (Contract Policy), at *osd.pentagon.ousd-a-s.mbx.dpc-cp@mail.mil.*

■ 6. Revise section 217.7404 to read as follows:

217.7404 Limitations.

See PGI 217.7404 for additional guidance on obtaining approval to authorize use of an undefinitized contact action, documentation requirements, and other limitations on their use.

(a) *Foreign military sales contracts.*

(1) A contracting officer may not enter into a UCA for a foreign military sale unless—

(i) The UCA provides for agreement upon contractual terms, specifications, and price by the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal; and

(ii) The contracting officer obtains approval from the head of the contracting activity to enter into a UCA in accordance with 217.7404–1.

(2) The head of the contracting activity may waive the requirements of paragraph (a)(1) of this section, if a waiver is necessary in order to support any of the following operations:

(i) A contingency operation.

(ii) A humanitarian or peacekeeping operation.

(b) *Unilateral definitization by a contracting officer.* Any UCA with a value greater than $50 million may not be unilaterally definitized until—

(1) The earlier of—

(i) The end of the 180-day period, beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or

(ii) The date on which the amount of funds expended under the contractual action is equal to more than 50 percent of the negotiated overall not-to-exceed price for the contractual action;

(2) The head of the contracting activity, without power of redelegation, approves the definitization in writing;

(3) The contracting officer provides a copy of the written approval to the contractor; and

(4) A period of 30 calendar days has elapsed after the written approval is provided to the contractor.

■ 7. Amend section 217.7404–3 by revising paragraph (a)(1) to read as follows:

217.7404–3 Definitization schedule.

(a) * * *

(1) The date that is 180 days after the contractor submits a qualifying proposal. This date may not be extended beyond an additional 90 days without a written determination by the head of the contracting activity without power of redelegation, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment that it is in the best interests of the military department or the defense agency, the combatant command, or the Department of Defense, respectively, to continue the action; or

* * * * *

217.7404–5 [Amended]

■ 8. Amend section 217.7404–5, paragraph (b) introductory text, by removing ''217.7404–2'' and adding ''217.7404(a), 217.7404–2'' in its place.

■ 9. Amend section 217.7404–6 by–

■ a. Revising paragraph (a); and

■ b. In paragraph (b) removing ''contract;'' and adding ''contract after negotiation of the final price;'' in its place.

The revision reads as follows:

217.7404–6 Allowable profit.

* * * * *

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price. However, if a contractor submits a qualifying proposal to definitize a UCA, and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal, the profit allowed on the contract shall accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal;

* * * * *

[FR Doc. 2019–16766 Filed 8–8–19; 8:45 am]

BILLING CODE 6820–ep–P

of non-LSC funds for any restricted activities and to otherwise demonstrate compliance with this part.

§ 1610.10 Compliance.

In addition to all other compliance and enforcement options, LSC may recover from a recipient's LSC funds an amount not to exceed the amount improperly charged to non-LSC funds, as provided in § 1630.16 of this chapter.

PART 1630—COST STANDARDS AND PROCEDURES

■ 2. The authority citation for part 1630 continues to read as follows:

Authority: 42 U.S.C. 2996g(e).

■ 3. Revise § 1630.16 to read as follows:

§ 1630.16 Applicability to non-LSC funds.

(a) No cost may be charged to non-LSC funds in violation of §§ 1610.3 or 1610.4 of this chapter.

(b) LSC may recover from a recipient's LSC funds an amount not to exceed the amount improperly charged to non-LSC funds. The review and appeal procedures of §§ 1630.11 and 1630.12 govern any decision by LSC to recover funds under this paragraph.

Dated: August 1, 2019.

Mark Freedman,

Senior Associate General Counsel.

[FR Doc. 2019–16822 Filed 8–9–19; 8:45 am]

BILLING CODE 7050–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2 and 19

[FAR Case 2016–002; Docket No. 2016–0002; Sequence No. 1]

RIN 9000–AN34

Federal Acquisition Regulation: Applicability of Small Business Regulations Outside the United States

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to support the Small Business Administration's (SBA) policy of including overseas contracts in agency small business contracting goals. This amendment is consistent with SBA's regulatory changes, which clarify that small business contracting provisions, *e.g.,* set-asides, may apply to contracts performed overseas.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before October 11, 2019 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2016–002 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''FAR Case 2016–002'' under the heading ''Enter Keyword or ID''. Select the link ''Submit a Comment'' that corresponds with FAR Case 2016–002. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''FAR Case 2016–002'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, 2nd Floor, ATTN: Lois Mandell, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2016–002 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Marilyn E. Chambers, Procurement Analyst, at 202–285–7380 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at (202) 501–4755. Please cite FAR Case 2016–002.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to support SBA's changes to the basis for the Governmentwide small business contracting goals. The proposed FAR changes are consistent with SBA's regulatory changes, which clarify that small business contracting rules, *e.g.,* set-asides, may be applied to contracts performed outside the United States. On October 3, 2013, SBA issued a final rule amending its regulations at 13 CFR 125.2 to make this clarification.

The Small Business Act requires the President to establish Governmentwide contracting goals for small business contracts awarded by Federal agencies each fiscal year (15 U.S.C. 644(g)). Historically, SBA has not included certain categories of contracts in the establishment of these goals, for example, contracts with a place of performance outside of the United States. Section 1631(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239), amended the Governmentwide small business contracting goal provisions established under section 15(g) of the Small Business Act. Section 1631(c) requires SBA to review and revise the guidelines for the establishment of small business goals for Federal procurement to ensure that agency goals are established in a manner that does not exclude contracts based on (a) type of goods or services for which the agency contracts, (b) how funding for the contracts is made available to the agency by an Appropriations Act or is made available by reimbursement from another agency or account, or (c) whether or not the contract is subject to the FAR. As a result of this review, SBA began including overseas contracts in the establishment of small business goals for FY 2016 to broaden the base of contracts that could be awarded to small businesses under FAR part 19.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. *Subpart 2.1, Definitions.* This subpart is amended to revise the definition of ''bundling'' by deleting paragraph (3) in its entirety, making the definition applicable outside the United States. The Small Business Act does not exempt an agency from justifying its bundling of contract requirements based on location of award, location of service performance, or location of supply delivery.

B. *Section 19.000, Scope of part.* This section is amended to clarify that, unless otherwise noted in FAR part 19 (such as for subparts 19.6 and 19.7), contracting officers shall apply this part in the United States and its outlying areas and may apply this part outside the United States and its outlying areas. Additionally, the section is amended to specify that offerors participating in any FAR part 19 procurement are required to meet the definition of ''small business concern'' at FAR 2.101 and the definition of ''concern'' at FAR 19.001.

C. *Section 19.309, Solicitation provisions and contract clauses.* This section is amended to remove language that restricts application of the following provisions and clause to contracts to be performed in the United States or its outlying areas: The provisions at FAR 52.219–1, Small

Business Program Representations, and FAR 52.219–2, Equal Low Bids; and the clause at FAR 52.219–28, Post-Award Small Business Program Rerepresentation.

III. Expected Impact of the Rule

Currently, FAR 19.000(b) states that FAR part 19, except for FAR subpart 19.6, applies only in the United States or its outlying areas. Some contracting officers have interpreted the phrase ''applies only in the United States'' to mean that they are not allowed to use the set-aside and sole-source procedures of FAR part 19 for overseas procurements. Other contracting officers have interpreted ''applies only in the United States'' to mean that they are not required to use FAR part 19 procedures for overseas procurements, but may do so if they choose. These conflicting interpretations have resulted in inconsistent use of FAR part 19 procedures for overseas procurements across Federal agencies. Conflicting interpretations may also contribute to low numbers of overseas contract actions that are set aside for small businesses.

This proposed rule will clarify that contracting officers are allowed, but not required, to use the set-aside and sole-source procedures of FAR part 19 for overseas procurements. While SBA's regulations do not explicitly state that use of small business programs is discretionary overseas, SBA clarified and confirmed their position in the preamble of their notice on Small Business Mentor-Protégé Programs published July 25, 2016, at 81 FR 48557. The preamble stated that SBA had issued a final rule previously on October 2, 2013, to amend 13 CFR 125.2 ''recognizing that small business contracting could be used 'regardless of the place of performance.' '' The preamble went on to explain that SBA merely sought to clarify that the authority to use small business programs overseas already existed and to highlight contracting officers' discretionary authority to use these programs where appropriate regardless of the place of performance. This proposed rule is consistent with these rules.

As a result of the clarification provided in the rule, contracting officers may set aside more overseas actions for small businesses in the future. However, this rule does not propose to impose additional costs or reduce existing costs for small businesses who may compete. The rule merely allows additional opportunities to be provided to small businesses through set-asides and other tools in FAR part 19 for overseas requirements.

Data are not available on the number of overseas procurements contracting officers have not set aside for small business as a result of the conflicting interpretations described in the first paragraph of this section. According to data obtained from the Federal Procurement Data System (FPDS) for FY 2017 and 2018, there were an average of 1,601,915 awards for performance overseas, including contracts, task and delivery orders, and calls under FAR part 13 blanket purchase agreements. Of those awards, 1,588,334 were made to approximately 8,512 unique large businesses, while 13,581 awards were made to approximately 1,954 unique small businesses. These numbers indicate that less than 1 percent of actions awarded for performance outside the United States are awarded to small businesses.

Contract awards to small businesses could increase if contracting officers expand their use of set-asides and other tools in FAR part 19 for overseas contracts. FAR 19.502–(2)(b) states that the set-aside authority can only be used where a contracting officer has a reasonable expectation that offers will be received from two small businesses and that award will be made at a fair market price. Similarly, sole-source authority under any of the small business programs also requires certain conditions to be met before being utilized. The conditions for using the FAR part 19 sole-source authorities include, but are not limited to, making award at a fair and reasonable price. It is not possible to identify how many small businesses will have the capability, capacity, or inclination to compete for contracts performed outside the United States. In addition, it is not possible to predict how many overseas procurements contracting officers will set aside for small business as a result of the proposed FAR changes.

DoD, GSA, and NASA invite public comment regarding the driving and restraining forces impacting application of FAR part 19 to overseas procurements, both on the Government's acquisition workforce and small business concerns.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This proposed rule does not change the applicability of the existing provisions at FAR 52.219–1, Small Business Program Representations, and 52.219–2, Equal Low Bids, and the clause at 52.219–28, Post-Award Small Business Program Rerepresentation, which already apply to acquisitions at or below the simplified acquisition threshold and to acquisitions for commercial items, including commercially available off-the-shelf items.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This proposed rule is not expected to be an E.O. 13771 regulatory action, because this rule imposes de minimis costs on the public as explained in section III of this preamble, Expected Impact of the Rule. The FAR Council invites comments from the regulated community on the analysis provided in this rule.

VII. Regulatory Flexibility Act

The change may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the FAR to give contracting officers the tools they need, including the ability to use set-asides, to maximize opportunities for small businesses to obtain contracts for performance outside the United States. This change may increase contract awards to small businesses, which will improve agencies' achievement of their small business contracting goals.

The objective of this proposed rule is to provide the Government with additional tools with which to maximize small business participation in contracts performed outside the United States. Currently, the FAR states that the small business programs do not apply outside of the United States (FAR 19.000(b)). However, on October 3, 2013, the Small Business Administration (SBA) issued

a final rule amending its regulations at 13 CFR 125.2 to clarify that its small business contracting regulations apply regardless of the place of performance. With the changes to SBA's guidelines for establishment of small business goals in response to section 1631(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239), contracts performed outside of the United States are now included in the Government's small business contracting goals.

This rule may have a positive economic impact on small businesses. The proposed rule expands existing procurement mechanisms (*e.g.,* set-asides) to contracts performed outside the United States. Therefore, small businesses available to compete for Federal contracts performed outside the United States are most directly affected by this rule. Analysis of the System for Award Management (SAM) indicates there are over 327,000 small business registrants that can potentially benefit from the implementation of this rule. An analysis of the Federal Procurement Data System (FPDS) for FY 2017 and 2018 revealed that there was an average of 1,601,915 awards for performance overseas, including contracts, task and delivery orders, and calls under part 13 blanket purchase agreements (BPAs). Of those awards, 1,588,334 were made to approximately 8,512 unique large businesses, while 13,581 awards were made to approximately 1,954 unique small businesses. This number could increase if contracting officers expand their use of set-asides and other tools in FAR part 19 for overseas contracts.

Therefore, this rule could affect a smaller number of small businesses than the 327,000 registered in SAM, but potentially more than those revealed by FPDS as having overseas contracts. It is not possible to identify how many of the registered small businesses will have the capability, capacity, or inclination to compete for contracts performed outside the United States. In addition, it is not possible to predict how many overseas procurements contracting officers will set aside for small business as a result of the proposed FAR changes. Contracting officers must continue to comply with FAR 19.502–(2)(b), which states that the set-aside authority can only be used where a contracting officer has a reasonable expectation that offers will be received from two small businesses and that award will be made at a fair market price. Similarly, sole source authority under any of the small business programs also requires certain conditions to be met before being utilized. The conditions for using the FAR part 19 sole-source authorities include, but are not limited to, making award at a fair and reasonable price.

Nonetheless, we believe that this rule may have a significant positive economic impact on small business concerns competing for Federal contracting opportunities since it will provide greater access to Federal contracting opportunities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the SBA. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit comments separately and should cite 5 U.S.C. 610 (FAR case 2016–002) in correspondence.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2 and 19

Government procurement.

Janet Fry,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 2 and 19 as set forth below:

■ 1. The authority citation for 48 CFR parts 2 and 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Part 2—Definitions of Words and Terms

2.101 [Amended]

■ 2. Amend section 2.101, in the definition of ''bundling'', by removing paragraph (3).

Part 19—Small Business Programs

■ 3. Amend section 19.000 by revising paragraph (b) to read as follows:

19.000 Scope of part.

* * * * *

(b)(1) Unless otherwise specified in this part (see subparts 19.6 and 19.7)—

(i) Contracting officers shall apply this part in the United States and its outlying areas; and

(ii) Contracting officers may apply this part outside the United States and its outlying areas.

(2) Offerors that participate in any part 19 procurement are required to meet the definition of ''small business concern'' at 2.101 and the definition of ''concern'' at 19.001.

■ 4. Amend section 19.309 by revising paragraphs (a)(1), (b), and (c) to read as follows:

19.309 Solicitation provisions and contract clauses.

(a)(1) Insert the provision at 52.219–1, Small Business Program Representations, in solicitations exceeding the micro-purchase threshold when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied part 19 in accordance with 19.000(b)(1)(ii).

* * * * *

(b) When contracting by sealed bidding, insert the provision at 52.219–2, Equal Low Bids, in solicitations when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied part 19 in accordance with 19.000(b)(1)(ii).

(c) Insert the clause at 52.219–28, Post-Award Small Business Program Rerepresentation, in solicitations and contracts exceeding the micro-purchase threshold when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied part 19 in accordance with 19.000(b)(1)(ii).

[FR Doc. 2019–16957 Filed 8–9–19; 8:45 am]

BILLING CODE 6820–EP–P

Federal Register
Vol. 84, No. 24
Tuesday, February 5, 2019

Presidential Documents

Title 3—

The President

Executive Order 13858 of January 31, 2019

Strengthening Buy-American Preferences for Infrastructure Projects

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to strengthen Buy-American principles in Federal financial assistance programs, it is hereby ordered as follows:

Section 1. *Policy.* As expressed in Executive Order 13788 of April 18, 2017 (Buy American and Hire American), it is the policy of the executive branch to maximize, consistent with law, the use of goods, products, and materials produced in the United States, in Federal procurements and through the terms and conditions of Federal financial assistance awards.

Sec. 2. *Definitions.* As used in this order:

(a) "Produced in the United States" means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(b) "Federal financial assistance" shall have the meaning and shall be interpreted consistent with the definition provided by the Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, found at section 200.40 of title 2, Code of Federal Regulations.

(c) "Manufactured products" means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

(d) "Infrastructure project" means a project to develop public or private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production, generation, and storage, including from fossil-fuels, renewable, nuclear, and hydroelectric sources; electricity transmission; gas, oil, and propane storage and transmission; electric, oil, natural gas, and propane distribution systems; broadband internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; cybersecurity; and any other sector designated through a notice published in the *Federal Register* by the Federal Permitting Improvement Steering Council.

(e) "Covered program" means any program for which a focus of the statutory authorities under which it is administered is the award of Federal financial assistance for the alteration, construction, conversion, demolition, extension, improvement, maintenance, reconstruction, rehabilitation, or repair of an infrastructure project in the United States, except that this term shall not include:

(i) programs for which providing a domestic preference is inconsistent with law; or

(ii) programs providing Federal financial assistance that are subject to comparable domestic preferences.

(f) "Domestic Preference" means a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States,

including iron and aluminum as well as steel, cement, and other manufactured products.

Sec. 3. *Application of Buy-American Principles to Covered Programs.* (a) Within 90 days of the date of this order, the head of each executive department and agency (agency) administering a covered program shall, as appropriate and to the extent consistent with law, encourage recipients of new Federal financial assistance awards pursuant to a covered program to use, to the greatest extent practicable, iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in every contract, subcontract, purchase order, or sub-award that is chargeable against such Federal financial assistance award.

(b) The head of each agency administering a covered program shall include in the report required by section 4 of this order a detailed explanation of the strategy, plan, or program developed to satisfy the requirement of subsection (a) of this section.

Sec. 4. *Identification of Opportunities to Maximize the Use of Buy-American Principles.* Within 120 days of the date of this order, the head of each agency administering a covered program shall identify in a report to the President, through the Assistant to the President for Trade and Manufacturing Policy, any tools, techniques, terms, or conditions that have been used or could be used, consistent with law and in furtherance of the policy set forth in section 1 of this order, to maximize the use of iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in contracts, sub-contracts, purchase orders, or sub-awards that are chargeable against Federal financial assistance awards for infrastructure projects. In preparing this report, the agency head shall take care to analyze whether covered programs within the agency head's jurisdiction would support, through terms and conditions on new Federal financial assistance awards under such covered programs, the imposition of a requirement to use iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in contracts, sub-contracts, purchase orders, or sub-awards that are chargeable against such Federal financial assistance awards.

Sec. 5. *Amendment to Executive Order 13788.* Subsection 1(a) of Executive Order 13788 is hereby amended by substituting "Federal financial assistance" for "Federal grants".

Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

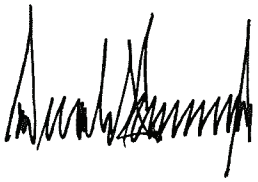
(i) the authority granted by law to an executive department or agency, or the head thereof;

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals; or

(iii) existing rights or obligations under international agreements.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 31, 2019.

[FR Doc. 2019–01426
Filed 2–4–19; 11:15 am]
Billing code 3295–F9–P

Federal Register
Vol. 84, No. 96
Friday, May 17, 2019

Presidential Documents

Title 3—

The President

Executive Order 13873 of May 15, 2019

Securing the Information and Communications Technology and Services Supply Chain

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, DONALD J. TRUMP, President of the United States of America, find that foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services, which store and communicate vast amounts of sensitive information, facilitate the digital economy, and support critical infrastructure and vital emergency services, in order to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its people. I further find that the unrestricted acquisition or use in the United States of information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments the ability of foreign adversaries to create and exploit vulnerabilities in information and communications technology or services, with potentially catastrophic effects, and thereby constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. This threat exists both in the case of individual acquisitions or uses of such technology or services, and when acquisitions or uses of such technologies are considered as a class. Although maintaining an open investment climate in information and communications technology, and in the United States economy more generally, is important for the overall growth and prosperity of the United States, such openness must be balanced by the need to protect our country against critical national security threats. To deal with this threat, additional steps are required to protect the security, integrity, and reliability of information and communications technology and services provided and used in the United States. In light of these findings, I hereby declare a national emergency with respect to this threat.

Accordingly, it is hereby ordered as follows:

Section 1. *Implementation.* (a) The following actions are prohibited: any acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service (transaction) by any person, or with respect to any property, subject to the jurisdiction of the United States, where the transaction involves any property in which any foreign country or a national thereof has any interest (including through an interest in a contract for the provision of the technology or service), where the transaction was initiated, is pending, or will be completed after the date of this order, and where the Secretary of Commerce (Secretary), in consultation with the Secretary of the Treasury, the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the United States Trade Representative, the Director of National Intelligence, the Administrator of General Services, the Chairman of the Federal Communications Commission, and, as appropriate, the heads of other executive departments and agencies (agencies), has determined that:

(i) the transaction involves information and communications technology or services designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and

(ii) the transaction:

(A) poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of information and communications technology or services in the United States;

(B) poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the digital economy of the United States; or

(C) otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons.

(b) The Secretary, in consultation with the heads of other agencies as appropriate, may at the Secretary's discretion design or negotiate measures to mitigate concerns identified under section 1(a) of this order. Such measures may serve as a precondition to the approval of a transaction or of a class of transactions that would otherwise be prohibited pursuant to this order.

(c) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

Sec. 2. *Authorities.* (a) The Secretary, in consultation with, or upon referral of a particular transaction from, the heads of other agencies as appropriate, is hereby authorized to take such actions, including directing the timing and manner of the cessation of transactions prohibited pursuant to section 1 of this order, adopting appropriate rules and regulations, and employing all other powers granted to the President by IEEPA, as may be necessary to implement this order. All agencies of the United States Government are directed to take all appropriate measures within their authority to carry out the provisions of this order.

(b) Rules and regulations issued pursuant to this order may, among other things, determine that particular countries or persons are foreign adversaries for the purposes of this order; identify persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries for the purposes of this order; identify particular technologies or countries with respect to which transactions involving information and communications technology or services warrant particular scrutiny under the provisions of this order; establish procedures to license transactions otherwise prohibited pursuant to this order; establish criteria, consistent with section 1 of this order, by which particular technologies or particular participants in the market for information and communications technology or services may be recognized as categorically included in or as categorically excluded from the prohibitions established by this order; and identify a mechanism and relevant factors for the negotiation of agreements to mitigate concerns raised in connection with subsection 1(a) of this order. Within 150 days of the date of this order, the Secretary, in consultation with the Secretary of the Treasury, Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the United States Trade Representative, the Director of National Intelligence, the Administrator of General Services, the Chairman of the Federal Communications Commission and, as appropriate, the heads of other agencies, shall publish rules or regulations implementing the authorities delegated to the Secretary by this order.

(c) The Secretary may, consistent with applicable law, redelegate any of the authorities conferred on the Secretary pursuant to this section within the Department of Commerce.

Sec. 3. *Definitions.* For purposes of this order:

(a) the term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(b) the term "foreign adversary" means any foreign government or foreign non-government person engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons;

'(c) the term "information and communications technology or services" means any hardware, software, or other product or service primarily intended to fulfill or enable the function of information or data processing, storage, retrieval, or communication by electronic means, including transmission, storage, and display;

(d) the term "person" means an individual or entity; and

(e) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

Sec. 4. Recurring and Final Reports to the Congress. The Secretary, in consultation with the Secretary of State, is hereby authorized to submit recurring and final reports to the Congress on the national emergency declared in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

Sec. 5. *Assessments and Reports.* (a) The Director of National Intelligence shall continue to assess threats to the United States and its people from information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary. The Director of National Intelligence shall produce periodic written assessments of these threats in consultation with the heads of relevant agencies, and shall provide these assessments to the President, the Secretary for the Secretary's use in connection with his responsibilities pursuant to this order, and the heads of other agencies as appropriate. An initial assessment shall be completed within 40 days of the date of this order, and further assessments shall be completed at least annually, and shall include analysis of:

(i) threats enabled by information and communications technologies or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and

(ii) threats to the United States Government, United States critical infrastructure, and United States entities from information and communications technologies or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the influence of a foreign adversary.

(b) The Secretary of Homeland Security shall continue to assess and identify entities, hardware, software, and services that present vulnerabilities in the United States and that pose the greatest potential consequences to the national security of the United States. The Secretary of Homeland Security, in coordination with sector-specific agencies and coordinating councils as appropriate, shall produce a written assessment within 80 days of the date of this order, and annually thereafter. This assessment shall include an evaluation of hardware, software, or services that are relied upon by multiple information and communications technology or service providers, including the communication services relied upon by critical infrastructure entities identified pursuant to section 9 of Executive Order 13636 of February 12, 2013 (Improving Critical Infrastructure Cybersecurity).

(c) Within 1 year of the date of this order, and annually thereafter, the Secretary, in consultation as appropriate with the Secretary of the Treasury, the Secretary of Homeland Security, Secretary of State, the Secretary of Defense, the Attorney General, the United States Trade Representative, the

Director of National Intelligence, and the Chairman of the Federal Communications Commission, shall assess and report to the President whether the actions taken by the Secretary pursuant to this order are sufficient and continue to be necessary to mitigate the risks identified in, and pursuant to, this order.

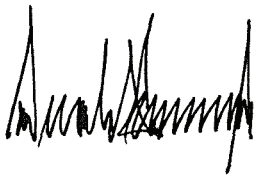
Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
May 15, 2019.

[FR Doc. 2019–10538
Filed 5–16–19; 11:15 am]
Billing code 3295–F9–P

Presidential Documents

Executive Order 13881 of July 15, 2019

Maximizing Use of American-Made Goods, Products, and Materials

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to promote the principles underlying the Buy American Act of 1933 (41 U.S.C. 8301–8305), it is hereby ordered as follows:

Section 1. *Policy.* (a) As expressed in Executive Order 13788 of April 18, 2017 (Buy American and Hire American), and in Executive Order 13858 of January 31, 2019 (Strengthening Buy-American Preferences for Infrastructure Projects), it is the policy of the United States to buy American and to maximize, consistent with law, the use of goods, products, and materials produced in the United States. To those ends, my Administration shall enforce the Buy American Act to the greatest extent permitted by law.

(b) In Executive Order 10582 of December 17, 1954 (Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act), President Eisenhower established that materials shall be, for purposes of the Buy American Act, considered of foreign origin if the cost of the foreign products used in such materials constitutes 50 percent or more of the cost of all the products used in such materials. He also established that, in determining whether the bid or offered price of materials of domestic origin is unreasonable or inconsistent with the public interest, the executive agencies shall either (1) add 6 percent to the total bid or offered price of materials of foreign origin, or (2) add 10 percent to the total bid or offered price of materials of foreign origin less certain specified costs as follows. Where the foreign bid or offer is less than $25,000, applicable duty is excluded from the calculation. Where the foreign bid or offer is more than $25,000, both applicable duty, and all costs incurred after arrival in the United States, are excluded from the calculation.

(c) The policies described in section 1(b) of this order were adopted by the Federal Acquisition Regulatory Council (FAR Council) in the Federal Acquisition Regulation (FAR), title 48, Code of Federal Regulations. The FAR should be reviewed and revised, as appropriate, to most effectively carry out the goals of the Buy American Act and my Administration's policy of enforcing the Buy American Act to its maximum lawful extent. I therefore direct the members of the FAR Council to consider measures that may better effectuate this policy.

Sec. 2. *Proposed Rules.* (a) Within 180 days of the date of this order, the FAR Council shall consider proposing for notice and public comment:

(i) an amendment to the applicable provisions in the FAR that would provide that materials shall be considered to be of foreign origin if:

(A) for iron and steel end products, the cost of foreign iron and steel used in such iron and steel end products constitutes 5 percent or more of the cost of all the products used in such iron and steel end products; or

(B) for all other end products, the cost of the foreign products used in such end products constitutes 45 percent or more of the cost of all the products used in such end products; and

(ii) an amendment to the applicable provisions in the FAR that would provide that the executive agency concerned shall in each instance conduct the reasonableness and public interest determination referred to in sections 8302 and 8303 of title 41, United States Code, on the basis of the following-described differential formula, subject to the terms thereof: the sum determined by computing 20 percent (for other than small businesses), or 30 percent (for small businesses), of the offer or offered price of materials of foreign origin.

(b) The FAR Council shall consider and evaluate public comments on any regulations proposed pursuant to section 2(a) of this order and shall promptly issue a final rule, if appropriate and consistent with applicable law and the national security interests of the United States. The head of each executive agency shall issue such regulations as may be necessary to ensure that agency procurement practices conform to the provisions of any final rule issued pursuant to this order.

Sec. 3. *Effect on Executive Order 10582.* Executive Order 10582 is superseded to the extent that it is inconsistent with this order. Upon the issuance of a final rule pursuant to section 2 of this order, subsections 2(a) and 2(c) of Executive Order 10582 are revoked.

Sec. 4. *Additional Actions.* Within 180 days of the date of this order, the Secretary of Commerce and the Director of the Office of Management and Budget shall, in consultation with the FAR Council, the Chairman of the Council of Economic Advisers, the Assistant to the President for Economic Policy, and the Assistant to the President for Trade and Manufacturing Policy, submit to the President a report on any other changes to the FAR that the FAR Council should consider in order to better enforce the Buy American Act and to otherwise act consistent with the policy described in section 1 of this order, including whether and when to further decrease, including incrementally, the threshold percentage in subsection 2(a)(i)(B) of this order from the proposed 45 percent to 25 percent. The report shall include recommendations based on the feasibility and desirability of any decreases, including the timing of such decreases.

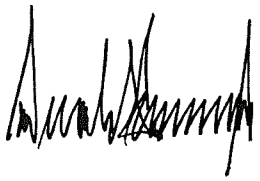
Sec. 5. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof, including, for example, the authority to utilize non-availability and public interest exceptions as delineated in section 8303 of title 41, United States Code, and 48 CFR 25.103; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
July 15, 2019.

[FR Doc. 2019–15449
Filed 7–17–19; 8:45 am]
Billing code 3295–F9–P

Federal Register
Vol. 84, No. 31
Thursday, February 14, 2019

Presidential Documents

Title 3—

The President

Executive Order 13859 of February 11, 2019

Maintaining American Leadership in Artificial Intelligence

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy and Principles.* Artificial Intelligence (AI) promises to drive growth of the United States economy, enhance our economic and national security, and improve our quality of life. The United States is the world leader in AI research and development (R&D) and deployment. Continued American leadership in AI is of paramount importance to maintaining the economic and national security of the United States and to shaping the global evolution of AI in a manner consistent with our Nation's values, policies, and priorities. The Federal Government plays an important role in facilitating AI R&D, promoting the trust of the American people in the development and deployment of AI-related technologies, training a workforce capable of using AI in their occupations, and protecting the American AI technology base from attempted acquisition by strategic competitors and adversarial nations. Maintaining American leadership in AI requires a concerted effort to promote advancements in technology and innovation, while protecting American technology, economic and national security, civil liberties, privacy, and American values and enhancing international and industry collaboration with foreign partners and allies. It is the policy of the United States Government to sustain and enhance the scientific, technological, and economic leadership position of the United States in AI R&D and deployment through a coordinated Federal Government strategy, the American AI Initiative (Initiative), guided by five principles:

(a) The United States must drive technological breakthroughs in AI across the Federal Government, industry, and academia in order to promote scientific discovery, economic competitiveness, and national security.

(b) The United States must drive development of appropriate technical standards and reduce barriers to the safe testing and deployment of AI technologies in order to enable the creation of new AI-related industries and the adoption of AI by today's industries.

(c) The United States must train current and future generations of American workers with the skills to develop and apply AI technologies to prepare them for today's economy and jobs of the future.

(d) The United States must foster public trust and confidence in AI technologies and protect civil liberties, privacy, and American values in their application in order to fully realize the potential of AI technologies for the American people.

(e) The United States must promote an international environment that supports American AI research and innovation and opens markets for American AI industries, while protecting our technological advantage in AI and protecting our critical AI technologies from acquisition by strategic competitors and adversarial nations.

Sec. 2. *Objectives.* Artificial Intelligence will affect the missions of nearly all executive departments and agencies (agencies). Agencies determined to be implementing agencies pursuant to section 3 of this order shall pursue six strategic objectives in furtherance of both promoting and protecting American advancements in AI:

(a) Promote sustained investment in AI R&D in collaboration with industry, academia, international partners and allies, and other non-Federal entities

to generate technological breakthroughs in AI and related technologies and to rapidly transition those breakthroughs into capabilities that contribute to our economic and national security.

(b) Enhance access to high-quality and fully traceable Federal data, models, and computing resources to increase the value of such resources for AI R&D, while maintaining safety, security, privacy, and confidentiality protections consistent with applicable laws and policies.

(c) Reduce barriers to the use of AI technologies to promote their innovative application while protecting American technology, economic and national security, civil liberties, privacy, and values.

(d) Ensure that technical standards minimize vulnerability to attacks from malicious actors and reflect Federal priorities for innovation, public trust, and public confidence in systems that use AI technologies; and develop international standards to promote and protect those priorities.

(e) Train the next generation of American AI researchers and users through apprenticeships; skills programs; and education in science, technology, engineering, and mathematics (STEM), with an emphasis on computer science, to ensure that American workers, including Federal workers, are capable of taking full advantage of the opportunities of AI.

(f) Develop and implement an action plan, in accordance with the National Security Presidential Memorandum of February 11, 2019 (Protecting the United States Advantage in Artificial Intelligence and Related Critical Technologies) (the NSPM) to protect the advantage of the United States in AI and technology critical to United States economic and national security interests against strategic competitors and foreign adversaries.

Sec. 3. *Roles and Responsibilities.* The Initiative shall be coordinated through the National Science and Technology Council (NSTC) Select Committee on Artificial Intelligence (Select Committee). Actions shall be implemented by agencies that conduct foundational AI R&D, develop and deploy applications of AI technologies, provide educational grants, and regulate and provide guidance for applications of AI technologies, as determined by the co-chairs of the NSTC Select Committee (implementing agencies).

Sec. 4. *Federal Investment in AI Research and Development.*

(a) Heads of implementing agencies that also perform or fund R&D (AI R&D agencies), shall consider AI as an agency R&D priority, as appropriate to their respective agencies' missions, consistent with applicable law and in accordance with the Office of Management and Budget (OMB) and the Office of Science and Technology Policy (OSTP) R&D priorities memoranda. Heads of such agencies shall take this priority into account when developing budget proposals and planning for the use of funds in Fiscal Year 2020 and in future years. Heads of these agencies shall also consider appropriate administrative actions to increase focus on AI for 2019.

(b) Heads of AI R&D agencies shall budget an amount for AI R&D that is appropriate for this prioritization.

(i) Following the submission of the President's Budget request to the Congress, heads of such agencies shall communicate plans for achieving this prioritization to the OMB Director and the OSTP Director each fiscal year through the Networking and Information Technology Research and Development (NITRD) Program.

(ii) Within 90 days of the enactment of appropriations for their respective agencies, heads of such agencies shall identify each year, consistent with applicable law, the programs to which the AI R&D priority will apply and estimate the total amount of such funds that will be spent on each such program. This information shall be communicated to the OMB Director and OSTP Director each fiscal year through the NITRD Program.

(c) To the extent appropriate and consistent with applicable law, heads of AI R&D agencies shall explore opportunities for collaboration with non-

Federal entities, including: the private sector; academia; non-profit organizations; State, local, tribal, and territorial governments; and foreign partners and allies, so all collaborators can benefit from each other's investment and expertise in AI R&D.

Sec. 5. *Data and Computing Resources for AI Research and Development.*

(a) Heads of all agencies shall review their Federal data and models to identify opportunities to increase access and use by the greater non-Federal AI research community in a manner that benefits that community, while protecting safety, security, privacy, and confidentiality. Specifically, agencies shall improve data and model inventory documentation to enable discovery and usability, and shall prioritize improvements to access and quality of AI data and models based on the AI research community's user feedback.

(i) Within 90 days of the date of this order, the OMB Director shall publish a notice in the *Federal Register* inviting the public to identify additional requests for access or quality improvements for Federal data and models that would improve AI R&D and testing. Additionally, within 90 days of the date of this order, OMB, in conjunction with the Select Committee, shall investigate barriers to access or quality limitations of Federal data and models that impede AI R&D and testing. Collectively, these actions by OMB will help to identify datasets that will facilitate non-Federal AI R&D and testing.

(ii) Within 120 days of the date of this order, OMB, including through its interagency councils and the Select Committee, shall update implementation guidance for Enterprise Data Inventories and Source Code Inventories to support discovery and usability in AI R&D.

(iii) Within 180 days of the date of this order, and in accordance with the implementation of the Cross-Agency Priority Goal: Leveraging Federal Data as a Strategic Asset, from the March 2018 President's Management Agenda, agencies shall consider methods of improving the quality, usability, and appropriate access to priority data identified by the AI research community. Agencies shall also identify any associated resource implications.

(iv) In identifying data and models for consideration for increased public access, agencies, in coordination with the Senior Agency Officials for Privacy established pursuant to Executive Order 13719 of February 9, 2016 (Establishment of the Federal Privacy Council), the heads of Federal statistical entities, Federal program managers, and other relevant personnel shall identify any barriers to, or requirements associated with, increased access to and use of such data and models, including:

(A) privacy and civil liberty protections for individuals who may be affected by increased access and use, as well as confidentiality protections for individuals and other data providers;

(B) safety and security concerns, including those related to the association or compilation of data and models;

(C) data documentation and formatting, including the need for interoperable and machine-readable data formats;

(D) changes necessary to ensure appropriate data and system governance; and

(E) any other relevant considerations.

(v) In accordance with the President's Management Agenda and the Cross-Agency Priority Goal: Leveraging Data as a Strategic Asset, agencies shall identify opportunities to use new technologies and best practices to increase access to and usability of open data and models, and explore appropriate controls on access to sensitive or restricted data and models, consistent with applicable laws and policies, privacy and confidentiality protections, and civil liberty protections.

(b) The Secretaries of Defense, Commerce, Health and Human Services, and Energy, the Administrator of the National Aeronautics and Space Administration, and the Director of the National Science Foundation shall, to the extent appropriate and consistent with applicable law, prioritize the allocation of high-performance computing resources for AI-related applications through:

(i) increased assignment of discretionary allocation of resources and resource reserves; or

(ii) any other appropriate mechanisms.

(c) Within 180 days of the date of this order, the Select Committee, in coordination with the General Services Administration (GSA), shall submit a report to the President making recommendations on better enabling the use of cloud computing resources for federally funded AI R&D.

(d) The Select Committee shall provide technical expertise to the American Technology Council on matters regarding AI and the modernization of Federal technology, data, and the delivery of digital services, as appropriate.

Sec. 6. *Guidance for Regulation of AI Applications.*

(a) Within 180 days of the date of this order, the OMB Director, in coordination with the OSTP Director, the Director of the Domestic Policy Council, and the Director of the National Economic Council, and in consultation with any other relevant agencies and key stakeholders as the OMB Director shall determine, shall issue a memorandum to the heads of all agencies that shall:

(i) inform the development of regulatory and non-regulatory approaches by such agencies regarding technologies and industrial sectors that are either empowered or enabled by AI, and that advance American innovation while upholding civil liberties, privacy, and American values; and

(ii) consider ways to reduce barriers to the use of AI technologies in order to promote their innovative application while protecting civil liberties, privacy, American values, and United States economic and national security.

(b) To help ensure public trust in the development and implementation of AI applications, OMB shall issue a draft version of the memorandum for public comment before it is finalized.

(c) Within 180 days of the date of the memorandum described in subsection (a) of this section, the heads of implementing agencies that also have regulatory authorities shall review their authorities relevant to applications of AI and shall submit to OMB plans to achieve consistency with the memorandum.

(d) Within 180 days of the date of this order, the Secretary of Commerce, through the Director of the National Institute of Standards and Technology (NIST), shall issue a plan for Federal engagement in the development of technical standards and related tools in support of reliable, robust, and trustworthy systems that use AI technologies. NIST shall lead the development of this plan with participation from relevant agencies as the Secretary of Commerce shall determine.

(i) Consistent with OMB Circular A–119, this plan shall include:

(A) Federal priority needs for standardization of AI systems development and deployment;

(B) identification of standards development entities in which Federal agencies should seek membership with the goal of establishing or supporting United States technical leadership roles; and

(C) opportunities for and challenges to United States leadership in standardization related to AI technologies.

(ii) This plan shall be developed in consultation with the Select Committee, as needed, and in consultation with the private sector, academia, nongovernmental entities, and other stakeholders, as appropriate.

Sec. 7. *AI and the American Workforce.*

(a) Heads of implementing agencies that also provide educational grants shall, to the extent consistent with applicable law, consider AI as a priority area within existing Federal fellowship and service programs.

(i) Eligible programs for prioritization shall give preference to American citizens, to the extent permitted by law, and shall include:

(A) high school, undergraduate, and graduate fellowship; alternative education; and training programs;

(B) programs to recognize and fund early-career university faculty who conduct AI R&D, including through Presidential awards and recognitions;

(C) scholarship for service programs;

(D) direct commissioning programs of the United States Armed Forces; and

(E) programs that support the development of instructional programs and curricula that encourage the integration of AI technologies into courses in order to facilitate personalized and adaptive learning experiences for formal and informal education and training.

(ii) Agencies shall annually communicate plans for achieving this prioritization to the co-chairs of the Select Committee.

(b) Within 90 days of the date of this order, the Select Committee shall provide recommendations to the NSTC Committee on STEM Education regarding AI-related educational and workforce development considerations that focus on American citizens.

(c) The Select Committee shall provide technical expertise to the National Council for the American Worker on matters regarding AI and the American workforce, as appropriate.

Sec. 8. *Action Plan for Protection of the United States Advantage in AI Technologies.*

(a) As directed by the NSPM, the Assistant to the President for National Security Affairs, in coordination with the OSTP Director and the recipients of the NSPM, shall organize the development of an action plan to protect the United States advantage in AI and AI technology critical to United States economic and national security interests against strategic competitors and adversarial nations.

(b) The action plan shall be provided to the President within 120 days of the date of this order, and may be classified in full or in part, as appropriate.

(c) Upon approval by the President, the action plan shall be implemented by all agencies who are recipients of the NSPM, for all AI-related activities, including those conducted pursuant to this order.

Sec. 9. *Definitions.* As used in this order:

(a) the term "artificial intelligence" means the full extent of Federal investments in AI, to include: R&D of core AI techniques and technologies; AI prototype systems; application and adaptation of AI techniques; architectural and systems support for AI; and cyberinfrastructure, data sets, and standards for AI; and

(b) the term "open data" shall, in accordance with OMB Circular A–130 and memorandum M–13–13, mean "publicly available data structured in a way that enables the data to be fully discoverable and usable by end users."

Sec. 10. *General Provisions.*

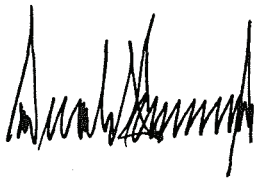
(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
February 11, 2019.

[FR Doc. 2019–02544
Filed 2–13–19; 8:45 am]
Billing code 3295–F9–P

Federal Register
Vol. 84, No. 90
Thursday, May 9, 2019

Presidential Documents

Title 3—

The President

Executive Order 13870 of May 2, 2019

America's Cybersecurity Workforce

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to better ensure continued American economic prosperity and national security, it is hereby ordered as follows:

Section 1. *Policy.* (a) America's cybersecurity workforce is a strategic asset that protects the American people, the homeland, and the American way of life. The National Cyber Strategy, the President's 2018 Management Agenda, and Executive Order 13800 of May 11, 2017 (Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure), each emphasize that a superior cybersecurity workforce will promote American prosperity and preserve peace. America's cybersecurity workforce is a diverse group of practitioners who govern, design, defend, analyze, administer, operate, and maintain the data, systems, and networks on which our economy and way of life depend. Whether they are employed in the public or private sectors, they are guardians of our national and economic security.

(b) The United States Government must enhance the workforce mobility of America's cybersecurity practitioners to improve America's national cybersecurity. During their careers, America's cybersecurity practitioners will serve in various roles for multiple and diverse entities. United States Government policy must facilitate the seamless movement of cybersecurity practitioners between the public and private sectors, maximizing the contributions made by their diverse skills, experiences, and talents to our Nation.

(c) The United States Government must support the development of cybersecurity skills and encourage ever-greater excellence so that America can maintain its competitive edge in cybersecurity. The United States Government must also recognize and reward the country's highest-performing cybersecurity practitioners and teams.

(d) The United States Government must create the organizational and technological tools required to maximize the cybersecurity talents and capabilities of American workers—especially when those talents and capabilities can advance our national and economic security. The Nation is experiencing a shortage of cybersecurity talent and capability, and innovative approaches are required to improve access to training that maximizes individuals' cybersecurity knowledge, skills, and abilities. Training opportunities, such as work-based learning, apprenticeships, and blended learning approaches, must be enhanced for both new workforce entrants and those who are advanced in their careers.

(e) In accordance with Executive Order 13800, the President will continue to hold heads of executive departments and agencies (agencies) accountable for managing cybersecurity risk to their enterprises, which includes ensuring the effectiveness of their cybersecurity workforces.

Sec. 2. *Strengthening the Federal Cybersecurity Workforce.* (a) To grow the cybersecurity capability of the United States Government, increase integration of the Federal cybersecurity workforce, and strengthen the skills of Federal information technology and cybersecurity practitioners, the Secretary of Homeland Security, in consultation with the Director of the Office of Management and Budget (OMB) and the Director of the Office of Personnel Management (OPM), shall establish a cybersecurity rotational assignment program, which will serve as a mechanism for knowledge transfer and a development

program for cybersecurity practitioners. Within 90 days of the date of this order, the Secretary of Homeland Security, in consultation with the Directors of OMB and OPM, shall provide a report to the President that describes the proposed program, identifies its resource implications, and recommends actions required for its implementation. The report shall evaluate how to achieve the following objectives, to the extent permitted by applicable law, as part of the program:

(i) The non-reimbursable detail of information technology and cybersecurity employees, who are nominated by their employing agencies, to serve at the Department of Homeland Security (DHS);

(ii) The non-reimbursable detail of experienced cybersecurity DHS employees to other agencies to assist in improving those agencies' cybersecurity risk management;

(iii) The use of the National Initiative for Cybersecurity Education Cybersecurity Workforce Framework (NICE Framework) as the basis for cybersecurity skill requirements for program participants;

(iv) The provision of training curricula and expansion of learning experiences to develop participants' skill levels; and

(v) Peer mentoring to enhance workforce integration.

(b) Consistent with applicable law and to the maximum extent practicable, the Administrator of General Services, in consultation with the Director of OMB and the Secretary of Commerce, shall:

(i) Incorporate the NICE Framework lexicon and taxonomy into workforce knowledge and skill requirements used in contracts for information technology and cybersecurity services;

(ii) Ensure that contracts for information technology and cybersecurity services include reporting requirements that will enable agencies to evaluate whether personnel have the necessary knowledge and skills to perform the tasks specified in the contract, consistent with the NICE Framework; and

(iii) Provide a report to the President, within 1 year of the date of this order, that describes how the NICE Framework has been incorporated into contracts for information technology and cybersecurity services, evaluates the effectiveness of this approach in improving services provided to the United States Government, and makes recommendations to increase the effective use of the NICE Framework by United States Government contractors.

(c) Within 180 days of the date of this order, the Director of OPM, in consultation with the Secretary of Commerce, the Secretary of Homeland Security, and the heads of other agencies as appropriate, shall identify a list of cybersecurity aptitude assessments for agencies to use in identifying current employees with the potential to acquire cybersecurity skills for placement in reskilling programs to perform cybersecurity work. Agencies shall incorporate one or more of these assessments into their personnel development programs, as appropriate and consistent with applicable law.

(d) Agencies shall ensure that existing awards and decorations for the uniformed services and civilian personnel recognize performance and achievements in the areas of cybersecurity and cyber-operations, including by ensuring the availability of awards and decorations equivalent to citations issued pursuant to Executive Order 10694 of January 10, 1957 (Authorizing the Secretaries of the Army, Navy, and Air Force To Issue Citations in the Name of the President of the United States to Military and Naval Units for Outstanding Performance in Action), as amended. Where necessary and appropriate, agencies shall establish new awards and decorations to recognize performance and achievements in the areas of cybersecurity and cyber-operations. The Assistant to the President for National Security Affairs may recommend to agencies that any cyber unified coordination group or similar ad hoc interagency group that has addressed a significant cybersecurity

or cyber-operations-related national security crisis, incident, or effort be recognized for appropriate awards and decorations.

(e) The Secretary of Homeland Security, in consultation with the Secretary of Defense, the Director of the Office of Science and Technology Policy, the Director of OMB, and the heads of other appropriate agencies, shall develop a plan for an annual cybersecurity competition (President's Cup Cybersecurity Competition) for Federal civilian and military employees. The goal of the competition shall be to identify, challenge, and reward the United States Government's best cybersecurity practitioners and teams across offensive and defensive cybersecurity disciplines. The plan shall be submitted to the President within 90 days of the date of this order. The first competition shall be held no later than December 31, 2019, and annually thereafter. The plan for the competition shall address the following:

(i) The challenges and benefits of inviting advisers, participants, or observers from non-Federal entities to observe or take part in the competition and recommendations for including them in future competitions, as appropriate;

(ii) How the Department of Energy, through the National Laboratories, in consultation with the Administrator of the United States Digital Service, can provide expert technical advice and assistance to support the competition, as appropriate;

(iii) The parameters for the competition, including the development of multiple individual and team events that test cybersecurity skills related to the NICE Framework and other relevant skills, as appropriate. These parameters should include competition categories involving individual and team events, software reverse engineering and exploitation, network operations, forensics, big data analysis, cyber analysis, cyber defense, cyber exploitation, secure programming, obfuscated coding, cyber-physical systems, and other disciplines;

(iv) How to encourage agencies to select their best cybersecurity practitioners as individual and team participants. Such practitioners should include Federal employees and uniformed services personnel from Federal civilian agencies, as well as Department of Defense active duty military personnel, civilians, and those serving in a drilling reserve capacity in the Armed Forces Reserves or National Guard;

(v) The extent to which agencies, as well as uniformed services, may develop a President's Cup awards program that is consistent with applicable law and regulations governing awards and that allows for the provision of cash awards of not less than $25,000. Any such program shall require the agency to establish an awards program before allowing its employees to participate in the President's Cup Cybersecurity Competition. In addition, any such program may not preclude agencies from recognizing winning and non-winning participants through other means, including honorary awards, informal recognition awards, rating-based cash awards, time-off awards, Quality Step Increases, or other agency-based compensation flexibilities as appropriate and consistent with applicable law; and

(vi) How the uniformed services, as appropriate and consistent with applicable law, may designate service members who win these competitions as having skills at a time when there is a critical shortage of such skills within the uniformed services. The plan should also address how the uniformed services may provide winning service members with a combination of bonuses, advancements, and meritorious recognition to be determined by the Secretaries of the agencies concerned.

(f) The Director of OMB shall, in consultation with appropriate agencies, develop annually a list of agencies and subdivisions related to cybersecurity that have a primary function of intelligence, counterintelligence, investigative, or national security work, including descriptions of such functions. The Director of OMB shall provide this list to the President, through the

Deputy Assistant to the President for Homeland Security and Counterterrorism (DAPHSCT), every year starting September 1, 2019, for consideration of whether those agencies or subdivisions should be exempted from coverage under the Federal Labor-Management Relations Program, consistent with the requirements of section 7103(b)(1) of title 5, United States Code.

Sec. 3. *Strengthening the Nation's Cybersecurity Workforce.* (a) The Secretary of Commerce and the Secretary of Homeland Security (Secretaries), in coordination with the Secretary of Education and the heads of other agencies as the Secretaries determine is appropriate, shall execute, consistent with applicable law and to the greatest extent practicable, the recommendations from the report to the President on Supporting the Growth and Sustainment of the Nation's Cybersecurity Workforce (Workforce Report) developed pursuant to Executive Order 13800. The Secretaries shall develop a consultative process that includes Federal, State, territorial, local, and tribal governments, academia, private-sector stakeholders, and other relevant partners to assess and make recommendations to address national cybersecurity workforce needs and to ensure greater mobility in the American cybersecurity workforce. To fulfill the Workforce Report's vision of preparing, growing, and sustaining a national cybersecurity workforce that safeguards and promotes America's national security and economic prosperity, priority consideration will be given to the following imperatives:

(i) To launch a national Call to Action to draw attention to and mobilize public- and private-sector resources to address cybersecurity workforce needs;

(ii) To transform, elevate, and sustain the cybersecurity learning environment to grow a dynamic and diverse cybersecurity workforce;

(iii) To align education and training with employers' cybersecurity workforce needs, improve coordination, and prepare individuals for lifelong careers; and

(iv) To establish and use measures that demonstrate the effectiveness and impact of cybersecurity workforce investments.

(b) To strengthen the ability of the Nation to identify and mitigate cybersecurity vulnerabilities in critical infrastructure and defense systems, particularly cyber-physical systems for which safety and reliability depend on secure control systems, the Secretary of Defense, the Secretary of Transportation, the Secretary of Energy, and the Secretary of Homeland Security, in coordination with the Director of OPM and the Secretary of Labor, shall provide a report to the President, through the DAPHSCT, within 180 days of the date of this order that:

(i) Identifies and evaluates skills gaps in Federal and non-Federal cybersecurity personnel and training gaps for specific critical infrastructure sectors, defense critical infrastructure, and the Department of Defense's platform information technologies; and

(ii) Recommends curricula for closing the identified skills gaps for Federal personnel and steps the United States Government can take to close such gaps for non-Federal personnel by, for example, supporting the development of similar curricula by education or training providers.

(c) Within 1 year of the date of this order, the Secretary of Education, in consultation with the DAPHSCT and the National Science Foundation, shall develop and implement, consistent with applicable law, an annual Presidential Cybersecurity Education Award to be presented to one elementary and one secondary school educator per year who best instill skills, knowledge, and passion with respect to cybersecurity and cybersecurity-related subjects. In developing and implementing this award, the Secretary of Education shall emphasize demonstrated superior educator accomplishment—without respect to research, scholarship, or technology development—as well as academic achievement by the educator's students.

(d) The Secretary of Commerce, the Secretary of Labor, the Secretary of Education, the Secretary of Homeland Security, and the heads of other

appropriate agencies shall encourage the voluntary integration of the NICE Framework into existing education, training, and workforce development efforts undertaken by State, territorial, local, tribal, academic, non-profit, and private-sector entities, consistent with applicable law. The Secretary of Commerce shall provide annual updates to the President regarding effective uses of the NICE Framework by non-Federal entities and make recommendations for improving the application of the NICE Framework in cybersecurity education, training, and workforce development.

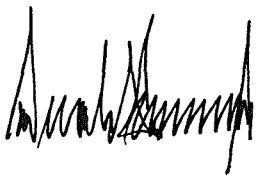
Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
May 2, 2019.

[FR Doc. 2019–09750
Filed 5–8–19; 11:15 am]
Billing code 3295–F9–P

Federal Register
Vol. 84, No. 199
Tuesday, October 15, 2019

Presidential Documents

Title 3—

The President

Executive Order 13891 of October 9, 2019

Promoting the Rule of Law Through Improved Agency Guidance Documents

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure that Americans are subject to only those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them, and that Americans have fair notice of their obligations, it is hereby ordered as follows:

Section 1. *Policy.* Departments and agencies (agencies) in the executive branch adopt regulations that impose legally binding requirements on the public even though, in our constitutional democracy, only Congress is vested with the legislative power. The Administrative Procedure Act (APA) generally requires agencies, in exercising that solemn responsibility, to engage in notice-and-comment rulemaking to provide public notice of proposed regulations under section 553 of title 5, United States Code, allow interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the *Federal Register.*

Agencies may clarify existing obligations through non-binding guidance documents, which the APA exempts from notice-and-comment requirements. Yet agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA. Even when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply. Moreover, the public frequently has insufficient notice of guidance documents, which are not always published in the *Federal Register* or distributed to all regulated parties.

Americans deserve an open and fair regulatory process that imposes new obligations on the public only when consistent with applicable law and after an agency follows appropriate procedures. Therefore, it is the policy of the executive branch, to the extent consistent with applicable law, to require that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public. Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.

Sec. 2. *Definitions.* For the purposes of this order:

(a) "Agency" has the meaning given in section 3(b) of Executive Order 12866 (Regulatory Planning and Review), as amended.

(b) "Guidance document" means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include the following:

(i) rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;

(ii) rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(iii) rules of agency organization, procedure, or practice;

(iv) decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

(v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or

(vi) internal executive branch legal advice or legal opinions addressed to executive branch officials.

(c) "Significant guidance document" means a guidance document that may reasonably be anticipated to:

(i) lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(ii) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(iii) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(iv) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

(d) "Pre-enforcement ruling" means a formal written communication by an agency in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person. The term includes informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Title II), as amended, letter rulings, advisory opinions, and no-action letters.

Sec. 3. *Ensuring Transparent Use of Guidance Documents.* (a) Within 120 days of the date on which the Office of Management and Budget (OMB) issues an implementing memorandum under section 6 of this order, each agency or agency component, as appropriate, shall establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component. The website shall note that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.

(b) Within 120 days of the date on which OMB issues an implementing memorandum under section 6 of this order, each agency shall review its guidance documents and, consistent with applicable law, rescind those guidance documents that it determines should no longer be in effect. No agency shall retain in effect any guidance document without including it in the relevant database referred to in subsection (a) of this section, nor shall any agency, in the future, issue a guidance document without including it in the relevant database. No agency may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts. Within 240 days of the date on which OMB issues an implementing memorandum, an agency may reinstate a guidance document rescinded under this subsection without complying with any procedures adopted or imposed pursuant to section 4 of this order, to the extent consistent with applicable law, and shall include the guidance document in the relevant database.

(c) The Director of OMB (Director), or the Director's designee, may waive compliance with subsections (a) and (b) of this section for particular guidance documents or categories of guidance documents, or extend the deadlines set forth in those subsections.

(d) As requested by the Director, within 240 days of the date on which OMB issues an implementing memorandum under section 6 of this order, an agency head shall submit a report to the Director with the reasons for maintaining in effect any guidance documents identified by the Director.

The Director shall provide such reports to the President. This subsection shall apply only to guidance documents existing as of the date of this order.

Sec. 4. *Promulgation of Procedures for Issuing Guidance Documents.* (a) Within 300 days of the date on which OMB issues an implementing memorandum under section 6 of this order, each agency shall, consistent with applicable law, finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents. The process set forth in each regulation shall be consistent with this order and shall include:

(i) a requirement that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract;

(ii) procedures for the public to petition for withdrawal or modification of a particular guidance document, including a designation of the officials to which petitions should be directed; and

(iii) for a significant guidance document, as determined by the Administrator of OMB's Office of Information and Regulatory Affairs (Administrator), unless the agency and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements, provisions requiring:

(A) a period of public notice and comment of at least 30 days before issuance of a final guidance document, and a public response from the agency to major concerns raised in comments, except when the agency for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest;

(B) approval on a non-delegable basis by the agency head or by an agency component head appointed by the President, before issuance;

(C) review by the Office of Information and Regulatory Affairs (OIRA) under Executive Order 12866, before issuance; and

(D) compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, 13563 (Improving Regulation and Regulatory Review), 13609 (Promoting International Regulatory Cooperation), 13771 (Reducing Regulation and Controlling Regulatory Costs), and 13777 (Enforcing the Regulatory Reform Agenda).

(b) The Administrator shall issue memoranda establishing exceptions from this order for categories of guidance documents, and categorical presumptions regarding whether guidance documents are significant, as appropriate, and may require submission of significant guidance documents to OIRA for review before the finalization of agency regulations under subsection (a) of this section. In light of the Memorandum of Agreement of April 11, 2018, this section and section 5 of this order shall not apply to the review relationship (including significance determinations) between OIRA and any component of the Department of the Treasury, or to compliance by the latter with Executive Orders 12866, 13563, 13609, 13771, and 13777. Section 4(a)(iii) and section 5 of this order shall not apply to pre-enforcement rulings.

Sec. 5. *Executive Orders 12866, 13563, and 13609.* The requirements and procedures of Executive Orders 12866, 13563, and 13609 shall apply to guidance documents, consistent with section 4 of this order.

Sec. 6. *Implementation.* The Director shall issue memoranda and, as appropriate, regulations pursuant to sections 3504(d)(1) and 3516 of title 44, United States Code, and other appropriate authority, to provide guidance regarding or otherwise implement this order.

Sec. 7. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Notwithstanding any other provision in this order, nothing in this order shall apply:

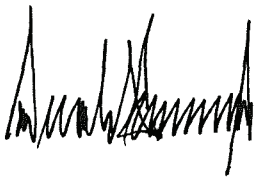
(i) to any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than guidance documents involving procurement or the import or export of non-defense articles and services);

(ii) to any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;

(iii) to any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee;

(iv) to any document or information that is exempt from disclosure under section 552(b) of title 5, United States Code (commonly known as the Freedom of Information Act); or

(v) in any other circumstance or proceeding to which application of this order, or any part of this order, would, in the judgment of the head of the agency, undermine the national security.



THE WHITE HOUSE,
October 9, 2019.

[FR Doc. 2019–22623
Filed 10–11–19; 11:15 am]
Billing code 3295–F0–P

Presidential Documents

Executive Order 13892 of October 9, 2019

Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* The rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions. The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* was enacted to provide that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974). The Freedom of Information Act, America's landmark transparency law, amended the APA to further advance this goal. The Freedom of Information Act, as amended, now generally requires that agencies publish in the *Federal Register* their substantive rules of general applicability, statements of general policy, and interpretations of law that are generally applicable and both formulated and adopted by the agency (5 U.S.C. 552(a)(1)(D)). The Freedom of Information Act also generally prohibits an agency from adversely affecting a person with a rule or policy that is not so published, except to the extent that the person has actual and timely notice of the terms of the rule or policy (5 U.S.C. 552(a)(1)).

Unfortunately, departments and agencies (agencies) in the executive branch have not always complied with these requirements. In addition, some agency practices with respect to enforcement actions and adjudications undermine the APA's goals of promoting accountability and ensuring fairness.

Agencies shall act transparently and fairly with respect to all affected parties, as outlined in this order, when engaged in civil administrative enforcement or adjudication. No person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct. Moreover, the Federal Government should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct. Agencies shall afford regulated parties the safeguards described in this order, above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose.

Sec. 2. *Definitions.* For the purposes of this order:

(a) "Agency" has the meaning given to "Executive agency" in section 105 of title 5, United States Code, but excludes the Government Accountability Office.

(b) "Collection of information" includes any conduct that would qualify as a "collection of information" as defined in section 3502(3)(A) of title 44, United States Code, or section 1320.3(c) of title 5, Code of Federal Regulations, and also includes any request for information, regardless of the number of persons to whom it is addressed, that is:

(i) addressed to all or a substantial majority of an industry; or

(ii) designed to obtain information from a representative sample of individual persons in an industry.

(c) "Guidance document" means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include the following:

(i) rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;

(ii) rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(iii) rules of agency organization, procedure, or practice;

(iv) decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

(v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or

(vi) internal executive branch legal advice or legal opinions addressed to executive branch officials.

(d) "Legal consequence" means the result of an action that directly or indirectly affects substantive legal rights or obligations. The meaning of this term should be informed by the Supreme Court's discussion in *U.S. Army Corps of Engineers* v. *Hawkes Co.,* 136 S. Ct. 1807, 1813–16 (2016), and includes, for example, agency orders specifying which commodities are subject to or exempt from regulation under a statute, *Frozen Food Express* v. *United States,* 351 U.S. 40, 44–45 (1956), as well as agency letters or orders establishing greater liability for regulated parties in a subsequent enforcement action, *Rhea Lana, Inc.* v. *Dep't of Labor,* 824 F.3d 1023, 1030 (DC Cir. 2016). In particular, "legal consequence" includes subjecting a regulated party to potential liability.

(e) "Unfair surprise" means a lack of reasonable certainty or fair warning of what a legal standard administered by an agency requires. The meaning of this term should be informed by the examples of lack of fair notice discussed by the Supreme Court in *Christopher* v. *SmithKline Beecham Corp.,* 567 U.S. 142, 156 & n.15 (2012).

(f) "Pre-enforcement ruling" means a formal written communication from an agency in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person. The term includes informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Title II), as amended (SBREFA), letter rulings, advisory opinions, and no-action letters.

(g) "Regulation" means a legislative rule promulgated pursuant to section 553 of title 5, United States Code, or similar statutory provisions.

Sec. 3. *Proper Reliance on Guidance Documents.* Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract. When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it must establish a violation of law by applying statutes or regulations. The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations. When an agency uses a guidance document to state the legal applicability of a statute or regulation, that document can do no more, with respect to prohibition of conduct, than articulate the agency's understanding of how a statute or regulation applies to particular circumstances. An agency may cite a guidance document to convey that understanding in an administrative enforcement action or adjudication only if it has notified the public of such document in advance through publication, either in full or by citation if publicly available, in the *Federal Register* (or on the portion of the agency's website

that contains a single, searchable, indexed database of all guidance documents in effect).

Sec. 4. *Fairness and Notice in Administrative Enforcement Actions and Adjudications.* When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law.

Sec. 5. *Fairness and Notice in Jurisdictional Determinations.* Any decision in an agency adjudication, administrative order, or agency document on which an agency relies to assert a new or expanded claim of jurisdiction—such as a claim to regulate a new subject matter or an explanation of a new basis for liability—must be published, either in full or by citation if publicly available, in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) before the conduct over which jurisdiction is sought occurs. If an agency intends to rely on a document arising out of litigation (other than a published opinion of an adjudicator), such as a brief, a consent decree, or a settlement agreement, to establish jurisdiction in future administrative enforcement actions or adjudications involving persons who were not parties to the litigation, it must publish that document, either in full or by citation if publicly available, in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) and provide an explanation of its jurisdictional implications. An agency may not seek judicial deference to its interpretation of a document arising out of litigation (other than a published opinion of an adjudicator) in order to establish a new or expanded claim or jurisdiction unless it has published the document or a notice of availability in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect).

Sec. 6. *Opportunity to Contest Agency Determination.* (a) Except as provided in subsections (b) and (c) of this section, before an agency takes any action with respect to a particular person that has legal consequence for that person, including by issuing to such a person a no-action letter, notice of noncompliance, or other similar notice, the agency must afford that person an opportunity to be heard, in person or in writing, regarding the agency's proposed legal and factual determinations. The agency must respond in writing and articulate the basis for its action.

(b) Subsection (a) of this section shall not apply to settlement negotiations between agencies and regulated parties, to notices of a prospective legal action, or to litigation before courts.

(c) An agency may proceed without regard to subsection (a) of this section where necessary because of a serious threat to health, safety, or other emergency or where a statute specifically authorizes proceeding without a prior opportunity to be heard. Where an agency proceeds under this subsection, it nevertheless must afford any person an opportunity to be heard, in person or in writing, regarding the agency's legal determinations and respond in writing as soon as practicable.

Sec. 7. *Ensuring Reasonable Administrative Inspections.* Within 120 days of the date of this order, each agency that conducts civil administrative inspections shall publish a rule of agency procedure governing such inspections, if such a rule does not already exist. Once published, an agency must conduct inspections of regulated parties in compliance with the rule.

Sec. 8. *Appropriate Procedures for Information Collections.* (a) Any agency seeking to collect information from a person about the compliance of that person or of any other person with legal requirements must ensure that such collections of information comply with the provisions of the Paperwork Reduction Act, section 3512 of title 44, United States Code, and section

1320.6(a) of title 5, Code of Federal Regulations, applicable to collections of information (other than those excepted under section 3518 of title 44, United States Code).

(b) To advance the purposes of subsection (a) of this section, any collection of information during the conduct of an investigation (other than those investigations excepted under section 3518 of title 44, United States Code, and section 1320.4 of title 5, Code of Federal Regulations, or civil investigative demands under 18 U.S.C. 1968) must either:

(i) display a valid control number assigned by the Director of the Office of Management and Budget; or

(ii) inform the recipient through prominently displayed plain language that no response is legally required.

Sec. 9. *Cooperative Information Sharing and Enforcement.* (a) Within 270 days of the date of this order, each agency, as appropriate, shall, to the extent practicable and permitted by law, propose procedures:

(i) to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties;

(ii) to encourage voluntary information sharing by regulated parties; and

(iii) to provide pre-enforcement rulings to regulated parties.

(b) Any agency that believes additional procedures are not practicable—because, for example, the agency believes it already has adequate procedures in place or because it believes it lacks the resources to institute additional procedures—shall, within 270 days of the date of this order, submit a report to the President describing, as appropriate, its existing procedures, its need for more resources, or any other basis for its conclusion.

Sec. 10. *SBREFA Compliance.* Within 180 days of the date of this order, each agency shall submit a report to the President demonstrating that its civil administrative enforcement activities, investigations, and other actions comply with SBREFA, including section 223 of that Act. A copy of this report, subject to redactions for any applicable privileges, shall be posted on the agency's website.

Sec. 11. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Notwithstanding any other provision in this order, nothing in this order shall apply:

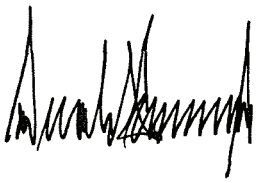
(i) to any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than procurement actions and actions involving the import or export of non-defense articles and services);

(ii) to any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;

(iii) to any action related to detention, seizure, or destruction of counterfeit goods, pirated goods, or other goods that infringe intellectual property rights;

(iv) to any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee; or

(v) in any other circumstance or proceeding to which application of this order, or any part of this order, would, in the judgment of the head of the agency, undermine the national security.



THE WHITE HOUSE,
October 9, 2019.

[FR Doc. 2019–22624
Filed 10–11–19; 11:15 am]
Billing code 3295–F0–P

Regulatory Update

I. Small Business-Related Regulations

a. April 11, 2019, 84 Fed. Reg. 14587, SBA Notice

i. On April 27, 2018, the Small Business Administration ("SBA") published a notification seeking comments on proposed revisions to its 2009 size standards methodology white paper. This notification discussed the comments SBA received on its proposed methodology and SBA's responses, followed by a description of major changes to the methodology and their impacts on size standards. The revised white paper, entitled "SBA's Size Standards Methodology (April 2019)" ("Revised Methodology") is available on the SBA's website.

ii. SBA revised the 2009 methodology to incorporate recent amendments to the Small Business Act involving size standards, address public comments to the 2009 methodology, and make what it characterized as analytical improvements. SBA intends to apply the Revised Methodology to the ongoing second five-year comprehensive review of size standards required by the Small Business Jobs Act of 2010.

b. May 14, 2019, 84 Fed. Reg. 21256, Proposed SBA Rule

i. The SBA proposed to amend its regulations to implement a statutory requirement to certify Women-Owned Small Business Concerns ("WOSB") and Economically Disadvantaged Women-Owned Small Business Concerns ("EDWOSB") participating in the Women-Owned Small Business Contract Program.

ii. The rule proposed to provide certification, to accept certification from certain identified government entities, and to allow certification by SBA-approved third-party certifiers.

iii. The rule also proposed to amend SBA regulations regarding continuing eligibility and program examinations and to adjust the economic disadvantage thresholds applicable to determining whether an individual qualifies as economically disadvantaged for participation in the 8(a) Business Development ("BD") Program—making them consistent with the thresholds applicable to whether a woman qualifies as economically disadvantaged for EDWOSB status.

c. May 31, 2019, 84 Fed. Reg. 25225, Proposed DFARS Rule

i. The Department of Defense ("DoD") proposed to amend the DFARS to implement Section 852 of the Fiscal Year ("FY") 2019 National Defense Authorization Act ("NDAA") which provides for accelerated payments to small business contractors and subcontractors by accelerating payments to their prime contractors.

ii. Specifically, Section 852 requires DoD to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, Section 852 requires DoD to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if (i) a specific payment date is not established by contract, and (ii) the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

d. June 24, 2019, 84 Fed. Reg. 29399, Proposed SBA Rule

i. SBA proposed to modify its method for calculating annual average receipts used to prescribe size standards for small businesses. Specifically, SBA proposed to change its regulations on the calculation of annual average receipts for all receipts-based SBA size standards and other agencies' proposed size standards for service-industry firms from a 3-year averaging period to a 5-year averaging period.

ii. To promote consistency government-wide on small business size standards, SBA proposed to change its own size standards to provide for a 5-year averaging period for calculating annual average receipts for all receipts-based size standards. SBA reasoned that, in applying SBA's own size standards, separating out service industry firms would cause confusion and create a greater compliance burden on firms that participate in both services industries and non-services industries.

iii. SBA also proposed to clarify how it believes annual receipts should be calculated in connection with the acquisition or sale of a division.

e. June 26, 2019, 84 Fed. Reg. 30071, Proposed FAR Rule

i. The Federal Acquisition Regulatory ("FAR") Council proposed to revise the FAR to implement Section 1614 of the FY 2014 NDAA, as implemented by the SBA in its final rule published in 2016 and thus align

the FAR with SBA rules. Section 1614 addressed the credit for lower-tier small business subcontracting—providing where a prime contractor has an individual subcontracting plan for a contract with a single executive agency, the prime contractor would receive credit towards its subcontracting goals for awards made to small business concerns at any tier by subcontractors with individual subcontracting plans.

ii. The proposed rule, if finalized, would allow for the following changes regarding individual subcontracting plans (but not commercial subcontracting plans):

1. Modify FAR 19.701 and 52.219-9 to define first-tier and lower-tier subcontracting.
2. Give prime contractors credit toward their subcontracting plan goals for lower-tier small business subcontract awards, so long as the first-tier subcontractor is not a small business.
3. Add a requirement that prime contractors monitor their first-tier subcontractor's individual subcontracting plans, when applicable, to ensure compliance with the subcontracting goals. The prime contractor must certify that it will ensure the first-tier subcontractors submit the Summary Subcontract Report (SSR) in the Electronic Subcontracting Reporting System (eSRS).

iii. These changes would apply to contracts over $700,000 (or $1.5 million for construction contracts). They would have to be flowed down to subcontracts over these thresholds, and individual subcontracting plans would be required from those first-tier subcontractors as well.

f. Aug. 12, 2019, 84 Fed. Reg. 39793, Proposed FAR Rule

i. The FAR Council proposed to amend the FAR to support SBA's policy of including overseas contracts in agency small business contracting goals. This amendment is intended to be consistent with SBA's regulatory changes, which clarify that small business contracting provisions, e.g., set-asides, may apply to contracts performed overseas.

ii. Historically, SBA had not included certain categories of contracts in the establishment of these goals—*i.e.*, contracts with a place of performance outside of the United States. After legislative changes and further review, SBA began including overseas contracts in the establishment of small business goals for FY 2016 to broaden the base of contracts that could be awarded to small businesses under FAR part 19.

II. Commercial Terms/Commercial Items

a. Sept. 13, 2019, 84 Fed. Reg. 48513, Advance Notice of Proposed Rulemaking (DFARS)

i. DoD is seeking information from experts and interested parties in Government and the private sector to assist in development of a revision to amend the DFARS to implement Section 865 of the FY 2019 NDAA.

ii. Section 865 repeals several years of congressional adjustments to the statutory presumption of development at private expense for commercial items in the validation procedures at paragraph (f) of 10 U.S.C. § 2321. The DFARS implementation of this mandatory presumption has evolved accordingly to track the statutory changes, with the primary coverage found at paragraph (c) of DFARS 227.7103–13, and paragraph (b) of the clause at DFARS 252.227–7037.

iii. There is no DFARS coverage applying such a presumption of development funding to commercial computer software because, as a matter of policy also dating back to the Federal Acquisition Streamlining Act time frame, the underlying procedures for challenging and validating asserted restrictions have not been applied to commercial computer software—only to noncommercial computer software.

b. Sept. 26, 2019, 84 Fed. Reg. 50812, Proposed DFARS Rule

i. DoD proposed to amend the DFARS to implement Sections 871 and 872 of the FY 2017 NDAA to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis and allow an offeror to submit information relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item.

ii. The objective of the rule is to address the use of market research and value analysis to support the determination of price reasonableness for commercial items.

c. Oct. 10, 2019, 84 Fed. Reg. 54760, Final FAR Rule

i. The FAR Council issued a final rule amending the FAR to change the definition of ‘‘commercial item’’ at FAR 2.101 so that the regulatory definition conforms to statutory changes made to the definition by Section 847 of the FY 2018 NDAA.

ii. The final rule broadens the definition to allow certain additional items developed exclusively at private expense to qualify for the benefits associated with being treated as a commercial item. Section 847 expands the universe of nondevelopmental items ("NDIs") that qualify as commercial items to include items sold, in substantial quantities on a competitive basis, to multiple foreign governments.

III. Lowest Price Technically Acceptable

a. Sept. 26, 2019, 84 Fed. Reg. 50785, Final DFARS Rule

i. DoD issued a final rule amending the DFARS to implement sections of the FY 2017 and 2018 NDAAs that established limitations and prohibitions on the use of the lowest price technically acceptable ("LPTA") source selection process.

ii. Under the new rule, LPTA can only be used when the following eight factors are satisfied:

1. Minimum requirements can be clearly described and measured;
2. No, or minimal, value would be realized by proposals that exceed the minimum technical or performance requirements;
3. Proposed technical approaches require no, or minimal, subjective judgment from the source selection authority ("SSA") to determine the awardee;
4. The SSA has a high degree of confidence that reviewing all technical proposals would not result in identification of characteristics that would provide value or benefits;
5. No, or minimal, additional innovation or future technological advantage would be achieved by using a different source selection approach;
6. Goods being procured are predominantly expendable, nontechnical, or have a short life expectancy/shelf life;
7. The contract file contains a determination that the lowest price reflects full life-cycle costs; and
8. The contracting officer documents the contract file describing the circumstances justifying the use of LPTA.

b. Oct. 2, 2019, 84 Fed. Reg. 52425, Proposed FAR Rule

i. The FAR Council issued a proposed rule to amend the FAR to implement a section of the FY 2019 NDAA, which specified the criteria that must be met in order to include LPTA source selection criteria in a solicitation; and requires procurements predominantly for the acquisition of certain

services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable.

ii. The FAR rule would include most of the criteria listed in the final DFARS rule, but has the following six factors (instead of eight):

1. An Executive agency can clearly describe minimum requirements expressed in terms of performance, objectives, measures or standards that will allow determination of acceptability of offers;
2. An Executive agency would realize no, or minimal, extra value by proposals exceeding the technical or performance requirements;
3. Proposed technical approaches require no, or minimal, subjective judgment from the source selection authority ("SSA") to determine the awardee;
4. The Executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in identification of factors that could provide value or benefits to the agency;
5. The contracting officer must document the contract file describing the circumstances justifying the use of LPTA; and
6. The Executive agency has determined that the lowest price reflects total costs—including for operations and support.

IV. Foreign Companies

a. May 31, 2019, 84 Fed. Reg. 25188, Final DFARS Rule

i. The DoD adopted an interim rule as a final rule amending the DFARS to implement sections of the FY 2017 and 2018 NDAAs.

ii. One section imposed additional prohibitions with regard to acquisition of certain foreign commercial satellite services, such as cybersecurity risk and source of satellites and launch vehicles used to provide the foreign commercial satellite services, and expanded the definition of "covered foreign country" to include Russia.

iii. Another section prohibited purchase of items originating China that meet the definition of goods and services controlled as munitions items when moved to the Commerce Control List of the Export Administration Regulations of the Department of Commerce.

b. Aug. 13, 2019, 84 Fed. Reg. 40216, Interim FAR Rule

i. The FAR Council issued an interim rule amending the FAR to implement Section 889(a)(1)(A) of the FY2019 NDAA. This interim rule prohibits agencies from procuring or obtaining or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system, on or after August 13, 2019.

ii. Through the definition of "covered telecommunications equipment or services," the rule imposes prohibitions on executive agencies procuring telecommunications equipment and services from Huawei and other Chinese technology companies as well as video surveillance and telecommunications equipment produced by other Chinese entities. The rule also imposes strict reporting and other requirements on U.S. government contractors.

V. Department of Labor Regulations

a. Aug. 15, 2019, 84 Fed. Reg. 41677, Proposed DoL Rule

i. The Department of Labor ("DoL") Office of Federal Contract Compliance Programs ("OFCCP") proposed regulations to clarify the scope and application of the religious exemption contained in Section 204(c) of Executive Order 11246, as amended.

ii. According to DoL, some religious organizations have provided feedback to OFCCP that they were reluctant to participate as federal contractors because of uncertainty regarding the scope of the religious exemption contained in Section 204(c) of Executive Order 11246 and codified in OFCCP's regulations. According to the notice, DoL's proposal intends to provide clarity regarding the scope and application of the religious exemption consistent with legal developments discussed in the notice by proposing definitions of key terms in 41 CFR 60–1.3 and a rule of construction in 41 CFR 60–1.5.

b. Sept. 27, 2019, 84 Fed. Reg. 51230, Final DoL Rule

i. DoL issued a final rule updating and revising the regulations issued under the Fair Labor Standards Act ("FLSA") implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees.

ii. The final rule raises the minimum salary level necessary to exempt these employees from the FLSA's minimum wage and overtime pay requirements, thereby qualifying, in DoL's estimate, 1.2 million additional workers for overtime protections.

VI. Other Regulations

a. May 6, 2019, 84 Fed. Reg. 19835, Final FAR Rule

i. The FAR Council issued a final rule amending the FAR to implement sections of the FY 2017 NDAA to expand special emergency procurement authorities for acquisitions of supplies or services that facilitate defense against or recovery from cyber-attack, provide international disaster assistance under the Foreign Assistance Act of 1961, or support response to an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

ii. This final rule expands the use of the special emergency procurement authorities to apply to acquisitions of supplies or services that facilitate defense against or recovery from a cyber-attack; support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. § 2292 *et seq.*; or support a response to an emergency or major disaster (42 U.S.C. § 5122).

b. May 31, 2019, 84 Fed. Reg. 25228, Proposed DFARS Rule

i. DoD proposed a rule to amend the DFARS to establish a DoD contractor purchasing system review dollar threshold that provides a regulatory basis for allowing DoD personnel to support other essential priorities and missions of greater contractual risk, while reducing regulatory impact on contractors.

ii. This proposed rule is based on a recommendation from the Defense Contract Management Agency ("DCMA") to raise the contractor purchasing system review ("CPSR") threshold at FAR 44.302(a) from $25 million to $50 million.

c. June 12, 2019, 84 Fed. Reg. 27494, Final FAR Rule

i. The FAR Council issued a final rule amending the FAR to provide guidance to DoD, NASA, and the Coast Guard, consistent with Section 882 of the FY 2017 NDAA.

ii. Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received. The standard of adequate price competition that is based on a reasonable expectation of competition is now applicable only to agencies *other than* DoD, NASA, and the Coast Guard.

d. June 24, 2019, 84 Fed. Reg. 29389, Temporary Rule and Request for Comments (VA)

i. The Veterans Administration ("VA") provided notification that the agency has issued a class deviation from VA Acquisition Regulation ("VAAR") Part 808—Required Sources of Supplies and Services. VA is amending the VAAR to implement the Federal Circuit's mandate in *PDS Consultants, Inc., v. United States*, 907 F.3d 1345 (Fed. Cir. 2018).

ii. The class deviation—effective May 20, 2019—was issued to immediately implement the Federal Circuit's mandate, and this publication is to further notify the public in order to avoid confusion regarding applicable policy and to make conforming amendments to VA's regulations. Specifically, the class deviation requires VA contracting officers to apply the VA Rule of Two, as implemented in VAAR subpart 819.70, before awarding a contract to a qualified nonprofit organization under the Javits-Wagner O'Day Act ("JWOD") or making a contract award to Federal Prison Industries, Inc. ("FPI").

iii. The deviation clarifies that if VA is unable to award to a Vendor Information Pages ("VIP")-listed and verified service-disabled veteran-owned small business ("SDVOSB") or a veteran-owned small business ("VOSB") using the procedures set forth in VAAR subpart 819.70, AbilityOne nonprofit organization and FPI would retain their mandatory source status.

e. June 28, 2019, 84 Fed. Reg. 30947, Final DFARS Rule

i. The DoD issued a final rule amending the DFARS to partially implement a section of the FY 2017 NDAA that addresses the requirement for additional cost or pricing data when only one offer is received in response to a competitive solicitation. This DFARS rule supplements the FAR final rule published at 84 Fed. Reg. 27494.

ii. According to DoD, the changes required in this rule will not affect acquisition of commercial items because 10 U.S.C. § 2306a(b)(1)(B)

provides that certified cost or pricing data is not required for commercial item contracts or subcontracts.

f. Aug. 9, 2019, 84 Fed. Reg. 39204, Final DFARS Rule

i. The DoD issued a final rule amending the DFARS to implement Section 811 of the FY 2017 NDAA and Section 815 of the FY 2018 NDAA. Section 811 modifies restrictions on undefinitized contractual actions ("UCAs") regarding risk-based profit, time for definitization, and Foreign Military Sales. Section 815 establishes limitations on unilateral definitizations of UCAs over $50 million.

g. Sept. 26, 2019, 84 Fed. Reg. 50811, Proposed DFARS Rule

i. The DoD proposed a rule to amend the DFARS to implement a section of the FY 2016 NDAA that modifies the authority of DoD to carry out certain prototype project "other transactions" as well as the criteria required to award an associated follow-on production contract to a participant in the other transaction agreement without the use of competitive procedures.

h. Oct. 2, 2019, 84 Fed. Reg. 52428, Proposed FAR Rule

i. The FAR Council proposed a rule to amend the FAR to implement a section of the FY 2018 NDAA to increase the threshold for requiring certified cost or pricing data from $750,000 to $2 million for contracts entered into after June 30, 2018.

ii. In the case of a change or modification made to a prime contract that was entered into before July 1, 2018, the threshold for obtaining certified cost or pricing data remains $750,000, with the following exception. Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to reflect a $2 million threshold for obtaining certified cost or pricing data from subcontractors. Similarly, for sealed bidding, upon request by a contractor, the contracting officer shall modify the contract without requiring consideration to replace the relevant clause.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2019–0001, Sequence No. 6]

Federal Acquisition Regulation; Federal Acquisition Circular 2020–01; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of a final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2020–01. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the internet at *http://www.regulations.gov.*

DATES: For effective date see the separate document, which follows.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–01, FAR Case 2018–008.

RULE LISTED IN FAC 2020–01

Subject	FAR Case	Analyst
Definition of ''Commercial Item''.	2018–008	Delgado.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific subject set forth in the document following this item summary. FAC 2020–01 amends the FAR as follows:

Definition of ''Commercial Item'' (FAR Case 2018–008)

This final rule amends the definition of ''commercial item'' in FAR part 2 to reflect the statutory change made by section 847 of the National Defense Authorization Act for Fiscal Year 2018. Section 847 expands the universe of nondevelopmental items that qualify as commercial items to include items sold, in substantial quantities on a competitive basis, to multiple foreign governments.

This final rule will not have a significant economic impact on a substantial number of small entities.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2020–01 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2020–01 is effective October 10, 2019 except for FAR Case 2018–008, which is effective November 12, 2019.

Kim Herrington,

Acting Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

William G. Roets, II,

Acting Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.

[FR Doc. 2019–21846 Filed 10–9–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 2

[FAC 2020–01; FAR Case 2018–008; Docket No. FAR–2018–0008; Sequence No. 1]

RIN 9000–AN68

Federal Acquisition Regulation: Definition of ''Commercial Item''

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA and NASA are issuing a final rule to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to revise the definition of a ''commercial item.''

DATES: *Effective:* November 12, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–01, FAR Case 2018–008.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 84 FR 20607 on May 10, 2019, to implement the statutory changes made to the definition of ''commercial item'' by section 847 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91, enacted December 12, 2017). The rule would broaden the definition to allow certain additional items developed exclusively at private expense to qualify for the benefits associated with being treated as a commercial item. Section 847 expands the universe of nondevelopmental items (NDIs) that qualify as commercial items to include items sold, in substantial quantities on a competitive basis, to multiple foreign governments. Three respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of Changes

This final rule amends the definition of commercial item in FAR part 2 to reflect the statutory change made by section 847. Specifically, the rule adds the phrase ''or to multiple foreign governments'' at the end of paragraph (8). There are no changes as a result of comments on the proposed rule.

B. Analysis of Public Comments

1. Supports the proposed rule.

Comment: One respondent stated that the proposed rule accurately and effectively implements section 847.

Response: Noted.

2. Does not support the proposed rule.

Comment: One respondent stated that the rule is unnecessary, clouds the definition of what a commercial item is, and sets the stage for contracting officers

to lose the ability to require contractors to provide certified cost or pricing data.

Response: The rule is necessary to implement section 847 of the NDAA for FY 2018. The Councils do not agree that the implementing rule will complicate the definition of commercial item and note that the transactions, which will now become subject to FAR part 12, will be more simplified and less costly as a result of the reduced number of government-unique requirements that will be applied.

3. Potential burden reductions associated with future regulatory actions that facilitate broader acquisition of commercial items.

Comment: One respondent, in response to a request for feedback in the **Federal Register** notice for the proposed rule, provided recommendations with regard to potential burden reductions associated with future regulatory actions that facilitate broader acquisition of commercial items, and cited policies that restrict the commercial item acquisition process and pose a serious threat to the Government's access to the commercial industrial base.

Response: These comments are outside the scope of this case, but will be considered in relation to future regulatory actions.

4. Other expansion of the definition of ''commercial item.''

Comment: One respondent recommended expanding the definition of ''commercial item'' to include ''spare assemblies or piece parts which are a component of the higher level commercial item.''

Response: This recommendation is outside the scope of this case, and the Councils do not believe there is a need for additional regulatory clarification of this nature.

III. Expected Impact on the Public

Implementation of this rule allows for an increased number of transactions to benefit from the less burdensome requirements associated with rules governing commercial items. Under this rule, for the first time, NDIs that are developed exclusively at private expense and sold in substantial quantities to multiple foreign governments may be treated as commercial items.

Because commercial items, which include commercially available off-the-shelf items, are sold to the Government in the same way as NDIs, the Government can take advantage of technological advances without the need for costly, time-consuming, Government-sponsored research and development programs. All of this is made possible due to previous testing and general acceptance of the product in the commercial marketplace or by a state, local, or foreign government.

To promote the Government's acquisition of commercial items, the law and FAR part 12 create a preference for buying commercial items and provide relief from certain recordkeeping, reporting, and compliance requirements. According to an analysis published by the Section 809 Panel at page 23 of its ''May 2017 Interim Report,'' available at *https://section809panel.org/wp-content/uploads/2017/05/Sec809Panel_Interim-Report_May2017_FINAL-for-web.pdf,* commercial item acquisitions are subject to up to 138 contract clauses, while acquisitions for NDIs that do not meet the commercial item definition as well as acquisitions for noncommercial items could be subject to nearly 500 clauses, depending on the principal type and purpose of the contract. For example, a commercial firm selling an NDI today to multiple foreign governments in substantial quantities could face compliance costs with the Truth in Negotiations Act (TINA), which requires implementation of Government-specific business systems for any modifications to competitively awarded items. TINA has long been recognized under analyses performed in accordance with the Paperwork Reduction Act as one of the most costly statutes and regulations in Federal procurement. In addition, policies governing commercial item acquisitions favor reliance on commercial sector business practices and use of standard commercial terms and conditions to the maximum extent practicable. Each of these dimensions of the commercial item framework contributes to more simplified and less costly transactions.

DoD, GSA, and NASA are unable to monetize the cost savings, because procurement data is not captured in a manner that enables a determination to be made regarding how many NDIs developed exclusively at private expense have been sold or are expected to be sold to multiple foreign governments in substantial quantities, that are not also sold in substantial quantities to multiple State and local governments. For these reasons and though the public comment period did not provide data to monetize savings, this rule is considered deregulatory.

IV. Applicability to Contracts At or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule amends the FAR to change the definition of ''commercial item''. The revision does not add any new solicitation provisions or clauses, or impact any existing provisions or clauses.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a significant regulatory action and was not subject to the review of the Office of Information and Regulatory Affairs under section 6(b) of E.O. 12866. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This final rule is an E.O. 13771 deregulatory action per the discussion found in Section III, Expected Impact on the Public, of this preamble.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule is required to implement section 847 of the NDAA for FY 2018. The objective is to treat nondevelopmental items, developed at private expense, that have been sold to multiple foreign governments, as commercial items.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will impact any entities offering to the Federal Government a nondevelopmental item, developed at private expense, that has been sold to multiple foreign governments, but did not otherwise qualify as a commercial item. There are over 327,458 small business registrants in the System for Award Management database, but it is unknown how many of those registrants may offer to the Government a nondevelopmental item, developed at private expense, that has been sold to multiple foreign governments, but does not otherwise qualify as a commercial item. It is not expected that this rule will have a significant economic impact on a substantial number of small entities, because the number of affected entities is not expected to be substantial, and any impact will be beneficial, due to the treatment of additional nondevelopmental items as commercial items.

The rule does not include additional reporting or recordkeeping requirements.

There are no available alternatives to the rule to accomplish the desired objective of

the statute. Small businesses would benefit from the streamlined commercial acquisition procedures.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 2

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, GSA, DoD, and NASA amend 48 CFR part 2 as follows:

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 1. The authority citation for 48 CFR part 2 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

■ 2. Amend section 2.101, in paragraph (b)(2), in the definition of ''commercial item'', by revising paragraph (8), to read as follows:

2.101 Definitions.

* * * * *

Commercial item * * *

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments or to multiple foreign governments.

* * * * *

[FR Doc. 2019–21847 Filed 10–9–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2019–0001, Sequence No. 6]

Federal Acquisition Regulation; Federal Acquisition Circular 2020–01; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2020–01, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2020–01, which precedes this document. These documents are also available via the internet at *http://www.regulations.gov.*

DATES: October 10, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–01, FAR Case 2018–008.

RULE LISTED IN FAC 2020–01

Subject	FAR Case	Analyst
* Definition of ''Commercial Item''.	2018–008	Delgado

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific subject set forth in the document following this item summary. FAC 2020–01 amends the FAR as follows:

Definition of ''Commercial Item'' (FAR Case 2018–008)

This final rule amends the definition of ''commercial item'' in FAR part 2 to reflect the statutory change made by section 847 of the National Defense Authorization Act for Fiscal Year 2018. Section 847 expands the universe of nondevelopmental items that qualify as commercial items to include items sold, in substantial quantities on a competitive basis, to multiple foreign governments.

This final rule will not have a significant economic impact on a substantial number of small entities.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2019–21848 Filed 10–9–19; 8:45 am]

BILLING CODE 6820–EP–P

■ e. Adding paragraph (b)(7)(iii).

The additions read as follows:

16.505 Ordering.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(F) Except for DoD, ensure the criteria at 15.101–2(c)(1)–(5) are met when using the lowest price technically acceptable source selection process; and

(G) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101–2(d).

* * * * *

(7) * * *

(iii) Except for DoD, the contracting officer shall document in the contract file a justification for use of the lowest price technically acceptable source selection process, when applicable.

* * * * *

PART 37—SERVICE CONTRACTING

■ 7. Amend section 37.102 by adding paragraph (j) to read as follows:

37.102 Policy.

* * * * *

(j) Except for DoD, see 15.101–2(d) for limitations on the use of the lowest price technically acceptable source selection process to acquire certain services.

[FR Doc. 2019–20798 Filed 10–1–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 15, 30, and 52

[FAR Case 2018–005; Docket No. FAR–2018–0006, Sequence No. 1]

RIN 9000–AN69

Federal Acquisition Regulation: Modifications to Cost or Pricing Data Reporting Requirements

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to increase the threshold for requiring certified cost or pricing data.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before December 2, 2019 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–005 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2018–005''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2018–005''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''FAR Case 2018–005'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite ''FAR Case 2018–005'', in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite ''FAR Case 2018–005''.

SUPPLEMENTARY INFORMATION:

I. Background

Cost or Pricing Data: Truth in Negotiations, 10 U.S.C. 2306a, and Required cost or pricing data and certification, 41 U.S.C. 3502, require that the Government obtain certified cost or pricing data for certain contract actions listed at 15.403–4(a)(1), such as negotiated contracts, certain subcontracts and certain contract modifications. Section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 amends 10 U.S.C. 2306a and 41 U.S.C. 3502 to increase the threshold for requesting certified cost or pricing data from $750,000 to $2 million for contracts entered into after June 30, 2018.

II. Discussion and Analysis

DoD, GSA and NASA are proposing to amend the FAR to implement section 811 of the NDAA for FY 2018 to increase the threshold for requesting certified cost or pricing data from $750,000 to $2 million for contracts entered into after June 30, 2018.

In the case of a change or modification made to a prime contract that was entered into before July 1, 2018, the threshold for obtaining certified cost or pricing data remains $750,000, with the following exception. Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to reflect a $2 million threshold for obtaining certified cost or pricing data from subcontractors. Similarly for sealed bidding, upon request by a contractor, the contracting officer shall modify the contract without requiring consideration to replace the relevant clause.

The proposed changes to the FAR are summarized in the following paragraphs.

A. Subpart 14.2, Solicitation of Bids, is revised to add the prescription for Alternate I of the clause at FAR 52.214–28, Subcontractor Certified Cost or Pricing Data-Modifications-Sealed Bidding. The Alternate I will be used in the circumstances described at FAR 14.201–7(c)(1)(ii).

B. Subpart 15.4, Contract Pricing, is revised to incorporate the revised threshold for obtaining certified cost or pricing data at FAR 15.403–4(a)(1). The example provided of a price adjustment is also revised to reflect the increased threshold. A new paragraph (a)(3) is added to allow a contractor with a prime contract entered into before July 1, 2018, to request that the contracting officer modify the contract without requiring consideration to reflect a $2 million threshold for obtaining certified cost or pricing data on subcontracts entered on and after July 1, 2018, by replacing the following clauses, as applicable. The prescriptions at FAR 15.408 will instruct the contracting officer to:

- Replace FAR clause 52.215–12, Subcontractor Certified Cost or Pricing Data, with its Alternate I.
- Replace FAR clause 52.215–13, Subcontractor Certified Cost or Pricing

Data—Modifications, with its Alternate I.

C. Subpart 30.2, CAS Program Requirements, is revised to reflect the new $2 million threshold for inserting the FAR clause at 52.230–3, Disclosure and Consistency of Cost Accounting Practices, in negotiated contracts. The threshold for Cost Accounting Standards (CAS) applicability is required by 41 U.S.C. 1502(b)(1)(B) to be the same as the threshold at FAR 15.403–4(a)(1). Thus, changes are made to adjust the thresholds. Conforming changes are also made to the thresholds in FAR provision at 52.230–1, Cost Accounting Standards Notices and Certification; and the clauses at 52.230–2, Cost Accounting Standards; 52.230–3, Disclosure and Consistency of Cost Accounting Practices; 52.230–4, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns; and 52.230–5, Cost Accounting Standards—Educational Institution.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

The proposed changes are not applicable to contracts at or below the simplified acquisition threshold or to contracts for the acquisition of commercial items.

IV. Expected Cost Savings

DoD, GSA, and NASA have performed a regulatory cost analysis on this rule. The following is a summary of the estimated public and Government cost savings. This rule will impact large and small businesses which currently compete on solicitations issued using FAR part 15 negotiation procedures and are valued between $750,000 and $2 million as these firms will no longer be required to submit certified cost or pricing data between those amounts. In addition, because of the comparable increase in the cost accounting standards threshold, fewer contractors will be required to comply with FAR clauses that implement the cost accounting standards. The following is a summary of the estimated cost savings to the public calculated in perpetuity in 2016 dollars at a 7 percent discount rate:

Present Value Cost Savings	−$588,988,385
Annualized Cost Savings	−$ 41,229,187
Annualized Value Cost Savings as of 2016 if Year 1 is 2020	−$ 31,453,549

The following is a summary of the estimated cost savings to the Government calculated in perpetuity in 2016 dollars at a 7 percent discount rate:

Present Value Cost Savings	−$90,669,628
Annualized Cost Savings	−$6,346,874
Annualized Value Cost Savings as of 2016 if Year 1 is 2020	−$4,841,999

The Councils welcome comments on both the methodology and the analysis during the public comment period on this rule. To access the full Regulatory Cost Analysis for this rule, go to the Federal eRulemaking Portal at *www.regulations.gov,* search for ''FAR Case 2018–005,'' click ''Open Docket,'' and view ''Supporting Documents.''

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, is not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This proposed rule is expected to be an E.O. 13771 deregulatory action. Information on the estimated cost savings of this rule are discussed in the ''Expected Cost Savings'' section of this preamble.

VII. Regulatory Flexibility Act

The changes in this rule are not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, *et seq.* However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and it is summarized as follows:

DoD, GSA, and NASA are proposing to amend the FAR to increase the threshold for requiring certified cost or pricing data from $750,000 to $2 million.

The objective is to implement section 811 of the National Defense Authorization Act for Fiscal Year 2018 which amends 10 U.S.C. 2306a and 41 U.S.C. 3502 to increase the threshold for requesting certified cost or pricing data from $750,000 to $2 million.

This rule will impact small entities who compete on solicitations issued using FAR part 15, Contracting by Negotiation, valued between $750,000 and $2 million. It also impacts subcontracts and contract modifications, including those contracts awarded under sealed bidding procedures, valued between $750,000 and $2 million. Offerors and contractors under the revised threshold will no longer be required to submit ''certified cost or pricing data'' and will now submit ''data other than certified cost or pricing data,'' which takes less time to prepare.

In order to calculate the savings due to the increased threshold, the same FY 2016 Federal Procurement Data System (FPDS) data was utilized that was used to calculate information collection burdens associated with submission of certified cost or pricing data and of data other than certified cost or pricing data under the Office of Management and Budget (OMB) Control Number 9000–0013, which was cleared in January 2018. For contracts and orders awarded using FAR part 15 that were valued between $750,000 and $2 million, reflecting the actions impacted by the increase in the threshold, there were 2,697 contract awards/orders issued, 636 modifications to contracts or orders, an estimated 1,288 subcontracts awarded, and 592 subcontract modifications. Of these responses, 3,364 were from small entities. Of the 1,871 small entities that were awarded contract or issued orders, 1,501 were unique small entities (about 1.25 contracts/orders per small entity). We estimate a comparable ratio of actions to entities in the other categories. This ratio is less than the overall ratio of actions to entities because this is just a small slice of the total range covered by the information collection clearance. The cost accounting standards do not apply to small entities, therefore that threshold change only affects other than small entities.

The proposed rule does not include additional reporting or record keeping requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no available alternatives to the proposed rule to accomplish the desired objective of the statute. However, the impact on small entities will be beneficial, as it will relieve them of the requirement to provide certified cost or pricing data when the acquisition is less than $2 million. Instead, they may submit data other than certified cost or pricing data which is estimated to save 40 hours of labor effort and related cost savings for each submission not requiring certification.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2018–005), in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does apply. However, DoD, GSA, and NASA believe the changes proposed by this rule will result in a reduction to the paperwork burden approved under the following two OMB Control Numbers: 9000–0013, Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, and 9000–0129, Cost Accounting Standards Administration.

OMB Control Number 9000–0013

OMB Control Number 9000–0013 covers the paperwork burden for submitting cost or pricing data and certified cost or pricing data. With this proposed rule, the public reporting burden for this collection is expected to decrease from 9,759,813 hours to 9,160,160 as fewer contractors will be required to submit certified cost or pricing data.

Based on this proposed rule, the revised annual reporting burden has been estimated as follows:

FAR Clause 52.214–28:
Respondents 2
Total annual responses 2
Response burden hours 320
FAR Clause 52.215–12:
Respondents 2,544
Total annual responses 2,544
Response burden hours 407,040
FAR Clause 52.215–13:
Respondents 700
Total annual responses 700
Response burden hours 112,000
FAR Clause 52.215–20:
Respondents 25,853
Total annual responses 117,225
Response burden hours 6,259,120
FAR Clause 52.215–21:
Respondents 8,440
Total annual responses 27,623
Response burden hours 2,381,680

As part of this proposed rulemaking, the FAR Council is soliciting comments from the public in order to:

(1) Evaluate whether the proposed revisions to this collection of information are necessary for the proper performance of the functions of the FAR Council, including whether the information will have practical utility;

(2) Evaluate the accuracy of the FAR Council's estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate collection techniques.

Organizations and individuals desiring to submit comments on the information collection requirements associated with this rulemaking should submit comments not later than December 2, 2019 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB). The copy to GSA can be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. Go to *http://www.regulations.gov* and follow the instructions on the site.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, 2nd Floor, Washington, DC 20405. ATTN: Lois Mandell/IC 9000–0013, Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

Instructions: All items submitted must cite Information Collection 9000–0013, Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

OMB Control Number 9000–0129

OMB Control Number 9000–0129 requires contractors performing CAS-covered contracts to submit notifications and descriptions of certain cost accounting practice changes, including revisions to their Disclosure Statements, if applicable. With this proposed rule, the public reporting burden for this collection is expected to decrease from 474,075 to 314,475 hours as fewer contracts will be over the threshold for CAS applicability, which is the same as the threshold for obtaining certified cost or pricing data. A request for public comment on a revision and extension of OMB Control Number 9000–0129 was published on August 2, 2019.

List of Subjects in 48 CFR Parts 14, 15, 30, and 52

Government procurement.

William F. Clark,
Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 14, 15, 30, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 14, 15, 30, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 14—SEALED BIDDING

■ 2. Amend section 14.201–7 by revising paragraph (c)(1) to read as follows:

14.201–7 Contract clauses.

* * * * *

(c)(1) When contracting by sealed bidding, the contracting officer shall—

(i) Insert the clause at 52.214–28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at 15.403–4(a)(1); or

(ii) Upon request of a contractor in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to replace clause 52.214–28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, with its Alternate I.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 3. Amend section 15.403–4 by—

■ a. Revising the third sentence of paragraph (a)(1) introductory text;

■ b. Revising the second sentence of paragraph (a)(1)(iii) introductory text; and

■ c. Adding paragraph (a)(3).

The revised and added text reads as follows:

15.403–4 Requiring certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

(a)(1) * * * The threshold for obtaining certified cost or pricing data is $750,000 for prime contracts awarded before July 1, 2018, and $2 million for

prime contracts awarded on or after July 1, 2018.

* * * * *

(iii) * * * Price adjustment amounts must consider both increases and decreases (*e.g.,* a $500,000 modification resulting from a reduction of $1,500,000 and an increase of $1,000,000 is a $2,500,000 pricing adjustment exceeding the $2,000,000 threshold).

* * *

* * * * *

(3) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract, without requiring consideration, to reflect a $2 million threshold for obtaining certified cost or pricing data on subcontracts entered on and after July 1, 2018. See 15.408.

■ 4. Amend section 15.408 by revising paragraphs (d) and (e) to read as follows:

15.408 Solicitation provisions and contract clauses.

* * * * *

(d) *Subcontractor Certified Cost or Pricing Data.* The contracting officer shall—

(1) Insert the clause at 52.215–12, Subcontractor Certified Cost or Pricing Data, in solicitations and contracts when the clause prescribed in paragraph (b) of this section is included; or

(2) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration, to replace clause 52.215–12, Subcontractor Certified Cost or Pricing Data, with its Alternate I.

(e) *Subcontractor Certified Cost or Pricing Data—Modifications.* The contracting officer shall—

(1) Insert the clause at 52.215–13, Subcontractor Certified Cost or Pricing Data—Modifications, in solicitations and contracts when the clause prescribed in paragraph (c) of this section is included; or

(2) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration, to replace clause 52.215–13, Subcontractor Certified Cost or Pricing Data—Modifications, with its Alternate I.

* * * * *

PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

30.201–4 [Amended]

■ 5. Amend section 30.201–4 by removing from paragraph (b)(1) ''$750,000'' and adding ''$2 million'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.214–28 by—

■ a. Removing from the clause prescription reference ''14.201–7(c)'' and adding ''14.201–7(c)(1)(i)'' in its place;

■ b. Adding the Alternate I to the basic clause.

The revised text reads as follows:

52.214–28 Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding.

* * * * *

Alternate I (DATE). As prescribed in 14.201–7(c)(1)(ii), substitute the following paragraph (b) in place of paragraph (b) of the basic clause:

(b) Unless an exception under FAR 15.403–1(b) applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), as part of the subcontractor's proposal in accordance with FAR 15.408, Table 15–2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)—

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed $750,000; or

(2) Before awarding any subcontract expected to exceed $2 million on or after July 1, 2018, or modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed $2 million.

■ 7. Amend section 52.215–12 by—

■ a. Removing from the clause prescription reference ''15.408(d)'' and adding ''15.408(d)(1)'' in its place;

■ b. Revising the clause date;

■ c. Removing from the clause ''15.403–4'' and replacing it with ''15.403–4(a)(1)'', twice; and

■ d. Adding the Alternate I to the basic clause.

The revised text reads as follows:

52.215–12 Subcontractor Certified Cost or Pricing Data.

* * * * *

Subcontractor Certified Cost or Pricing Data (Date)

* * * * *

Alternate I (Date). As prescribed in 15.408(d)(2), substitute the following paragraph (a) in place of paragraph (a) of the basic clause:

(a) Unless an exception under FAR 15.403–1 applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408, Table 15–2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)—

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed $750,000; or

(2) Before awarding any subcontract expected to exceed $2 million on or after July 1, 2018, or modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed $2 million.

■ 8. Amend section 52.215–13 by—

■ a. Removing from the clause prescription reference ''15.408(e)'' and adding ''15.408(e)(1)'' in its place;

■ b. Revising the clause date;

■ c. Removing from the clause ''15.403–4'' and replacing it with ''15.403–4(a)(1)'', four times; and

■ d. Adding the Alternate I to the basic clause.

The revised text reads as follows:

52.215–13 Subcontractor Certified Cost or Pricing Data—Modifications.

* * * * *

Subcontractor Certified Cost or Pricing Data—Modifications (Date)

* * * * *

Alternate I (DATE). As prescribed in 15.408(e)(2), substitute the following paragraphs (a), (b), and (d) for paragraphs (a), (b), and (d) of the basic clause:

(a) The requirements of paragraphs (b) and (c) of this clause shall—

(1) Become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403–4(a)(1); and

(2) Be limited to such modifications.

(b) Unless an exception under FAR 15.403–1 applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408, Table 15–2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)—

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed $750,000; or

(2) Before modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed $2 million.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds $2 million.

■ 9. Amend section 52.230–1 by—
■ a. Removing from the provision prescription reference ''30.201–3'' and the word ''provisions'', adding ''30.201–3(a)'' and ''provision'' in its place respectively;
■ b. Revising the date of the provision; and
■ c. Removing from paragraph (a) ''$750,000'' and adding ''$2 million'' in its place.

The revision reads as follows:

52.230–1 Cost Accounting Standards Notices and Certification.

* * * * *

Cost Accounting Standards Notices and Certification ([DATE])

* * * * *

■ 10. Amend section 52.230–2 by—
■ a. Removing from the clause prescription reference ''30.201–4(a)'' and adding ''30.201–4(a)(1)'' in its place;
■ b. Revising the date of the clause; and
■ c. Removing from paragraph (d) ''$750,000'' and adding ''$2 million'' in its place.

The revision reads as follows:

52.230–2 Cost Accounting Standards.

* * * * *

Cost Accounting Standards ([DATE])

* * * * *

■ 11. Amend section 52.230–3 by revising the date of the clause, and removing from paragraph (d)(2) ''$750,000'' and adding ''$2 million'' in its place.

The revision reads as follows:

52.230–3 Disclosure and Consistency of Cost Accounting Practices.

* * * * *

Disclosure and Consistency of Cost Accounting Practices ([DATE])

* * * * *

■ 12. Amend section 52.230–4 by—
■ a. Removing from the clause prescription reference ''30.201–4(c)'' and adding ''30.201–4(c)(1)'' in its place;
■ b. Revising the date of the clause; and
■ c. Removing from paragraph (d)(2) ''$750,000'' and adding ''$2 million'' in its place.

The revision reads as follows:

52.230–4 Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns.

* * * * *

Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns ([DATE])

* * * * *

■ 13. Amend section 52.230–5 by—
■ a. Removing from the clause prescription reference ''30.201–4(e)'' and adding ''30.201–4(e)(1)'' in its place;
■ b. Revising the date of the clause; and
■ c. Removing from paragraph (d)(2) ''$750,000'' and adding ''$2 million'' in its place.

The revision reads as follows:

52.230–5 Cost Accounting Standards—Educational Institution.

* * * * *

Cost Accounting Standards—Educational Institution ([DATE])

* * * * *

[FR Doc. 2019–20797 Filed 10–1–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 385

[Docket No. FMCSA–2019–0068]

RIN 2126–AC28

Incorporation by Reference; North American Standard Out-of-Service Criteria; Hazardous Materials Safety Permits

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: FMCSA proposes to amend its Hazardous Materials Safety Permits regulations to incorporate by reference the updated Commercial Vehicle Safety Alliance (CVSA) handbook. The Out-of-Service Criteria provide enforcement personnel nationwide, including FMCSA's State partners, with uniform enforcement tolerances for roadside inspections. Currently, the regulations reference the April 1, 2018, edition of the handbook. Through this document, FMCSA proposes to incorporate by reference the April 1, 2019, edition.

DATES: Comments on this document must be received on or before November 1, 2019.

ADDRESSES: You may submit comments identified by Docket Number FMCSA–2019–0068 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments, including collection of information comments for the Office of Information and Regulatory Affairs, OMB.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Huntley, Chief, Vehicle and Roadside Operations Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 by telephone at (202) 366–9209 or by email at *michael.huntley@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION: This notice of proposed rulemaking (NPRM) is organized as follows:

■ 21. Amend section 52.209–5 by revising the date of the provision and removing from paragraph (a)(1)(i)(D) introductory text ''$3,500'' and adding ''the threshold at 9.104–5(a)(2)'' in its place.

The revision reads as follows:

52.209–5 Certification Regarding Responsibility Matters.

* * * * *

Certification Regarding Responsibility Matters (DATE)

* * * * *

■ 22. Amend section 52.212–1 by revising the date of the provision and removing from paragraph (j) ''$3,500, and offers of $3,500'' and adding ''the micro-purchase threshold, and offers at the micro-purchase threshold'' in its place.

The revision reads as follows:

52.212–1 Instructions to Offerors—Commercial Items.

* * * * *

Instructions to Offerors—Commercial Items (DATE)

* * * * *

■ 23. Amend section 52.212–3 by—

■ (a) Revising the date of the provision;

■ (b) Removing from paragraph (h)(4) introductory text ''$3,500'' and adding ''the threshold at 9.104–5(a)(2)'' in its place; and

■ (c) Removing from paragraph (o)(2)(iii) ''$3,500'' and adding ''the threshold at 25.703–2(a)(2)'' in its place.

The revision reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (DATE)

* * * * *

■ 24. Amend section 52.212–5 by—

■ (a) Revising the date of the clause;

■ (b) Removing from paragraph (b)(17)(i) ''(Aug 2018)'' and adding ''(DATE); and

■ (c) Removing from paragraph (b)(17)(v) ''(Aug 2018)'' and adding ''(DATE) in its place.

The revision reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (DATE)

* * * * *

■ 25. Amend section 52.219–9 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (d)(11)(iii) ''$150,000'' and adding ''the simplified acquisition threshold'' in its place;

■ c. Revising the date of Alternate IV; and

■ d. In Alternate IV, removing from (d)(11)(iii) ''$150,000'' and adding ''the simplified acquisition threshold'' in its place.

The revisions read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (DATE)

* * * * *

Alternate IV (DATE). * * *

* * * * *

■ 26. Amend section 52.225–25 by revising the provision title and date, and removing from paragraph (c)(3) ''$3,500'' and adding ''the threshold at 25.703–2(a)(2)'' in its place.

The revisions read as follows:

52.225–25 Prohibition on Contracting with Entities Engaging in Certain Activities or Transactions Relating to Iran—Representation and Certifications.

* * * * *

Prohibition on Contracting With Entities Engaging in Certain Activities or Transactions Relating to Iran—Representation and Certifications (DATE)

* * * * *

[FR Doc. 2019–20796 Filed 10–1–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 15, 16, and 37

[FAR Case 2018–016; Docket No. FAR–2018–0016, Sequence No. 1]

RIN 9000–AN75

Federal Acquisition Regulation: Lowest Price Technically Acceptable Source Selection Process

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which specifies the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation; and requires procurements predominantly for the acquisition of certain services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before December 2, 2019 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–016 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2018–016''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2018–016''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''FAR Case 2018–016'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite ''FAR Case 2018–016'', in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or *michaelo.jackson@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite ''FAR Case 2018–016''.

SUPPLEMENTARY INFORMATION:

I. Background

Section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note) makes it the policy of the Government to avoid using Lowest Price Technically Acceptable (LPTA) source selection criteria in circumstances that would

deny the Government the benefits of cost and technical tradeoffs in the source selection process. The section requires that LPTA source selection criteria be used only when: (1) An executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers; (2) the executive agency would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal; (3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal; (4) the executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency; (5) the contracting officer has included a justification for the use of an LPTA evaluation methodology in the contract file; and (6) the executive agency has determined that the lowest price reflects total costs, including for operations and support.

Additionally, section 880 requires that the use of LPTA source selection criteria be avoided, to the maximum extent practicable, in procurements that are predominantly for the acquisition of: information technology services; cybersecurity services; systems engineering and technical assistance services; advanced electronic testing; audit or audit readiness services; health care services and records; telecommunications devices and services; or other knowledge-based professional services; personal protective equipment; or, knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

II. Discussion and Analysis

This proposed rule would require contracting officers to: ensure procurements meet the criteria of section 880 before including LPTA source selection criteria in solicitations; document the contract file with a justification for the use of the LPTA source selection process, when applicable; and, to avoid, to the maximum extent practicable, the use of LPTA source selection criteria in procurements that are predominantly for the supplies and services identified in section 880. This rule does not address the applicability of section 880 to the Federal Supply Schedules Program (Schedules Program). GSA will separately address the applicability of section 880 to the Schedules Program.

In addition, section 880 does not apply to DoD. Instead, section 813 of the NDAA for FY 2017 (10 U.S.C. 2305 Note) and section 822 of the NDAA for FY 2018 (10 U.S.C. 2305 Note) establish a similar, but not the same, set of criteria for DoD procurements to meet in order to use LPTA source selection criteria in solicitations. These sections are being implemented in a separate Defense Federal Acquisition Regulation Supplement case (2018–D010).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This proposed rule does not create any new provisions or clauses, nor does it change the applicability of any existing provisions or clauses included in solicitations and contracts valued at or below the SAT, or for commercial items, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

The rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq*. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) are proposing to revise the Federal Acquisition Regulation (FAR) to:

- Specify the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation; and,
- Require procurements predominantly for the acquisition of certain services or supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable.

The objective of the rule is to avoid using LPTA source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process. The legal basis for the rule is section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). The rule does not cover DoD, which has already been covered by section 813 of the NDAA for FY 2017 and section 822 of the NDAA for FY 2018.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq*. The rule primarily affects internal Government requirements determination decisions, acquisition strategy decisions, and contract file documentation requirements. The Government does not collect data on the total number of solicitations issued on an annual basis that do or do not specify the use of the LPTA source selection process. However, the Federal Procurement Data System (FPDS) provides the following information for fiscal year 2018:

- Federal competitive contracts and orders awarded using FAR parts 13, 15, or 16.5 procedures. In FY 2018, the Federal Government, excluding DoD, awarded approximately 82,337 new contracts and orders using the competitive procedures of FAR 13, 15, or 16.5. This data excludes acquisitions for the supply/service categories identified in section 880(c) of the NDAA for FY 2019. Of the 82,337 contracts and orders, approximately 69 percent (or 56,622 contracts and orders) were awarded to approximately 27,029 unique small businesses. It is important to note that FPDS does not collect data on solicitations, but does collect information on competitively awarded contracts using various FAR procedures. Therefore, this data represents contracts that were awarded using LPTA and tradeoff source selection procedures.
- Federal competitive contracts and orders awarded for certain services and supplies. In FY 2018, the Federal Government, excluding DoD, awarded approximately 22,581 new contracts and orders potentially for the supplies and services identified in section 880(c) of the NDAA for FY 2019 using the competitive procedures of FAR parts 13, 15, and 16.5, of which approximately 63 percent (or 14,285 contracts and orders) were awarded to approximately 10,129 unique small businesses.

The proposed rule does not impose any Paperwork Reduction Act reporting or

recordkeeping requirements on any small entities. The rule may impact some small businesses. Some offerors may need to change the structure of their quotes or offers to conform to instructions and corresponding evaluation criteria in solicitations that use tradeoff source selection criteria, as LPTA source selection criteria is now unavailable for use in some circumstances. This impact, which represents the incremental difference between preparing a noncomplex proposal to be evaluated using LPTA criteria and preparing the additional information necessary to evaluate a proposal using tradeoff criteria, is expected to be minimal.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2018–016) in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 12, 13, 15, 16, and 37

Government procurement.

William F. Clark,

Director,

Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 12, 13, 15, 16 and 37 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 13, 15, 16 and 37 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Revise section 12.203 by redesignating the text as paragraph (a) and adding paragraph (b) to read as follows:

12.203 Procedures for solicitation, evaluation, and award.

* * * * *

(b) Contracting officers shall ensure the criteria at 15.101–2(c) are met when using the lowest price technically acceptable source selection process.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 3. Amend section 13.106–1 by adding paragraphs (a)(2)(i) and (a)(2)(ii) to read as follows:

13.106–1 Soliciting competition.

(a) * * *

(2) * * *

(i) Except for DoD, contracting officers shall ensure the criteria at 15.101–2(c)(1)–(5) are met when using the lowest price technically acceptable source selection process.

(ii) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101–2(d).

* * * * *

■ 4. Amend section 13.106–3 by—

■ a. In paragraph (b)(3), removing ''statements—'' and adding ''statements, when applicable—'' in its place;

■ b. In paragraph (b)(3)(i), removing ''; or'' and adding '';'' in its place;

■ c. In paragraph (b)(3)(ii), removing ''.'' and adding ''; and''

■ d. Adding paragraph (b)(3)(iii).

The addition reads as follows:

13.106–3 Award and documentation.

* * * * *

(b) * * *

(3) * * *

(iii) Except for DoD, when using lowest price technically acceptable source selection process, justifying the use of such process.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 5. Amend section 15.101–2 by adding paragraphs (c) and (d) to read as follows:

15.101–2 Lowest price technically acceptable source selection process.

* * * * *

(c) Except for DoD, in accordance with section 880 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note), the lowest price technically acceptable source selection process shall only be used when—

(1) The agency can comprehensively and clearly describe the minimum requirements in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

(2) The agency would realize no, or minimal, value from a proposal that exceeds the minimum technical or performance requirements;

(3) The agency believes the technical proposals will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(4) The agency has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit to the agency;

(5) The agency determined that the lowest price reflects the total cost, including operation and support, of the product(s) or service(s) being acquired; and

(6) The contracting officer documents the contract file describing the circumstances that justify the use of the lowest price technically acceptable source selection process.

(d) Except for DoD, in accordance with section 880 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note), contracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable source selection process in the case of a procurement that is predominantly for the acquisition of—

(1) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services;

(2) Personal protective equipment; or

(3) Knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

PART 16—TYPES OF CONTRACTS

■ 6. Amend section 16.505 by—

■ a. Removing from the end of paragraph (b)(1)(ii) ''must—'' and adding ''shall—'' in its place;

■ b. Removing from paragraph (b)(1)(ii)(D) ''contract; and'' and adding ''contract;'' in its place;

■ c. Removing from paragraph (b)(1)(ii)(E) ''decision.'' and adding ''decision;'' in its place;

■ d. Adding paragraphs (b)(1)(ii)(F) and (b)(1)(ii)(G); and

■ e. Adding paragraph (b)(7)(iii).

The additions read as follows:

16.505 Ordering.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(F) Except for DoD, ensure the criteria at 15.101–2(c)(1)–(5) are met when using the lowest price technically acceptable source selection process; and

(G) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101–2(d).

* * * * *

(7) * * *

(iii) Except for DoD, the contracting officer shall document in the contract file a justification for use of the lowest price technically acceptable source selection process, when applicable.

* * * * *

PART 37—SERVICE CONTRACTING

■ 7. Amend section 37.102 by adding paragraph (j) to read as follows:

37.102 Policy.

* * * * *

(j) Except for DoD, see 15.101–2(d) for limitations on the use of the lowest price technically acceptable source selection process to acquire certain services.

[FR Doc. 2019–20798 Filed 10–1–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 15, 30, and 52

[FAR Case 2018–005; Docket No. FAR–2018–0006, Sequence No. 1]

RIN 9000–AN69

Federal Acquisition Regulation: Modifications to Cost or Pricing Data Reporting Requirements

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to increase the threshold for requiring certified cost or pricing data.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before December 2, 2019 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–005 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2018–005''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2018–005''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''FAR Case 2018–005'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite ''FAR Case 2018–005'', in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite ''FAR Case 2018–005''.

SUPPLEMENTARY INFORMATION:

I. Background

Cost or Pricing Data: Truth in Negotiations, 10 U.S.C. 2306a, and Required cost or pricing data and certification, 41 U.S.C. 3502, require that the Government obtain certified cost or pricing data for certain contract actions listed at 15.403–4(a)(1), such as negotiated contracts, certain subcontracts and certain contract modifications. Section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 amends 10 U.S.C. 2306a and 41 U.S.C. 3502 to increase the threshold for requesting certified cost or pricing data from $750,000 to $2 million for contracts entered into after June 30, 2018.

II. Discussion and Analysis

DoD, GSA and NASA are proposing to amend the FAR to implement section 811 of the NDAA for FY 2018 to increase the threshold for requesting certified cost or pricing data from $750,000 to $2 million for contracts entered into after June 30, 2018.

In the case of a change or modification made to a prime contract that was entered into before July 1, 2018, the threshold for obtaining certified cost or pricing data remains $750,000, with the following exception. Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to reflect a $2 million threshold for obtaining certified cost or pricing data from subcontractors. Similarly for sealed bidding, upon request by a contractor, the contracting officer shall modify the contract without requiring consideration to replace the relevant clause.

The proposed changes to the FAR are summarized in the following paragraphs.

A. Subpart 14.2, Solicitation of Bids, is revised to add the prescription for Alternate I of the clause at FAR 52.214–28, Subcontractor Certified Cost or Pricing Data-Modifications-Sealed Bidding. The Alternate I will be used in the circumstances described at FAR 14.201–7(c)(1)(ii).

B. Subpart 15.4, Contract Pricing, is revised to incorporate the revised threshold for obtaining certified cost or pricing data at FAR 15.403–4(a)(1). The example provided of a price adjustment is also revised to reflect the increased threshold. A new paragraph (a)(3) is added to allow a contractor with a prime contract entered into before July 1, 2018, to request that the contracting officer modify the contract without requiring consideration to reflect a $2 million threshold for obtaining certified cost or pricing data on subcontracts entered on and after July 1, 2018, by replacing the following clauses, as applicable. The prescriptions at FAR 15.408 will instruct the contracting officer to:

- Replace FAR clause 52.215–12, Subcontractor Certified Cost or Pricing Data, with its Alternate I.
- Replace FAR clause 52.215–13, Subcontractor Certified Cost or Pricing

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1235–AA20

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor is updating and revising the regulations issued under the Fair Labor Standards Act implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees.

DATES: This final rule is effective on January 1, 2020.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

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

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

The Fair Labor Standards Act (FLSA or Act) requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the regular rate of pay. Section 13(a)(1) of the FLSA, commonly referred to as the ''white collar'' or ''EAP'' exemption, exempts from these minimum wage and overtime pay requirements ''any employee employed in a bona fide executive, administrative, or professional capacity.'' The statute delegates to the Secretary of Labor (Secretary) the authority to define and delimit the terms of the exemption. Since 1940, the regulations implementing the exemption have generally required each of the following three tests to be met: (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the ''salary basis test''); (2) the amount of salary paid must meet a minimum specified amount (the ''salary level test''); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the ''duties test'').

The Department of Labor (Department) has long used the salary level test as a tool to help define the white collar exemption on the basis that employees paid less than the salary level are unlikely to be bona fide executive, administrative, or professional employees, and, conversely, that nearly all bona fide executive, administrative, and professional employees are paid at least that much. The salary level test provides certainty for employers and employees, as well as efficiency for government enforcement agencies. The salary level test's usefulness, however, diminishes as the wages of employees entitled to overtime increase and inflation reduces the real value of the salary threshold.

The Department increased the standard salary level from $455 per week ($23,660 per year) to $913 per week ($47,476 per year) in a final rule published May 23, 2016 (''2016 final rule''). That rulemaking was challenged in court, and on November 22, 2016, the U.S. District Court for the Eastern District of Texas enjoined the Department from implementing and enforcing the rule. On August 31, 2017, the court granted summary judgment against the Department, invalidating the 2016 final rule because it ''makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties.'' *Nevada* v. *U.S. Dep't of Labor,* 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017). An appeal of that decision to the U.S. Court of Appeals for the Fifth Circuit is being held in abeyance. Currently, the Department is enforcing the regulations in effect on November 30, 2016, including the $455 per week standard salary level, which is the level that was set in a final rule issued April 23, 2004 (''2004 final rule'').

Taking into account the *Nevada* district court's conclusion with respect to the salary level, public comments received in response to a July 26, 2017 Request for Information (RFI), and feedback received at public listening sessions, the Department has undertaken this rulemaking to revise the part 541 regulations so that they

effectively distinguish between the white collar employees whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions and bona fide executive, administrative, and professional employees whom Congress intended to exempt from those statutory requirements.

The Department published a Notice of Proposed Rulemaking (NPRM) on March 22, 2019. The NPRM stated that the standard salary level needed to exceed $455 per week to more effectively serve its purpose, but that the 2016 final rule's increase to $913 per week was inappropriate because it excluded from exemption 4.2 million employees whose duties would have otherwise qualified them for exemption, a result in significant tension with the text of section 13(a)(1). Noting the conclusions of the district court that invalidated the 2016 final rule, the Department explained that the 2016 final rule's inappropriately high salary level ''untethered the salary level test from its historical justification'' of ''[s]etting a dividing line between nonexempt and potentially exempt employees'' by screening out only those employees who, based on their compensation level, are unlikely to be bona fide executive, administrative, or professional employees. To address the district court's and the Department's concern with the 2016 final rule and set a more appropriate salary level, the NPRM proposed to rescind the 2016 final rule and update the salary level by applying the same methodology as the 2004 final rule to current earnings data.

In 2004, the Department set the standard salary level at $455 per week ($23,660 per year), which was approximately the 20th percentile of full-time salaried workers in the South and in the retail industry nationally.[1] Accordingly, in the NPRM, the Department proposed to update the standard salary level to the 20th percentile of full-time salaried workers in the lowest-wage Census Region (the South)[2] and/or in the retail industry nationally using current data.[3] This methodology resulted in a proposed standard salary level of $679 per week ($35,308 per year). Additionally, the Department proposed special salary levels for U.S. territories and an updated base rate for employees in the motion picture producing industry. The Department also proposed to allow employers to count nondiscretionary bonuses and incentive payments toward satisfying up to ten percent of the standard salary level or any of the special salary levels applicable to U.S. territories, so long as such bonuses are paid at least annually. Further, the Department proposed to update the highly compensated employee (HCE) total annual compensation level—a higher compensation level that is paired with a reduced duties requirement to provide an alternative basis for exemption under section 13(a)(1). The HCE level was set at $100,000 in the 2004 final rule and increased to $134,004 in the 2016 final rule, but the Department has continued to enforce the $100,000 level in light of the district court's invalidation of the 2016 final rule. In the NPRM, the Department proposed to update the HCE level by setting it equal to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers nationally, resulting in a level of $147,414 per year. The Department proposed to project both the standard salary level and HCE total annual compensation level to January 2020, the final rule's anticipated effective date. Finally, the Department explained its commitment to update the standard salary level and HCE total compensation levels more frequently in the future using notice-and-comment rulemaking every four years. The Department proposed no changes to the standard duties tests.

The 60-day comment period on the NPRM ended on May 21, 2019, and the Department received more than 116,000 comments. The vast majority of these comments, including tens of thousands of duplicate or similar submissions, were campaign comments using similar template language.[4] After considering the comments, the Department has decided in this final rule to maintain the proposed methodology for updating the part 541 standard salary level, but not to inflate the salary level to January 2020. The Department is also finalizing the special salary levels for certain U.S. territories as proposed, and updating the base rate for employees in the motion picture producing industry. Additionally, the Department is finalizing its proposal to permit employers to count nondiscretionary bonuses, incentives, and commissions toward up to 10 percent of the standard salary level or the special salary levels applicable to the U.S. territories, so long as employers pay those amounts at least annually. The Department has also decided to set the HCE total annual compensation threshold equal to the 80th percentile of earnings of full-time salaried workers nationally, without inflating the threshold to January 2020. When applied to updated data, these methodologies result in a standard salary level of $684 per week ($35,568 per year) and an HCE total annual compensation level of $107,432. Finally, the Department intends to update these thresholds more regularly in the future.

The Department estimates that in 2020, 1.2 million currently exempt employees who earn at least $455 per week but less than the standard salary level of $684 per week will, without some intervening action by their employers, gain overtime eligibility. The Department also estimates that an additional 2.2 million white collar workers who are currently nonexempt because they do not satisfy the EAP duties tests and currently earn at least $455 per week, but less than $684 per week, will have their overtime-eligible status strengthened in 2020 because these employees will now fail both the salary level and duties tests. Lastly, an estimated 101,800 employees who are currently exempt under the HCE test will be affected by the increase in the HCE total annual compensation level. The Department has not made any changes to the duties tests in this final rule.

This rule is considered an Executive Order 13771 deregulatory action. When the Department uses a perpetual time horizon to allow for cost comparisons under Executive Order 13771, and using the 2016 rule as the baseline, the annualized cost savings of this rule is $534.8 million with 7 percent discounting.

Because the Department is currently enforcing the 2004 salary level, much of the economic analysis uses the 2004 rule as the baseline for calculating costs and transfers. The economic analysis

[1] 69 FR 22171.

[2] The South Census Region comprises the following: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

[3] In 2004, the Department looked to the 20th percentile of full-time salaried workers in the South and in the retail industry nationally to validate the standard salary level set in the final rule. In this final rule, the Department set the standard salary level at the 20th percentile of the combined subpopulations of full-time salaried employees in the South and full-time salaried employees in the retail industry nationwide. Accordingly, the use of ''and/or'' when describing the salary level methodology in this final rule reflects that this data set includes full-time salaried workers who work: (1) In the South but not in the retail industry; (2) in the retail industry but not in the South; and (3) in the South in the retail industry.

[4] Specifically, one organization submitted spreadsheets containing over 56,000 comments from individuals. Of the comments contained in this submission, more than 34,000 were duplicates of comments that were submitted separately by these individuals. Additionally, numerous individual comments associated with this campaign were submitted multiple times. Together, these comments make up the vast majority of the comments received.

quantifies the direct costs resulting from the rule: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. The Department estimates that annualized direct employer costs in the first 10 years following the rule's effective date will be $173.3 million with 7 percent discounting, including $543.0 million in Year 1 and $99.1 million in Year 10. This rulemaking will also give employees higher earnings in the form of transfers of income from employers to employees. Annualized transfers are estimated to be $298.8 million over the first ten years, with 7 percent discounting, including $396.4 million in Year 1.

II. Background

A. The FLSA

The FLSA generally requires covered employers to pay their employees at least the federal minimum wage (currently $7.25 an hour) for all hours worked, and overtime premium pay of at least 1.5 times the regular rate of pay for all hours worked over 40 in a workweek.[5] However, there are a number of exemptions from the FLSA's minimum wage and overtime requirements. Section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), exempts from both minimum wage and overtime protection ''any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the Administrative Procedure Act] . . .).'' The FLSA does not define the terms ''executive,'' ''administrative,'' ''professional,'' or ''outside salesman.'' Pursuant to Congress's grant of rulemaking authority, since 1938 the Department has issued regulations at 29 CFR part 541 defining the scope of the section 13(a)(1) exemptions. Because Congress explicitly delegated to the Secretary the power to define and delimit the specific terms of the exemptions through notice and comment rulemaking, the regulations so issued have the binding effect of law. *See Batterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1977).

Employees who meet the requirements of part 541 are not subject to the FLSA's minimum wage and overtime pay requirements. Some state laws have stricter exemption standards than federal law. The FLSA does not preempt any such stricter state standards. If a State establishes a higher standard than the provisions of the FLSA, the higher standard applies in that State. *See* 29 U.S.C. 218(a); 29 CFR 541.4.

B. Regulatory History

The Department has consistently used its rulemaking authority to define and clarify the section 13(a)(1) exemptions. The implementing regulations have generally required each of three tests to be met for the exemptions to apply: (1) The salary basis test; (2) the salary level test; and (3) the duties test.

The first version of part 541, establishing the criteria for exempt status under section 13(a)(1), was promulgated in October 1938.[6] The Department revised its regulations in 1940,[7] 1949,[8] 1954, 1958,[9] 1961, 1963, 1967, 1970, 1973, and 1975.[10] A final rule increasing the salary levels was published on January 13, 1981, but was stayed indefinitely on February 12, 1981.[11] In 1985, the Department published an Advance Notice of Proposed Rulemaking that was never finalized.[12] In 1992, the Department twice revised the part 541 regulations. First, the Department created a limited exception from the salary basis test for public employees.[13] The Department then implemented the 1990 law exempting employees in certain computer-related occupations.[14]

From 1949 until 2004, the part 541 regulations contained two different tests for exemption—a ''long'' test that paired a more rigorous duties test with a lower salary level, and a ''short'' test that paired a more flexible duties test with a higher salary level. On April 23, 2004, the Department issued a final rule, which replaced the ''long'' and ''short'' test system for determining exemption status with a single ''standard'' salary level paired with a ''standard'' duties test.[15] The Department set the standard salary level at $455 per week, and made other changes, some of which are discussed below. In the 2004 final rule, the Department also created the HCE test for exemption, which paired a reduced duties requirement with a higher compensation level ($100,000 per year).

On May 23, 2016, the Department issued another final rule, which raised the standard salary level to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, resulting in a salary level of $913 per week. Additionally, the Department set the HCE total annual compensation level equal to the 90th percentile of earnings of full-time salaried workers nationally ($134,004 annually). The Department also included in the final rule a mechanism to automatically update (every three years) the salary and compensation thresholds, and for the first time permitted nondiscretionary bonuses, incentives, and commissions paid at least quarterly to count toward up to 10 percent of the required salary level.

On November 22, 2016, the United States District Court for the Eastern District of Texas issued a preliminary injunction, enjoining the Department from implementing and enforcing the 2016 final rule, pending further review.[16] On August 31, 2017, the district court granted summary judgment against the Department.[17] The court held that the 2016 final rule's salary level exceeded the Department's authority and that the entire final rule was therefore invalid. The court determined that a salary level that ''supplant[s] an analysis of an employee's job duties'' conflicts with Congress's command to exempt bona fide executive, administrative, and professional employees.[18] As a result of these rulings, the Department has continued to enforce the salary level set in 2004.

On July 26, 2017, the Department published an RFI asking for public input

[5] 29 U.S.C. 201, *et seq.*

[6] 3 FR 2518 (Oct. 20, 1938).

[7] 5 FR 4077 (Oct. 15, 1940). The 1940 regulations were informed by what has come to be known as the Stein Report. *See* ''Executive, Administrative, Professional . . . Outside Salesman'' Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer [Harold Stein] at Hearings Preliminary to Redefinition (Oct. 10, 1940) (''Stein Report'').

[8] 14 FR 7705 (Dec. 24, 1949); 14 FR 7730 (Dec. 28, 1949). The 1949 regulations were informed by what has come to be known as the Weiss Report. *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) (''Weiss Report'').

[9] 23 FR 8962 (Nov. 18, 1958). The 1958 regulations were informed by what has come to be known at the Kantor Report. *See* Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Assistant Administrator, Office of Regulations and Research, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) (''Kantor Report'').

[10] *See* 19 FR 4405 (July 17, 1954); 26 FR 8635 (Sept. 15, 1961); 28 FR 9505 (Aug. 30, 1963); 32 FR 7823 (May 30, 1967); 35 FR 883 (Jan. 22, 1970); 38 FR 11390 (May 7, 1973); 40 FR 7091 (Feb. 19, 1975).

[11] 46 FR 3010 (Jan. 13, 1981); 46 FR 11972 (Feb. 12, 1981).

[12] 50 FR 47696 (Nov. 19, 1985).

[13] 57 FR 37677 (Aug. 19, 1992).

[14] 57 FR 46742 (Oct. 9, 1992); *see* Sec. 2, Pub. L. 101–583, 104 Stat. 2871 (Nov. 15, 1990), *codified at* 29 U.S.C. 213 Note.

[15] 69 FR 22122 (Apr. 23, 2004).

[16] *See Nevada* v. *U.S. Dep't of Labor,* 218 F. Supp. 3d 520 (E.D. Tex. 2016).

[17] *See* 275 F. Supp. 3d 795.

[18] *Id.* at 806.

on what changes the Department should propose in a new NPRM on the EAP exemption.[19] The Department received over 200,000 comments on the RFI. Between September 7 and October 17, 2018, the Department held listening sessions in all five Wage and Hour regions throughout the country, and in Washington, DC, to supplement feedback received as part of the RFI.[20]

On October 30, 2017, the Government appealed the *Nevada* district court's summary judgment decision to the United States Court of Appeals for the Fifth Circuit. On November 6, 2017, the Fifth Circuit granted the Government's motion to hold that appeal in abeyance while the Department undertook further rulemaking to set a new salary level.

On March 22, 2019, the Department issued its NPRM, proposing to update and revise the EAP regulations.

C. Overview of Existing Regulatory Requirements

The regulations in 29 CFR part 541 contain specific criteria that define each category of exemption provided by section 13(a)(1) for bona fide executive, administrative, professional, and outside sales employees, as well as teachers and academic administrative personnel. The regulations also define those computer employees who are exempt under section 13(a)(1) and section 13(a)(17). The employer bears the burden of establishing the applicability of any exemption from the FLSA's pay requirements.[21] Job titles, job descriptions, or the payment of a salary instead of an hourly rate are insufficient, standing alone, to confer exempt status on an employee.

To qualify for the EAP exemption, employees must meet certain tests regarding their job duties [22] and generally must be paid on a salary basis at least the amount specified in the regulations.[23] Some employees, such as business owners, doctors, lawyers, teachers, and outside sales employees, are not subject to salary tests.[24] Others, such as academic administrative personnel and computer employees, are subject to special, contingent earnings thresholds.[25] In 2004, the standard salary level for EAP employees was set at $455 per week (equivalent to $23,660 per year for a full-year worker), and the total annual compensation level for highly compensated employees was set at $100,000.[26] Due to the district court's decision invalidating the 2016 final rule, these are the salary levels the Department is currently enforcing.[27]

The 2004 final rule created the HCE test for exemption. Under the HCE test, employees who receive at least a specified total annual compensation (which must include at least the standard salary amount per week paid on a salary or fee basis) are exempt from the FLSA's overtime requirements if they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in the standard tests for exemption.[28] The HCE test applies only to employees whose primary duty includes performing office or non-manual work.[29] Non-management production line workers and employees who perform work involving repetitive operations with their hands, physical skill, and energy cannot be exempt under this section.[30]

D. The Department's Proposal

On March 22, 2019, the Department issued its proposal to update and revise the regulations issued under section 13(a)(1) of the FLSA.[31] The Department proposed to update the standard salary level by applying to current data the same method as in the 2004 final rule—*i.e.,* by looking at the 20th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (then and now the South) and/or in the retail industry nationwide. The Department also proposed to update the HCE total annual compensation level using the same method used in the 2016 final rule, setting it equivalent to the 90th percentile earnings of full-time salaried workers nationally. The Department proposed to project both levels to January 2020, the anticipated effective date of a final rule. Additionally, the Department proposed a special salary level of $380 per week for American Samoa, a special salary level of $455 per week for Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands, and a special ''base rate'' threshold of $1,036 for employees in the motion picture producing industry. The Department also proposed to permit employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard or special salary levels as long as such payments are made at least annually. As to future updates, the Department reaffirmed its commitment to evaluating the part 541 earnings thresholds more frequently, and stated its intent to propose updates to these levels quadrennially. The Department did not propose any changes to the duties tests.

The Department received more than 116,000 timely comments on the NPRM during the 60-day comment period that ended on May 21, 2019. The Department received comments from a broad array of constituencies, including small business owners, employer and industry associations, individual workers, worker advocacy groups, unions, non-profit organizations, law firms (representing both employers and employees), educational organizations and representatives, religious organizations, economists, Members of Congress, state and local governments, professional associations, and other interested members of the public. All timely received comments may be viewed on the *http://www.regulations.gov* website, docket ID WHD–2019–0001.

Some of the comments the Department received were general statements of support or opposition, and the Department also received many identical or nearly identical ''campaign'' comments sent in response to organized comment initiatives. Nearly all commenters favored some change to the currently enforced regulations, and commenters expressed a wide variety of views on the merits of particular aspects of the Department's proposal. Some commenters, including tens of thousands who submitted similar comments as part of a comment

[19] 82 FR 34616 (July 26, 2017).

[20] Listening Session transcripts may be viewed at *www.regulations.gov,* docket ID WHD–2017–0002.

[21] *See, e.g., Idaho Sheet Metal Works, Inc.* v. *Wirtz,* 383 U.S. 190, 209 (1966); *Walling* v. *Gen. Indus. Co.,* 330 U.S. 545, 547–48 (1947).

[22] *See* §§ 541.100 (executive employees); 541.200 (administrative employees); 541.300–.303 (teachers and professional employees); 541.400 (computer employees); 541.500 (outside sales employees).

[23] Alternatively, administrative and professional employees may be paid on a ''fee basis'' for a single job regardless of the time required for its completion as long as the hourly rate for work performed (*i.e.,* the fee payment divided by the number of hours worked) would total at least the weekly amount specified in the regulation if the employee worked 40 hours. *See* § 541.605.

[24] *See* §§ 541.101; 541.303(d); 541.304(d); 541.500(c); 541.600(e). Such employees are also not subject to a fee-basis test.

[25] *See* § 541.600(c)–(d).

[26] 69 FR 22123.

[27] The current text of the Code of Federal Regulations (CFR) reflects the updates made in the 2016 final rule. Therefore, unless otherwise indicated, citations to part 541 refer to the current CFR, and the amendments to the regulatory text reflect the current CFR's inclusion of the 2016 updates. However, because the Department is currently enforcing the 2004 standard salary and total annual compensation levels, the final rule references the 2004 standard salary and total annual compensation levels.

[28] § 541.601.

[29] § 541.601(d).

[30] *Id.*

[31] 84 FR 10900.

campaign (''Campaign Comments''),[32] requested that the Department reject the proposal and defend the 2016 final rule. The Department has carefully considered the timely submitted comments addressing the proposed changes.

Significant issues raised in the comments are discussed below, along with the Department's responses to those comments. Some commenters appear to have mistakenly filed comments intended for this rulemaking into the dockets for the Department's rulemakings concerning the regular rate (docket ID WHD–2019–0002) or joint employer status (docket ID WHD–2019–0003) under the FLSA. The Department did not consider these misfiled comments in this rulemaking.

The Department received a number of comments that are beyond the scope of this rulemaking. These include, for example, a request that the Department reconsider the scope of the exemption at 29 U.S.C. 207(i) for certain employees of retail and service establishments, and a request for tax write-offs for businesses that pass an annual audit by the Department. In addition, some non-profit organizations asked the Department to work with other federal agencies to create a mechanism that non-profits with government grants and contracts could use to adjust reimbursement rates to cover unanticipated increased costs, such as labor costs due to this rule. For example, in a joint comment, the National Council of Nonprofits and others recommended addressing this issue through changes to the relevant Federal Acquisition Regulations. The Department does not address such issues in this final rule.

Some commenters raised miscellaneous issues that more directly relate to other parts of the Department's regulations. For example, one commenter urged the Department to amend its regular rate regulations to allow the exclusion of any payments that do not count toward the salary level test; one commenter requested that private colleges and universities be permitted to use compensatory time off instead of cash payments for overtime hours; two commenters requested a safe harbor from joint-employment liability for franchisors who help their franchisees implement this rule; and one commenter asked the Department to permit hourly paid employees (beyond just computer employees) to qualify for the exemption. Some commenters requested that the Department make changes to the duties test, either as an alternative to raising the salary level more significantly or regardless of what salary level applies. The Department did not propose any of these changes in the NPRM, and declines to make such changes in this final rule.

A number of commenters asked the Department to provide guidance on how the FLSA applies to non-profit organizations. *See, e.g.,* Colorado Nonprofit Association; Independent Sector; National Council of Nonprofits. The Department notes that the FLSA does not provide special rules for non-profit organizations or their employees, nor does this final rule.[33]

E. Final Rule Effective Date

In the NPRM, the Department referenced an anticipated effective date of January 2020 for purposes of projecting forward the proposed standard salary level and proposed HCE total annual compensation level. Many commenters, while not expressly referencing the effective date, conveyed their view that updates to these regulations are ''long overdue.'' *See, e.g.,* Legal Aid at Work; Public Housing Authorities Directors Association; Washington State Budget and Policy Center. Similarly, a few commenters encouraged the Department to increase the standard salary threshold, or to promulgate a final rule, ''as soon as possible.'' *See, e.g.,* International Foodservice Distributors Association; Sergeants Benevolent Association.

Other commenters did specifically address the final rule's effective date. Nearly all of these commenters conveyed the need for employers to have sufficient time to adjust to and implement the rule, but they disagreed on how much time the Department should provide. The National Association of Landscape Professionals favored a period of 90 to 120 days between the rule's publication and its effective date, while several other commenters favored a minimum of 120 days, which was the applicable period of time in the 2004 final rule. *See, e.g.,* Seyfarth Shaw LLP (Seyfarth Shaw); Society for Human Resource Management (SHRM). SHRM thought the effective date should be at least 120 days from the date of publication of the final rule, but acknowledged that the proposed regulations are far more familiar to employers than the changes made in 2004. Other commenters favored a longer period, ranging from six to eighteen months from publication. The U.S. Public Interest Research Group suggested a two-year delay for public interest advocacy groups. Several employer representatives who opposed the proposed HCE level stated that adjusting to the new level would be particularly burdensome. For example, the National Association of Manufacturers stated that the proposed increase would require employers to spend significant time determining whether employees who previously met the HCE test satisfy the standard duties test (and thus remain exempt), and requested that if the Department were to finalize that increase as proposed, it should set a future compliance date that provides sufficient time for employers to adjust to the new HCE level.

Relatedly, multiple commenters requested that the Department ''phase in'' any new salary/compensation levels over a period of time. Suggested phase-in periods varied widely. Independent Sector and the National Council of Young Men's Christian Associations of the United States of America (YMCA) favored a two-year phase-in period. An individual employee commenter proposed a 3- to 5-year phase-in period for non-profit organizations. Some commenters who requested a phase-in period did not specify a particular timeframe. Many commenters who supported a phase-in cited the importance of providing sufficient time for employers to adapt to and implement the new levels. *See, e.g.,* Lutheran Services in America; National Grocers Association (NGA).

The Department has set an effective date of January 1, 2020, for the final rule. The Department agrees with the commenters who expressed the view that this update to the regulations is ''long overdue,'' and with those who encouraged the Department to increase the salary level as soon as possible. The time between this rule's publication and effective date exceeds the 30-day minimum required under the Administrative Procedure Act (APA), 5 U.S.C. 553(d), and the 60 days mandated for a ''major rule'' under the Congressional Review Act, 5 U.S.C. 801(a)(3)(A). While the 2004 rule provided for 120 days between the rule's publication and effective date,[34] the Department agrees with commenters who acknowledged that this final rule will be far more familiar to employers than the substantial changes provided in the 2004 final rule.[35]

[32] *See supra* note 4.

[33] The Department has issued specific guidance on the application of the FLSA to non-profit entities. *See* Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (FLSA), available at: *https://www.dol.gov/whd/regs/compliance/whdfs14a.pdf.*

[34] *See* 79 FR 22126.

[35] The 2004 final rule included several significant changes, including: (1) A significant percentage increase in the salary threshold; (2) a significant

Additionally, while the 2016 rule provided 192 days from the rule's publication until its effective date, the salary level increase in this rule is more modest, and affects fewer workers—two factors that favor a shorter period. Moreover, given that the Department is currently enforcing the 2004 standard salary level, which an overwhelming majority of commenters agreed needs to be updated, the Department concludes that a lengthier delayed effective date would be imprudent. Additionally, a January 1 date may be convenient for those employers who use the calendar year as their fiscal year, or who use budgets, software systems, or other practices on a calendar-year basis. The Department is also declining to delay the effective date, or create a phase-in, specifically for non-profits. As discussed in more detail in the standard salary level discussion below, consistent with past practice, the Department is declining to create special rules for the application of the part 541 exemptions to non-profits.

While some employer representatives expressed concern that the proposed HCE level increase would pose unique challenges for employers compared to the change to the standard salary level, given the change in methodology for setting the HCE threshold in the final rule, discussed in further detail below, the Department does not believe a delayed effective date for this provision is necessary. The Department believes that the January 1, 2020 effective date will provide employers adequate time to make any changes that are necessary to comply with the final regulations, and for similar reasons concludes that a phase-in of the new thresholds is not warranted. The Department will also provide significant outreach and compliance assistance, and will issue a number of guidance documents in connection with the publication of this final rule.

III. Need for Rulemaking

The primary goal of this rulemaking is to update the standard salary level that helps define and delimit the EAP exemption. This will ensure that the level works effectively with the standard duties test to distinguish potentially exempt EAP employees from overtime-protected white collar workers. Due to the *Nevada* district court's decision invalidating the 2016 final rule, the Department has been enforcing the standard salary level of $455 a week. The Department recognizes that this level should be updated to reflect current earnings. In the NPRM, the Department proposed using the methodology from the 2004 final rule to calculate the salary threshold using current data. The Department explained that this method would keep the standard salary level aligned with the intervening years' growth in earnings. It further stated that the 2004 approach has withstood the test of time, would restore the salary level to its traditional purpose of serving as a dividing line between nonexempt and potentially exempt employees, would address concerns that led to the 2016 rule's invalidation, and would ensure that the FLSA's intended overtime protections are fully implemented.

The Department is also updating the total annual compensation requirement for the HCE test for exemption to ensure that this threshold remains a meaningful and appropriate standard when paired with the more-lenient HCE duties test. In an effort to modernize the part 541 regulations to account for changing methods of workplace compensation, the Department also proposed allowing nondiscretionary bonuses and incentive payments (including commissions) to count toward up to 10 percent of the standard or special salary levels. Finally, in its proposal the Department explained the importance of updating the salary thresholds more frequently. Regular updates promote greater stability, avoid the disruptive salary level increases that can result from lengthy gaps between updates, and provide appropriate wage protection for those under the threshold. With these goals in mind, in the NPRM, the Department affirmed its intention to issue a proposal to update the earnings thresholds every four years, unless the Secretary determines that economic or other factors warrant forestalling such an update.

IV. Final Regulatory Revisions

The Department is formally rescinding the 2016 final rule and is replacing it with a new rule that updates the part 541 earnings thresholds. The Department is setting the standard salary level by applying the methodology from the 2004 final rule to current data, resulting in a new standard salary level of $684 per week. In addition, the Department is setting a special salary level of $455 per week for Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands; a special salary level of $380 per week for American Samoa; and an updated weekly ''base rate'' of $1,043 per week for the motion picture producing industry. Nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis may be used to satisfy up to 10 percent of the standard salary level or the special salary levels applicable to the U.S. territories. The Department is also setting the HCE annual compensation amount at the 80th percentile of full-time salaried workers nationally, resulting in a new HCE level of $107,432. These revisions are discussed in further detail below.

A. Standard Salary Level

i. History of the Standard Salary Level

Congress enacted the FLSA on June 25, 1938, and the first version of part 541, which the Department issued in October 1938, set a salary level of $30 per week for executive and administrative employees.[36] The Department updated the salary levels in 1940, maintaining the salary level for executive employees, increasing the salary level for administrative employees, and establishing a salary level for professional employees. In setting those rates, the Department considered surveys of private industry by federal and state government agencies, experience gained under the National Industrial Recovery Act, and Federal Government salaries to identify a salary level that reflected a reasonable ''dividing line'' between employees performing exempt and nonexempt work.[37] Taking into account salaries paid in numerous industries and the percentage of employees earning below these amounts, the Department set the salary level for each exemption slightly below the average salary dividing exempt and nonexempt employees.

In 1949, the Department evaluated salary data from state and federal agencies, including the Bureau of Labor Statistics (BLS). The Department considered wages in small towns and low-wage industries, wages of federal employees, average weekly earnings for exempt employees, starting salaries for college graduates, and salary ranges for different occupations such as bookkeepers, accountants, chemists, and mining engineers.[38] The Department also looked at data showing increases in exempt employee salaries since 1940,

reorganization of the part 541 regulations; (3) the elimination of the short and long test structure that had been in place for more than 50 years and the creation of a single standard test; and (4) the creation of a new test for highly compensated employees. In contrast, here the Department is not changing the standard duties test or reorganizing the regulations, and so this rule will be much less complicated for employers to implement.

[36] 3 FR 2518.

[37] Stein Report at 9, 20–21, 30–31.

[38] Weiss Report at 10, 14–17, 19–20.

and supplemented it with nonexempt employee earnings data to approximate the ''prevailing minimum salaries of exempt employees.'' [39] Recognizing that the ''increase in wage rates and salary levels'' since 1940 had ''gradually weakened the effectiveness of the present salary tests as a dividing line between exempt and nonexempt employees,'' the Department considered the increase in weekly earnings from 1940 to 1949 for various industries, and then adopted new salary levels at a ''figure slightly lower than might be indicated by the data'' to protect small businesses.[40] Also in 1949, the Department established a second, less-stringent duties test for each exemption, which applied to employees paid at or above a higher ''short test'' salary level. The original, more-rigorous duties test became known as the ''long test.'' Apart from the differing salary requirements, the most significant difference between the short test and the long test was that the long test limited the amount of time an exempt employee could spend on nonexempt duties, while the short duties test did not include a specific limit on nonexempt work.[41]

In 1958, the Department set the long test salary levels using data collected by WHD on salaries paid to employees who met the applicable salary and duties tests, grouped by geographic region, broad industry groups, number of employees, and city size, and supplemented with BLS and Census data to reflect income increases for white collar and manufacturing employees during the period not covered by the Department's investigations.[42] The Department then set the long test salary levels for exempt employees ''at about the levels at which no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests.'' [43] Thus, the Department set the long test salary levels so that about 10 percent of workers performing EAP duties in the lowest-wage regions and industries would not meet the salary level test and would therefore be nonexempt based on their salary level alone.

The Department followed a similar methodology when determining the salary level increase in 1963. The Department examined data on salaries paid to exempt workers collected in a 1961 WHD survey.[44] The salary level for executive and administrative employees was increased to $100 per week, for example, when the 1961 survey data showed that 13 percent of establishments paid one or more exempt executives less than $100 per week, and 4 percent of establishments paid one or more exempt administrative employees less than $100 per week.[45] The professional salary level was increased to $115 per week when the 1961 survey data showed that 12 percent of establishments surveyed paid one or more professional employees less than $115 per week.[46] The Department noted that these salary levels approximated the same percentages used to update the salary level in 1958.[47]

The Department applied a similar methodology when adopting salary level increases in 1970. After examining data from WHD investigations, BLS wage data, and information provided in a report issued by the Department in 1969 that included salary data for executive, administrative, and professional employees, the Department increased the long test salary level for executive employees to $125 per week when the salary level data showed that 20 percent of executive employees from all regions and 12 percent of executive employees in the West earned less than $130 a week.[48] The Department also increased the long test salary levels for administrative and professional employees to $125 and $140 per week, respectively.

In 1975, rather than follow the prior approaches, the Department updated the 1970 salary levels based on increases in the Consumer Price Index, but adjusted downward ''to eliminate any inflationary impact.'' [49] This resulted in a long test salary level for the executive and administrative exemptions of $155 per week, and $170 per week for the professional exemption. The short test salary level increased to $250 per week in 1975.[50] The salary levels adopted were intended as interim levels ''pending the completion and analysis of a study by [BLS] covering a six-month period in 1975.'' [51] Although the Department intended to increase the salary levels based on that study of actual salaries paid to employees, the process was never completed, and the ''interim'' salary levels remained in effect for the next 29 years.

In 2004, the Department replaced the separate long and short tests with a single ''standard'' salary level test of $455 per week, which was paired with a ''standard'' duties test for executive, administrative, and professional employees, respectively. The Department noted, in accord with numerous comments received during that rulemaking, that as a result of the outdated salary level, ''the 'long' duties tests [had], as a practical matter, become effectively dormant'' because relatively few salaried employees earned below the short test salary level.[52] The Department estimated that 1.3 million workers earning between $155 and $455 per week would become nonexempt under the new standard salary level.[53]

In setting the new standard salary level in 2004, the Department used Current Population Survey (CPS) Merged Outgoing Rotation Group (MORG) data collected by BLS that encompassed most salaried employees, including nonexempt salaried employees. The Department selected a standard salary level of $455 per week, which at the time was roughly equivalent to earnings at the 20th percentile of two subpopulations: (1) Salaried employees in the South and (2) salaried employees in the retail industry nationwide. Although prior salary levels had been based on salaries of approximately the lowest 10 percent of exempt salaried employees in low-wage regions and industries, the Department explained that the change in methodology was warranted in part to account for the elimination of the short and long tests, and because the data sample included nonexempt salaried employees, as opposed to only exempt salaried employees.[54] As in the past, the Department used lower-salary data sets to accommodate businesses for which salaries were generally lower due to geographic- or industry-specific reasons.

[39] *Id.* at 12.

[40] *Id.* at 8, 14–20. The Department also justified its modest increases by noting evidence of slow wage growth for executive employees ''in some areas and some industries.'' *Id.* at 14.

[41] The Department instituted a 20 percent cap on nonexempt work as part of the long duties test for executive and professional employees in 1940, and for administrative employees in 1949. By statute, beginning in 1961, retail employees could spend up to 40 percent of their hours worked performing nonexempt work and still be found to meet the duties tests for the EAP exemption. *See* 29 U.S.C. 213(a)(1).

[42] Kantor Report at 6.

[43] *Id.* at 6–7.

[44] 28 FR 7002 (July 9, 1963).

[45] *Id.* at 7004.

[46] *Id.*

[47] *See id.*

[48] 35 FR 884–85.

[49] 40 FR 7091.

[50] *Id.* at 7092. Each time the short test was increased between 1949 and 1975, it was set significantly higher than the long test salary levels.

[51] *Id.* at 7091.

[52] 69 FR 22126.

[53] *Id.* at 22123.

[54] *Id.* at 22167.

The Department published a final rule updating the salary level twelve years later, in 2016.[55] The Department set the standard salary level at an amount that would exclude from exemption the bottom 40 percent of full-time salaried workers (exempt and nonexempt) in the lowest-wage Census Region (the South).[56] The Department estimated that increasing the standard salary level from $455 per week to $913 per week would make 4.2 million workers earning between those levels newly nonexempt, absent other changes by their employers.[57] The Department made no changes to the standard duties test. As previously discussed, on August 31, 2017, the U.S. District Court for Eastern District of Texas declared the 2016 final rule invalid, and the Department's appeal of that decision is being held in abeyance. Until the Department issues a new final rule, it is enforcing the part 541 regulations in effect on November 30, 2016, including the $455 per week standard salary level.

ii. Purpose of the Salary Level Requirement

The FLSA states that its minimum wage and overtime requirements ''shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary . . .).'' [58] The Department has long used a salary level test as part of its method for defining and delimiting that exemption.

In 1949, the Department summarized the role of the salary level tests over the preceding decade, explaining:

> In this long experience, the salary tests, even though too low in the later years to serve their purpose fully, have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary. The salary requirements also have furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them.[59]

The Department again referenced these principles in the Kantor Report, reiterating, for example, that the salary level tests ''provide['] a ready method of screening out the obviously nonexempt employees[,]'' and that employees ''who do not meet the salary test are generally also found not to meet the other requirements of the regulations.'' [60] The 2003–2004 rulemaking also referenced these principles.[61] Likewise, this final rule updates the standard salary level in light of increased employee earnings, so that it maintains its usefulness in ''screening out the obviously nonexempt employees.''

For over 75 years the Department has used a salary level test as a criterion for identifying bona fide executive, administrative, and professional employees. Some statements in the Department's regulatory history have at times, however, suggested a greater role for the salary level test. These include, for instance, a statement from the 1940 Stein Report that salary is '' 'the best single test of the employer's good faith in characterizing the employment as of a professional nature.' '' [62] The Stein Report also stated that ''if an employer states that a particular employee is of sufficient importance . . . to be classified as an 'executive' employee and thereby exempt from the protection of the [A]ct, the best single test of the employer's good faith in attributing importance to the employee's services is the amount he pays for them.'' [63]

As explained in the NPRM, the *Nevada* district court's invalidation of the 2016 final rule has prompted the Department to clarify these and similar statements in light of the salary level test's purposes and regulatory history. The concept of a ''dividing line'' should not be misconstrued to suggest that the Department views the salary level test as an effort to divide all exempt employees from all nonexempt employees. A salary level is helpful to determine who is not an exempt executive, administrative or professional employee—the employees who fall beneath it. But the salary level has significantly less probative value for the employees above it. They may be exempt or nonexempt. Above the threshold, the Department evaluates an employee's status as exempt or nonexempt based on an assessment of the duties that employee performs. An approach that emphasizes salary alone, irrespective of employee duties, would stand in significant tension with the Act. Section 13(a)(1) directs the Department to define and delimit employees based on the ''capacity'' in which they are employed. Salary is a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees. But it is not ''capacity'' in and of itself.

The district court's summary judgment decision endorsed the Department's historical approach to setting the salary level and held the 2016 final rule unlawful because it departed from it. The district court approvingly cited the Weiss Report and explained that setting ''the minimum salary level as a floor to 'screen[ ] out the obviously nonexempt employees' '' is ''consistent with Congress's intent.'' [64] Further endorsing the Department's earlier rulemakings, the district court stated that prior to the 2016 final rule, ''the Department ha[d] used a permissible minimum salary level as a test for *identifying* categories of employees Congress intended to exempt.'' [65] The court then explained that in contrast to these acceptable past practices, the 2016 standard salary level of $913 per week was unlawful because it would exclude from exemption ''so many employees who perform exempt duties.'' [66] In support, the court cited the Department's estimate that, without some intervening action by their employers, the new salary level would result in 4.2 million workers who meet the duties test becoming nonexempt.[67] The court also emphasized the magnitude of the salary level increase, stating that the 2016 final rule ''more than double[d] the previous minimum salary level'' and that ''[b]y raising the salary level in this manner, the Department effectively eliminate[d] a

[55] 81 FR 32391 (May 23, 2016).

[56] *Id.* at 32408.

[57] *Id.* at 32393.

[58] 29 U.S.C. 213(a)–(a)(1).

[59] Weiss Report at 8.

[60] Kantor Report at 2–3; *see also* U.S. Dep't of Labor, *28th Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1940* (1940), at 236 (''[T]he power to define is the power to exclude.'').

[61] *See* 69 FR 22165; 68 FR 15560, 15570 (Mar. 31, 2003).

[62] 81 FR 32413 (quoting Stein Report at 42); *see also* 69 FR 22165 (quoting Stein Report at 42).

[63] Stein Report at 19; *see also id.* at 5 (''[T] he good faith specifically required by the [A]ct is best shown by the salary paid.''); *id.* at 19 (salary provides ''a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed''); *cf.* Weiss Report at 9 (''[S]alary is the best single indicator of the degree of importance involved in a particular employee's job.''); Kantor Report at 2 (''[Salary] is an index of the status that sets off the bona fide executive from the working squad-leader, and distinguishes the clerk or subprofessional from one who is performing administrative or professional work.''). The Department ''is not bound by the [Stein, Weiss, and Kantor] reports,'' though they have been carefully considered. 69 FR 22124.

[64] 275 F. Supp. 3d at 806 (quoting Weiss Report at 7–8); *see also id.* at 807 at n.6 (supporting salary level that operates ''as more of a floor'') (internal quotation marks and citation omitted).

[65] *Id.* at 806 (emphasis in original).

[66] *Id.* at 807.

[67] *Id.* at 806.

consideration of whether an employee performs 'bona fide executive, administrative, or professional capacity' duties.'' [68] The district court declared the final rule invalid because the Department had unlawfully excluded from exemption ''entire categories of previously exempt employees who perform 'bona fide executive, administrative, or professional capacity' duties.'' [69]

By excluding from exemption, without regard to their duties, 4.2 million workers who would have otherwise been exempt because they passed the salary basis and duties tests established under the 2004 final rule, the 2016 final rule was in tension with the Act and with the Department's longstanding policy of setting a salary level that does not ''disqualify[ ] any substantial number of'' bona fide executive, administrative, and professional employees from exemption.[70] A salary level set that high does not further the purpose of the Act, and is inconsistent with the salary level test's useful, but limited, role in defining the EAP exemption.

The Department has therefore reexamined the 2016 final rule in light of the district court's decision and the salary level's historical purpose. The district court's decision underscores that except at the relatively low levels of compensation where EAP employees are unlikely to be found, the salary level is not a substitute for an analysis of an employee's duties. It is, at most, an indicator of those duties. For most white collar, salaried employees, the exemption should turn on an analysis of their actual functions, not their salaries, as Congress instructed. The salary level test's primary and modest purpose is to identify potentially exempt employees by screening out obviously nonexempt employees.

In light of these considerations, as noted in the NPRM, the Department has concluded that, while an increase in the standard salary level from $455 per week is warranted, the increase to $913 per week in the 2016 final rule was inappropriate. The Department has therefore engaged in this rulemaking to realign the salary level with its appropriate limited purpose, to address the concerns about the 2016 final rule identified by the district court, and to update the salary level in light of increased employee earnings.

iii. Standard Salary Level Proposal

In its NPRM, the Department proposed to rescind formally the 2016 final rule and to update the salary level by setting the salary level equal to the 20th percentile of earnings of full-time salaried workers in the lowest-wage region (the South) and/or in the retail industry nationally. The Department applied this method to pooled CPS MORG data for 2015 to 2017, adjusted to 2017, producing a level of $641 per week. To reflect employees' anticipated compensation at the time the rule would become effective, the Department then inflated this level to January 2020 using the compound annual growth rate in earnings since the 2004 rule. This methodology resulted in a proposed salary level of $679 per week ($35,308 per year). The Department estimated that at this level, 1.1 million employees who earn at least $455 per week but less than $679 per week would, without some intervening action by their employers, gain overtime eligibility.

The Department also stated that applying the 2004 final rule's methodology to set the salary level would ensure that overtime-eligible workers continue to receive the protections Congress intended, while avoiding the concerns that led to the invalidation of the 2016 rule. 84 FR 10903. The Department explained that adhering to the 2004 final rule's methodology was reasonable and appropriate, noting that it has enforced the 2004 final rule's salary level for nearly 15 years—the second-longest period (after the salary levels set in 1975) for any part 541 salary test. *Id.* at 10909. The Department stated that applying this well-established method would also promote familiarity and stability in the workplace, without causing significant hardship or disruption to the economy. *Id.* The Department also noted that the 2004 final rule has never been challenged, and so applying the 2004 salary level methodology would minimize the uncertainty and potential legal vulnerabilities that could accompany a novel and untested approach. *Id.*

iv. Standard Salary Level Final Rule

In the final rule, the Department adopts its proposed methodology for setting the standard salary level, with one minor modification. The Department will set the salary level equal to the 20th percentile of earnings of full-time salaried workers in the lowest-wage region (the South) and/or in the retail industry nationally. To calculate the salary level, the Department used updated CPS earnings data that BLS has compiled since the Department drafted its proposal. Specifically, the Department applied the adopted methodology to pooled CPS MORG data for July 2016 to June 2019, adjusted to reflect 2018/2019. As discussed below, rather than projecting the salary level to January 2020, as proposed in the NPRM, the Department has instead used the most recent data available at the time the Department drafted this final rule. This results in a salary level of $684 per week.

The Department believes that this method will set an appropriate dividing line between nonexempt and potentially exempt employees by screening out from exemption employees who, based on their compensation, are unlikely to be bona fide executive, administrative, or professional employees. In addition, the use of earnings data from the South and the retail industry will ensure that the salary level is suitable for employees in low-wage regions and industries. This approach will also maintain the prominence of the duties test by ensuring that the salary level alone does not disqualify from exemption a substantial number of employees who meet the duties test. This is consistent with the duties test's historical function, and will alleviate a major concern—overemphasis on the salary level test—that led to the 2016 rule's invalidation.

Once this rule is effective, white collar employees who are subject to the salary level test and earn less than $684 per week will not qualify for the EAP exemption, and therefore will be entitled to overtime pay. Employees earning this amount or more on a salary or fee basis will be exempt if they meet the standard duties test. As a result of this updated salary level, 1.2 million currently exempt employees who earn at least $455 but less than the updated standard salary level of $684 per week will, without some intervening action by their employers, gain overtime eligibility. In addition, 2.2 million white collar workers earning within this salary range who are currently nonexempt because they do not meet the standard duties test will have their overtime-eligible status strengthened because their exemption status will be clear based on their salary alone.

v. Discussion of Comments

1. Threshold Issues

As was the case in the responses to the July 26, 2017 RFI and in feedback received at the public listening sessions, commenters to the NPRM overwhelmingly agreed that the salary

[68] *Id.* at 807 (quoting 29 U.S.C. 213(a)(1)).

[69] *Id.* at 806 (quoting 29 U.S.C. 213(a)(1)).

[70] Kantor Report at 5. In contrast, had the Department simply applied the 2004 methodology to set the standard salary level, the 2016 final rule would have resulted in approximately 683,000 workers who satisfied the duties test becoming nonexempt. *See* 81 FR 32504 (Table 32).

level should be increased from the currently enforced level of $455 per week, which was set in 2004. Only a few commenters asserted that the salary level should not be updated; these commenters generally expressed concern that it would be difficult for employers to absorb any increase to the salary level. *See* Home Care Association of America; South Butler Community Library. Fisher & Phillips LLP and the National Federation of Independent Business (NFIB), however, questioned whether the Department has authority to set a salary level at all.

The vast majority of commenters also agreed that the Department should continue to set the salary level on a nationwide basis rather than having different salary levels that vary by region, industry, or some other factor. *See, e.g.,* Associated General Contractors of America (AGC); National Council of Nonprofits; National Employment Law Project (NELP); National Propane Gas Association; Partnership to Protect Workplace Opportunity (PPWO). A few commenters suggested that the Department set multiple salary levels, such as by region or state or for urban and rural areas. *See* Council for Christian Colleges and Universities; Idaho Division of Human Resources; Lutheran Services in America. A few other commenters advocated for industry-specific salary levels, *see* National Newspaper Association, or exemptions from the salary level test for specific industries, *see* Family Focused Treatment Association, or for ''seasonal'' employers, *see* Corps Network. Special Olympics sought a special salary level for non-profits, while the National Council of Nonprofits opposed such a carve-out.

The Department maintains that the FLSA's delegation of authority to the Secretary to ''define[ ] and delimit[ ]'' the terms of the section 13(a)(1) exemption includes the authority to set a salary level. While the language of section 13(a)(1) precludes the Department from adopting a salary-only test because salary ''is not 'capacity' in and of itself,'' 84 FR 10907; *see also* 81 FR 32429; 69 FR 22173, the Department's broad authority to ''define and delimit'' the terms of the EAP exemption permits it to use a salary level test as one criterion for identifying bona fide executive, administrative, and professional employees. The Department has used such a test for over 75 years, and its authority to establish a salary level is well-established. *See, e.g., Wirtz* v. *Miss. Publishers Corp.,* 364 F.2d 603, 608 (5th Cir. 1966); *Fanelli* v. *U.S. Gypsum Co.,* 141 F.2d 216, 218 (2d Cir. 1944); *Walling* v. *Yeakley,* 140 F.2d 830, 832–33 (10th Cir. 1944). As noted in the NPRM, ''[a] salary level is helpful to determine who is not an executive, administrative or professional employee'' because it ''is a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees.'' 84 FR 10907.

The Department agrees with the vast majority of commenters who supported increasing the salary level. The currently enforced level of $455 was set a decade and a half ago in 2004. Like all previous salary levels, its effectiveness as a dividing line between nonexempt and potentially exempt employees has diminished over time, and the level should therefore be updated to align with growth in earnings in the intervening years. While the Department is sensitive to the views of commenters who contended that any increase would be challenging for businesses, historical experience has shown that incremental, reasonable salary level increases such as the one in this final rule are feasible and do not have significant adverse economic consequences. Additionally, as discussed below, the salary level set in this final rule takes these commenters' concerns into account by using wages in the South and the retail industry.

As in the past, the Department chooses to set a nationwide salary level and declines to establish multiple salary levels based on region, industry, employer size, or any other factor. Having multiple salary levels would make the regulations more complicated; for example, regional variations would introduce unnecessary complexity, particularly for employers and employees who operate or work across state lines. As the Department has explained when previously rejecting regional salary thresholds, adopting multiple different salary levels would, at minimum, create significant administrative difficulties ''because of the large number of different salary levels this would require.'' 69 FR 22171; 81 FR 32411. Likewise, the Department declines to set any additional industry-specific salary levels. The Department has rarely created such levels.[71] Instead, as the Department has previously noted, the 2004 methodology ''addresses the concerns'' of commenters advocating for multiple salary levels ''by looking toward the lower end of the salary levels and considering salaries in the South and in the retail industry.'' 69 FR 22171. This approach avoids the new compliance burdens that multiple salary levels would entail, while ensuring that the salary level is low enough that it exempts bona fide EAP employees in those regions and industries.[72]

2. The New Salary Level

Commenters diverged regarding the appropriate level at which to set the new salary level. As a general matter, with some exceptions, employer representatives supported the Department's proposal, while employee representatives opposed it and favored a level at least as high as the one set in the 2016 final rule.

The vast majority of employer representatives supported the Department's proposal to use the 2004 methodology to update the salary level. *See, e.g.,* HR Policy Association; National Association of Home Builders (NAHB); Small Business Legislative Council; PPWO; Wage and Hour Defense Institute. Employer representatives who supported the proposed level generally agreed with the Department's assessment that the 2004 methodology was faithful to the salary level's purpose of screening out only those employees who are obviously nonexempt, while avoiding a de facto salary-only test that would impermissibly replace the role of the duties test. *See, e.g.,* Bloomin' Brands; Job Creators Network; National Retail Federation (NRF); PPWO; Seyfarth Shaw.

Commenters who supported the proposal also stated that unlike the 2016 final rule, the proposal was suitable and manageable for low-wage regions and

[71] A special level for the motion picture producing industry has been in place for over six decades due to the ''peculiar employment conditions existing in the industry.'' 18 FR 2881. Academic administrative employees meet the compensation requirement if they are paid on a salary basis ''at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed.'' 29 CFR 541.600(c). The Department has otherwise refrained from setting industry-specific salary levels.

[72] Some commenters asked the Department to permit employers to prorate the salary level for part-time employees. *See, e.g.,* College and University Professional Association for Human Resources (CUPA–HR); Council for Christian Colleges and Universities; Idaho Division of Human Resources. The Department has never prorated the salary level for part-time positions, and it specifically considered and rejected similar requests in its 2004 and 2016 final rules. *See* 81 FR 23422; 69 FR 22171. As the Department has previously explained, employees hired to work part time, by most definitions, do not work in excess of 40 hours in a workweek, and overtime pay is not at issue for these employees. An employer may pay a nonexempt employee a salary to work part time without violating the FLSA, so long as the salary equals at least the minimum wage when divided by the actual number of hours (40 or fewer) the employee worked. *See* FLSA2008–1NA (Feb. 14, 2008). To the extent that commenters are concerned about the exemption status of seasonal employees, the Department notes that ''[e]xempt employees need not be paid for any workweek in which they perform no work.'' 29 CFR 541.602(a)(1).

industries, and for small businesses. *See, e.g.,* American Hotel and Lodging Association (AHLA); American Society of Travel Advisors (ASTA); CUPA–HR; LeadingAge; Society of Independent Gasoline Marketers of America (SIGMA); YMCA. Many also conveyed that the proposed level would not produce the same negative effects—*e.g.,* increased employer burdens and diminished workplace flexibility—as the 2016 final rule. *See, e.g.,* National Association of Landscape Professionals; Seyfarth Shaw. Some also noted that the 2004 rule has withstood the test of time for the past 15 years and has never been challenged in court. *See, e.g.,* Job Creators Network; SIGMA. Additionally, many of these commenters agreed with the Department that the proposed rule was responsive to the district court's concerns that led to the invalidation of the 2016 final rule. *See, e.g.,* Ogletree, Deakins, Nash, Smoak & Stewart, P.C.; SHRM.

Many employer representatives maintained that the proposed rule's salary level resulted in a more appropriate number of employees who would become newly nonexempt—1.1 million in the first year—compared to the 2016 final rule, which would have resulted in 4.2 million such workers in the first year. They noted that the smaller number of newly nonexempt employees would make it easier for employers to absorb the costs of compliance, *see* U.S. Small Business Administration Office of Advocacy (SBA Advocacy), would lessen the legal risk associated with the rule, *see* National Restaurant Association (NRA); Wage and Hour Defense Institute, and would ensure that the salary level maintains its historic screening function, *see* AGC; Chamber of Commerce of the United States of America (Chamber); NRF.

A few commenters, while generally supportive of the Department's approach in the NRPM, advocated for a salary level lower than the one proposed. These stakeholders maintained that to ensure that the salary level could accommodate low-wage regions and industries, the Department should exclude higher-wage states from the earnings data used to set the salary level. For example, some commenters urged the Department to include only the East South Central and West South Central Census Divisions, which include the lower-wage states of Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma, and Texas, *see* Chamber; Food Marketing Institute (FMI); International Franchise Association (IFA); NRA, while AHLA recommended excluding Maryland, Virginia, and the District of Columbia from the data set. Others suggested generally that the Department use a narrower geographic area than the entire South, using the East South Central Census Division (Alabama, Kentucky, Mississippi, and Tennessee) as an example. *See* Kentucky Retail Federation; SBA Advocacy.

Employee representatives, conversely, generally stated that the salary level should be raised significantly above the level proposed in the NPRM or that the duties test should be significantly strengthened. *See, e.g.,* National Women's Law Center (NWLC); Public Justice Center; UnidosUS. Many commenters supported the level in the 2016 final rule or something similar to it. *See, e.g.,* American Association of Retired Persons (AARP); American Federation of State, County, and Municipal Employees (AFSCME); Campaign Comments; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). A few advocated that the salary level be set even higher, at $1,176 per week ($61,152 per year), using median earnings data. *See* National Employment Lawyers Association (NELA); Nichols Kaster, PLLP (Nichols Kaster); Rudy, Exelrod, Zieff & Lowe, LLP (Rudy Exelrod); Texas Employment Lawyers Association (TELA).

Many employee representatives maintained that the salary level proposed in the NPRM is inconsistent with the purpose of the FLSA and the EAP exemption. In general, these commenters contended that the proposed salary level was too low to adequately distinguish between bona fide EAP employees and those who were intended to be eligible for overtime, and that the rule would result in the exemption of lower-wage workers with limited bargaining power, whom the statute was designed to protect. *See, e.g.,* NELP; NELA; Texas RioGrande Legal Aid; Washington State Budget and Policy Center. Several commenters stated that the proposal would inappropriately exempt employees who perform significant amounts of nonexempt work. *See, e.g.,* National Council of Jewish Women; Women Employed. The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) disagreed that the salary level test's primary purpose is to screen out obviously nonexempt employees, contending that statements to that effect in the Weiss and Stein reports were ''not proposals for setting the long duties salary threshold'' but ''defending the salary tests against criticism,'' and that the salary levels described in those reports as having ''screening'' functions were accompanied by the more rigorous long duties test.

Commenters also noted that according to the Department's own estimates, 84 FR 10951, the proposed rule would result in 2.8 million fewer workers newly entitled to overtime pay in the first year than the 2016 final rule. *See* Joint Comment from 77 Members of Congress; National Partnership for Women and Families; Nichols Kaster. Many of these commenters also cited estimates by EPI, which projected that the proposed rule, compared to the 2016 final rule, would result in $1.2 billion fewer dollars in earnings transfers to employees and would affect 8.2 million fewer workers, including 3.1 million workers who would have gained the right to overtime pay and 5.1 million workers who are already overtime-eligible but would have had their overtime protections strengthened by the 2016 final rule's higher salary level because of a reduced risk of misclassification. These commenters stated that the narrowed scope of the proposed rule would be detrimental to these employees, who include millions of women, people of color, and parents of children under 18. *See* EPI; National Partnership for Women and Families. Some maintained, for example, that a higher salary level that would affect more workers would provide such workers with more income, improve upward mobility, and/or provide workers with more time to spend with their families. *See* AARP; Campaign Comments. Several commenters highlighted the lower number of affected employees (compared to the 2016 final rule) in their particular states. *See, e.g.,* Maryland Center on Economic Policy; Washington State Budget and Policy Center.

Some commenters also asserted that the proposed salary level would result in a higher risk of misclassification relative to the 2016 final rule, as well as more litigation, because more employees' exempt status would turn on the duties test rather than the salary level test. *See* NELA; Winebrake & Santillo LLC. A group of 14 state attorneys general and the Attorney General for the District of Columbia (State AGs) stated that these misclassification consequences would extend to state wage-and-hour laws that contain EAP exemptions that track the federal standard.

Commenters who opposed the proposed rule also criticized the Department's reliance on the reasoning of the *Nevada* district court's decision.

See AFL–CIO; EPI; NELP; NWLC; State AGs. These commenters took issue with the district court's conclusion that the 2016 final rule's salary level was too high because it classified as nonexempt over 4 million previously exempt workers based on their salaries alone, and as a result impermissibly displaced the role of the duties test. AFL–CIO and EPI asserted that the raw number of newly nonexempt workers under a new salary test should not determine the test's appropriateness since that number depends on several factors, such as the amount of time since the previous update and whether the methodology used in the last update was sound. Relatedly, the AFL–CIO stated that it is unclear why the 2016 final rule's salary level, which would have resulted in 4.2 million newly nonexempt employees, was impermissibly high, but the proposed rule's salary level, which would result in 1.1 million (the Department's estimate) to 1.4 million (EPI's estimate) newly nonexempt employees, is not. The AFL–CIO also asserted that the Department preemptively responded to the district court's views in the 2016 final rule, while it and other employee representatives contended that the rationale that the Department put forth in support of the 2016 final rule was more persuasive than the district court decision that invalidated it. *See* AFL–CIO; EPI; NELP; NWLC.

Many employee commenters asserted that if the Department did not substantially raise the salary level above the proposed level, it should establish a more rigorous duties test such as the former long test, which set specific limits on the performance of nonexempt work. *See, e.g.,* AARP; House and Senate Democratic Caucuses of the Michigan Legislature; National Council of Jewish Women; Women Employed. Some commenters recommended instituting a more rigorous duties test regardless of the salary level the Department adopts. *See* AFL–CIO; State of Wisconsin Department of Workforce Development.

Finally, several employee representatives also asserted that by adopting the 2004 methodology in the NPRM, the Department perpetuated a methodological error that the 2016 final rule characterized as a ''mismatch.'' *See* AFL–CIO; Economic Policy Institute (EPI); NELP; NWLC; 81 FR 34400. According to this view, while the Department had historically used two tests for exemption—a long test that paired a more rigorous duties test with a lower salary level, and a short test that paired a less rigorous duties test with a higher salary level—in 2004, the Department instead paired a less rigorous duties test with a lower salary level, resulting in historically nonexempt workers being instead classified as exempt. These commenters stated that the 2004 methodology failed to adjust for changes from the long/short test structure, and that a significantly higher salary level is necessary to account for the absence of the long duties test, which restricted the amount of nonexempt work lower-wage white collar employees could perform while still being classified as exempt. Some of these commenters contended that, as a result, the 2004 methodology results in a salary level that exempts certain historically nonexempt employees because employees who traditionally passed the long salary test and failed the long duties test became exempt under the 2004 final rule's standard salary level and duties tests. *See, e.g.,* NELA; Nichols Kaster; Senator Patty Murray. Some commented that the Department unreasonably relied on the functional dormancy of the long test to justify its adoption of the standard test in 2004, given that the Department did not update the short and long test thresholds between 1975 and 2004. One commenter, EPI, noted that the Department did not include the methodology for the Kantor long test, which used the lowest 10 percent of exempt salaried employees in low-wage regions and industries, as an alternative in the NPRM or elsewhere in the proposal.

Conversely, employer representatives disagreed with the ''mismatch'' rationale. They stated, for example, that the standard duties test is not identical to the short duties test, and that in 2004, the Department accounted for its change in the structure and data set used for the EAP exemption by adjusting the percentile used for determining the salary level. *See* Chamber; NRA. More generally, nearly all employer representatives opposed any changes to the standard duties test. *See, e.g.,* Bowling Proprietors Association of America; NGA; PPWO.

The Department appreciates the thoughtful comments it received regarding the salary level. After considering these comments, the Department has decided to retain the approach from the proposed rule with one small change. As proposed, the Department is using CPS earnings data to set the salary level equal to the 20th percentile of full-time salaried workers in the lowest-wage Census Region (the South) and/or the retail industry nationwide. To set the salary level, the Department applied this methodology to pooled CPS MORG data for July 2016 to June 2019, adjusted to reflect 2018/2019. This results in a final rule salary level of $684 per week ($35,568 for a full-year worker). For the reasons discussed below, the Department is not inflating the salary level forward to January 2020 as was proposed in the NPRM, but instead has used the most recent available actual wage data.

As an initial matter, the Department believes that the proposed salary level is consistent with, and faithful to, the FLSA's purpose. As noted in the NPRM, the FLSA explicitly directs that bona fide executive, administrative, and professional employees ''shall not'' be subject to the statute's minimum wage and overtime requirements. 29 U.S.C. 213(a)(1); 84 FR 10903. As such, when defining the contours of the EAP exemption, while the Department must, of course, ensure that employees who are subject to the Act's coverage receive its benefits, it must also ensure that employees whom Congress has directed ''shall'' be exempt from coverage are, in fact, exempt. The 2016 final rule was in tension with this purpose, as it would have newly disqualified 4.2 million workers from exemption simply because of their salaries, regardless of their duties.

The Department believes that this final rule strikes the appropriate balance by using the salary level, in line with its historical purpose, to screen out obviously nonexempt employees. As explained above, the Department articulated this purpose in the Weiss Report in 1949, when it explained that the salary level tests ''prevent[ed] the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation'' and ''simplified enforcement by providing a ready method of screening out the obviously nonexempt employees'' who, ''[i]n an overwhelming majority of cases . . . would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them.'' Weiss Report at 8. Likewise, in the Kantor Report, the Department stated the salary level tests ''provide[ ] a ready method of screening out the obviously nonexempt employees,'' and that employees ''who do not meet the salary test are generally also found not to meet the other requirements of the regulations.'' Kantor Report at 2–3. The Department referenced the screening function again in the 2004 final rule. *See* 69 FR 22165. This principle has been at the heart of the Department's interpretation of the EAP exemption for over 75 years.

The Department disagrees with the proposition advanced by some employee representatives that this

articulation of the salary level's modest purpose misreads the Weiss and Kantor reports, or that it applies only when paired with the long duties test. Both reports explicitly characterize the minimum salary level as ''simplif[ying] enforcement by providing a ready method of screening out the obviously exempt employees.'' Kantor Report at 3; Weiss Report at 8. And both confirm that under an appropriate salary level test, employees earning below the salary level generally would not meet the requirements of the duties test.[73] While these reports were written while a more rigorous duties test was in effect, they nonetheless affirm that a minimum salary level's purpose is to serve as a ''screening'' mechanism.

Conversely, as explained in the NPRM, the 2016 final rule went beyond this purpose, and instead suggested that the salary level had a much greater role to play in determining exempt status. For example, in the 2016 final rule the Department took the position that, in light of the single standard duties test that is less rigorous than the long duties test, ''the salary threshold must play a greater role in protecting overtime-eligible employees,'' and that ''it [was] necessary to set the salary level higher . . . because the salary level must perform more of the screening function previously performed by the long duties test.'' 81 FR 32412, 32465–66.[74]

As a result, the $913 per week salary level newly excluded 4.2 million salaried workers from exemption regardless of the duties they performed. The district court concluded that this would exclude from exemption ''so many employees who perform exempt duties,'' and in fact excluded ''entire categories of previously exempt employees who perform 'bona fide executive, administrative, or professional capacity' duties[.]'' 275 F. Supp. 3d at 806–7. Accordingly, it invalidated the rule.

In sum, as explained in the NPRM, the Department believes that the 2016 final rule ''untethered the salary level test from its historical justification[,]'' 84 FR 10901, and that this resulted in its invalidation by the district court. For this reason, the Department declines to return to the 2016 methodology or to set an even higher salary level. In contrast, as noted in the NPRM, the methodology in the 2004 final rule, which the Department is applying in this rule, ''has withstood the test of time, is familiar to employees and employers, and can be used without causing significant hardship or disruption to employers or the economy, while ensuring overtime-eligible workers continue to receive the protections intended by Congress.'' *Id.* at 10903.

The Department also believes that the number of workers affected by the salary level set in this final rule confirms that the level is appropriate. The Department estimates that the final rule will result in 1.2 million workers who will be newly overtime-eligible in the first year as a result of the increased salary level. The number of affected workers is very similar to the 1.3 million workers affected by the 2004 rule's salary level increase. *Id.* at 10911 (citing 69 FR 22213, 22253). This similarity to the 2004 rule, which has never been challenged in court, is consistent with the Department's view that the salary level set in this final rule is reasonable and legally sound.

Moreover, as the Department explained in the NPRM, because the 2016 final rule set the salary level ''at the low end of the historical salary range of short test salary levels,'' 81 FR 32414, it failed to account for the absence of a long test that historically exempted white collar workers with lower salaries but whose duties confirmed they were bona fide EAP employees. Thus, the impact of the 2016 final rule would have been the inverse of the ''mismatch'' the Department sought to correct. It would have resulted in employees who, due to the nature of their duties, have historically been classified as exempt suddenly becoming nonexempt simply because of their salaries.

As a result, the 2016 final rule was in tension with the salary level's limited role in defining the EAP exemption, as it conflicted with the Department's longtime practice of setting a salary level that did not ''disqualify[ ] any substantial number of'' bona fide executive, administrative, and professional employees from exemption, Kantor Report at 5, leading directly to the district court's invalidation of the rule. While the Department has long recognized that it is inevitable that some employees will be incorrectly excluded from exemption since the salary level is ''a dividing line [that] cannot be drawn with great precision but can at best be only approximate[,]'' Weiss Report at 11, the Department may not disregard Congress's express directive to exempt bona fide EAP employees. Conversely, the 1.2 million lower-income workers who will become nonexempt as a result of this rule's increase to the standard salary level will not include a substantial number of workers whose duties have historically qualified them as bona fide EAP employees.

Thus, while employee representatives criticized the narrower scope of this rule compared to the 2016 final rule, the fact that this final rule affects considerably fewer employees than the 2016 final rule confirms, rather than undermines, its appropriateness. Given that the 2016 final rule was invalidated due to its overbreadth, that rule is not a reasonable benchmark for concluding that the number of affected employees under this rule is too low.

As noted above, employee commenters also objected to the Department's reliance on the *Nevada* district court's decision invalidating the 2016 final rule. The Department believes that its reliance on the reasoning of the district court is well-founded.

Such reliance is reasonable and prudent as it reduces the vulnerability of new rules to legal challenges or injunctions, and maximizes the likelihood that a new rule can be implemented immediately. Notably, it has been over three years since the 2016 rule was published, and nearly three years since its stated effective date. Because of the rule's invalidation, however, the currently enforced salary level remains at $455 per week, which the Department and nearly all commenters agree must be updated. Adoption of a salary level that reduces, to the extent possible, the likelihood that the rule will be enjoined is the best way to ensure that workers can reap the rule's benefits as soon as possible rather than waiting for the outcome of potentially lengthy litigation. The Department believes that the salary level in this final rule accomplishes that objective, particularly given the district court's implicit endorsement of the 2004 methodology. *See* 275 F. Supp. 3d at

[73] *See* Kantor Report at 3 (''Employees who do not meet the salary test are generally also found not to meet the other requirements of the regulations.''); Weiss Report at 8 (''In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them.'').

[74] As noted in the NRPM, 84 FR 10908 n.76, the Department explained in the 2016 final rule that at the time of its analysis, 12.2 million salaried white collar workers earned more than $455 per week but were overtime eligible because they failed the duties test, while 838,000 salaried white collar workers were overtime eligible because even though they passed the standard duties test they earned below $455 per week. The Department then estimated that a $913-per-week salary level would result in 6.5 million salaried white collar workers who failed only the duties test, and increase to 5.0 million the number of salaried white collar workers who passed the duties test but would be overtime eligible because they failed the salary level test. *See* 81 FR 32464–65; *see also id.* at 32413. As the Department noted, however, it ''has never compared the number of employees who are nonexempt based exclusively on the salary or duties test, respectively, to determine the effectiveness of the salary level.'' 84 FR 10908.

807 n.6 (noting the court's earlier observation that an updated 2004 salary level likely would have not prompted the litigation that invalidated the 2016 final rule because it ''would still be operating . . . as more of a floor'') (internal quotation marks and citation omitted).

Additionally, the Department is mindful of the concerns the district court cited. As articulated in the NPRM and above, the 2016 final rule was, at minimum, in tension with the FLSA because it resulted in 4.2 million employees, including employees who were historically exempt under the long test, becoming nonexempt based on their salaries alone, even though the Act directs that the EAP exemption be based on ''capacity.'' This threatened to make ''salary rather than an employee's duties determinative'' of an employee's status under the EAP exemption.[75] While the 2016 final rule naturally contains language disagreeing with these propositions, for the reasons explained above, the Department has reexamined the 2016 final rule in light of the district court's decision and the public comments it has received in response to the RFI and the NPRM, and ultimately finds that the concerns voiced by the district court and by many public commenters warrant adopting a lower salary level.

The Department disagrees with the employee commenters who asserted that the 2004 methodology created a ''mismatch'' that must be corrected by a salary level comparable to the one from the 2016 final rule or a restoration of the long duties test. *See, e.g.,* EPI (''The methodology for setting the standard salary threshold in the 2004 rule was fundamentally flawed.''); NELP. The 2004 final rule explained that it was difficult to coherently apply the long duties test's requirement that an EAP employee perform no more than 20 percent nonexempt work.[76] Consequently, the Department switched from the long and short duties tests to a single duties test that, like the previous short duties test, did not include a quantitative limit on the percentage of time performing nonexempt work. And the Department set a standard salary level that was similar to that of the long test.

The commenters relying on the ''mismatch'' theory appear to assert that the 2004 final rule should have paired the single duties test with a higher salary threshold such as the short test because the Department was obligated to preserve the previous structure of pairing a more rigorous duties test with a lower salary level test, or a less rigorous duties test with a higher salary level. *See, e.g.,* AFL–CIO, EPI. But the previous structure had been created by the Department as one among many permissible policy choices. It was not required by the statutory text. Indeed, the statutory text does not require the Department to determine any salary level. As such, the Department was under no legal obligation to preserve the previous salary/duties structure in the 2004 final rule.

Moreover, the Department believes it would have been inappropriate to adopt the higher short test salary level after removing the long duties test in the 2004 final rule. *See* 84 FR 10908. The long duties test ensured that white collar employees would not become nonexempt simply because their salaries fell below the short test's higher threshold, if their duties clearly indicated bona fide EAP status. If the 2004 final rule had adopted the short test's higher salary threshold after eliminating the long duties test, such employees would have been reclassified as nonexempt solely because of their salary level. This approach would have departed from the historical role of using the salary level to screen out only obviously nonexempt employees, and would have risked violating the statutory requirement to base EAP status on the ''capacity'' in which the employee is employed. 29 U.S.C. 213(a)(1). Therefore, the Department believes that its' decision in 2004 not to pair the higher short test salary level with the standard duties test was a necessary measure to maintain policy consistency and follow statutory requirements.

Indeed, the 2016 final rule's attempt to correct the ''mismatch'' by setting the salary level ''at the low end of the historical range of short test salary levels,'' 81 FR 32409, created the precise legal risks that the 2004 final rule attempted to avoid. While the Department previously relied on the mismatch theory in defending the 2016 final rule in litigation, the district court, in declaring the 2016 final rule invalid for the reasons set forth above, implicitly rejected application of the mismatch theory in reaching its conclusion. As explained above, the district court found that the salary level set by the 2016 final rule improperly substituted employee salaries for an analysis of employees' duties.[77] 275 F. Supp. 3d at 806. In contrast, the 2004 methodology has never even been challenged in court—let alone invalidated—during the 15 years it has been enforced by the Department.

Additionally, as noted in the NPRM, the mismatch rationale failed to account for the substantial number of years during which the long duties test was effectively dormant. 84 FR 10908–09; *see also* 69 FR 22126 (explaining that ''the 'long' duties test [had], as a practical matter, become effectively dormant'' due to outdated salary levels, and quoting commenters who described the long duties test as ''inoperative,'' ''rarely, if ever, used,'' ''largely . . . dormant,'' and ''lack[ing] current relevance''). The long test salary levels set in 1975 were equaled or surpassed by the minimum wage in 1991.[78] Thus, since at least 1991, the short duties test and salary level determined whether workers qualified for the EAP exemption. Employers and employees alike have effectively operated for 28 years under a single-test system. Thus, although, as noted above, some employee commenters asserted that the 2004 methodology exempts certain historically nonexempt employees (*i.e.,* those who had passed the long salary test and failed the long duties test), any of these employees who were nonexempt in the years leading up to 2004 were nonexempt because their salaries fell below the short test's salary threshold. It therefore appears that these commenters are requesting that the Department set the salary threshold at the historical short test level. The Department attempted to do this in the 2016 final rule, but as explained above, this approach created legal risks, as evidenced by the district court's conclusion.

The Department continues to believe that the post-1991 landscape is ''highly relevant'' to its approach here, 84 FR 10909, and disagrees with the employee representatives contending otherwise. The one-test system effectively in place for the nearly three decades has created significant reliance interests and

[75] 275 F. Supp. 3d at 807.

[76] 69 FR 22127 (''When employers, employees, as well as Wage and Hour Division investigators applied the 'long' test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes.'').

[77] Some commenters contend that the district court's decision was flawed because it did not address the ''mismatch'' theory in its opinion, even though it was the central theory behind the 2016 final rule. *See* AFL–CIO; NELP. However, as noted above, the district court implicitly rejected the mismatch theory.

[78] In 1975, the Department set a long test salary level of $155 per week for executive and administrative employees, and of $170 per week for professional employees. *See* 40 FR 7092. On April 1, 1991, the federal minimum wage increased to $4.25 per hour, which equals $170 for a 40-hour workweek. *See* Sec. 2, Public Law 101–157, 103 Stat. 938 (Nov. 17, 1989).

understandings in the workplace under which employees and employers alike recognize certain positions as exempt. As the *Nevada* district court recognized, a salary level that deviates substantially from recent practice would result in ''entire categories of previously exempt employees who perform 'bona fide executive, administrative, or professional capacity' duties'' becoming nonexempt. 275 F. Supp. 3d at 806 (quoting 29 U.S.C. 213(a)(1)). Numerous employers indicated that they anticipated significant adverse effects from the 2016 final rule as a result of this widespread reclassification, including not only increased compliance costs but decreased employee flexibility, reduced morale, and increased employee turnover. *See* Independent Electrical Contractors; National Association of Truck Stop Operators; National Multifamily Housing Council and the National Apartment Association; PPWO; SBA Advocacy; Seyfarth Shaw.

Regarding EPI's request that the Department ''include the value of the Kantor long test in the final rule,'' as explained below and as described in more detail in the economic analysis, the Department has considered the Kantor long test methodology as an alternative. But as the 2004 final rule explained, the Kantor method, which uses the lowest 10 percent of exempt salaried employees in low-wage regions and industries, requires ''uncertain assumptions regarding which employees are actually exempt[.]'' 69 FR 22167. It is also more complex to model and thus is less accessible and transparent. And it presents a circularity problem: The Kantor method would determine the population of exempt salaried employees, while being determined by the make-up of that population. The 2004 methodology of setting the minimum salary level based on the lowest 20 percent of *all* salaried employees in the South and retail industry avoids these problems. *See id.* Additionally, as discussed in the economic analysis below, upon consideration of the Kantor method, the Department found that it would result in a salary threshold that differs from the level set in this final rule by $40 per week. EPI similarly estimated that the Kantor method would result in a salary threshold that deviates from the level proposed in the NPRM by $33 per week. The Department does not believe this fairly small difference justifies reverting back to the Kantor method, particularly because the 2004 methodology is familiar to employers and employees, does not require uncertain and circular assumptions, and has never been challenged in court.

The Department also disagrees with commenters who stated that a significantly higher salary level is justified in order to reduce further the risk of employee misclassification. The Department recognizes that, in addition to conferring minimum wage and overtime protections on newly nonexempt employees, an updated salary level clarifies and strengthens the nonexempt status of employees who fail the duties test and earn between the previous salary level and the new one (*i.e.,* those who are and will remain nonexempt), and thereby reduces the risk that those employees will be misclassified as exempt. Indeed, this final rule clarifies and strengthens the nonexempt status of 2.2 million salaried white collar workers and 1.9 million salaried blue collar workers earning between $455 and $684 per week. *See infra* §§ VI.A.iii, VI.D.iii.3.

But the laudable goal of reducing misclassification cannot overtake the statutory text, which grounds an analysis of exemption status in the ''capacity'' in which someone is employed—*i.e.,* that employee's duties. Accordingly, the salary level test's limited purpose is to screen out only those employees who are not performing bona fide EAP duties. *See* Weiss Report at 8 (noting that the salary levels ''have amply proved their effectiveness in preventing the misclassification by employers of *obviously nonexempt* employees'') (emphasis added). As explained at length above, if the salary level is too high, as was the case in the 2016 final rule, it results in a substantial number of historically *exempt* bona fide EAP employees being classified as *nonexempt* without any examination of their duties. Such action is inconsistent with the section 13(a)(1) exemption. The Department believes that potential misclassification of nonexempt employees as exempt is most appropriately addressed through compliance assistance and, if necessary, enforcement by the Department or private parties, rather than through an artificial increase to the salary level.[79]

The Department also declines to adopt a lower salary level than the one proposed in the NPRM, as some employer representatives suggested. As explained above, by setting the salary level at the low end—the 20th percentile—of the earnings of full-time salaried employees in the South and/or retail industry, the Department, consistent with its historical practice, has tailored the salary level to the needs of the lowest-wage regions and industries. While some employer representatives stated that the Department could use an even narrower subset of data by eliminating from consideration higher-wage states, the Department believes that using the entire South—the lowest-wage Census Region—in addition to the retail industry nationwide strikes the appropriate balance by setting a salary level that is based on low-wage areas but can still serve as a meaningful dividing line in higher-wage areas as well.[80]

In sum, after considering the comments received, the Department has decided to update the salary level by applying the 2004 methodology to current data. As noted in the NPRM, using this methodology ''promotes familiarity and stability for the workplace, ensures workers the important wage protections contained in the Act, . . . minimizes the uncertainty and potential legal vulnerabilities that could accompany a novel and untested approach,'' ''avoids new regulatory burdens,'' and sets a salary level that ''accounts for nationwide differences in employee earnings and . . . work[s] appropriately with the standard duties test.'' 84 FR 10909.

The Department declines to make any changes to the duties test, such as adopting a duties test similar to the long duties test, which some employee representatives advocated as an alternative or complement to a higher salary level. As explained above, the standard duties test has been in effect for 15 years, and the short duties test, to which it is similar, was functionally the predominant test in use for the preceding 13 years. This approach has never been challenged. As a result, both employees and employers are accustomed to these tests. Moreover, a large body of jurisprudence interprets these duties tests, and so changing these tests could increase regulatory uncertainty and result in costly litigation. The Department also remains

[79] Regarding the view of the state attorneys general that the new salary level does not do enough to prevent misclassification under their states' wage-and-hour laws that track FLSA exemptions, nothing in this rule prevents any state from enacting a higher salary level, or a more restrictive duties test, than the FLSA if it believes it is necessary to prevent misclassification under state law.

[80] The Chamber stated that the 2004 rule and the Department's application of that rule (in the NPRM) used different groups of states, and that the 2004 rule used only a subset of states in the South Census Region. The Chamber's characterization of the data set used in the 2004 rule is incorrect, as both this rule and the 2004 final rule used the entire South Census Region in setting the salary level.

mindful of employer concerns that reinstating the long test's cap on nonexempt work could introduce new compliance burdens. *See, e.g.,* National Association of Truck Stop Operators; NRF; *see also* 81 FR 32446; 69 FR 22127. Finally, the Department did not propose any changes to the duties test in the NPRM and does not believe that it would be appropriate to institute such a significant change to the part 541 exemptions in this final rule.

Accordingly, the Department declines to return to the more complicated long duties test. The Department believes that the standard duties test, which focuses on whether an employee's ''primary duty'' consists of EAP tasks, can appropriately distinguish bona fide EAP employees from nonexempt workers.

The Department considered a number of alternatives to the salary level in this final rule.[81] First, the Department considered not changing the salary level from the currently enforced level of $455 per week. The Department rejected this option because, as discussed above, the Department concluded that the $455 salary level set fifteen years ago no longer reflects current earnings and must be updated to serve as a meaningful dividing line between nonexempt and potentially exempt employees. The Department also considered maintaining the average minimum wage protection in place since 2004 by using the weighted average of hours at minimum wage and overtime pay represented by the minimum salary level (*i.e.,* the $455 weekly threshold represented 72.2 hours at minimum wage and overtime pay at the minimum wage in 2004; currently, that salary level represents 55.2 hours at minimum wage and overtime pay; the weighted average is 59.5 hours, which yields a salary of $502 per week). The Department rejected this option because it would not adequately address wage growth since 2004.

In light of comments from some employer representatives, the Department also considered using the 2004 methodology but eliminating the District of Columbia, Maryland, and Virginia from the data set used to determine the salary level due to their higher levels of employee earnings. However, as discussed above, the Department believes that using the entire South and the retail industry nationwide results in an appropriate nationwide salary level that is based on low-wage regions but can still serve as a meaningful dividing line in higher-wage regions. Using the entire South is also consistent with the methodology used in the 2004 final rule.

In response to a comment from EPI, the Department also considered adopting the methodology that was used to derive the long test salary level prior to 2004 (the Kantor long test method), which used the lowest 10 percent of exempt salaried employees in low-wage regions and industries. However, as explained in greater detail above, the Department declined to do so because while the Kantor methodology produces a salary level that differs from the level set in this final rule by less than 6 percent, it depends on uncertain and circular assumptions, and is more complex to model and thus less accessible and transparent.

Finally, the Department considered using the methodology from the 2016 final rule to set the salary level, as suggested by many employee representatives. However, as explained at length above, the Department believes that methodology was inappropriate because it resulted in too many employees being newly classified as nonexempt based on their salaries alone, thus supplanting the role of the duties test. Moreover, the district court invalidated the 2016 final rule. Therefore, the Department has chosen to use the 2004 methodology, which, as noted above, screens out obviously nonexempt workers, works well with the standard duties test, and has never been challenged during the fifteen years in which it has been enforced by the Department.

3. Proposed Inflation to January 2020

The Department proposed to inflate the salary level to reflect anticipated wage growth to January 2020, the final rule's estimated effective date. Most commenters did not address this aspect of the proposal, but some employer representatives opposed it. A few stated that the proposed approach was inconsistent with the Department's past practice of setting the salary level using the most recent available data on actual salaries paid to employees, rather than inflationary metrics. *See, e.g.,* Center for Workplace Compliance; Chamber; FMI.

In the final rule, instead of projecting the salary level to January 2020, the Department has set the salary level using the most recent data available at the time the Department has drafted the final rule. The Department is using pooled CPS MORG data from July 2016 to June 2019, adjusted to reflect 2018/2019. As some commenters noted, using recent actual wage data is consistent with the approach the Department has taken in prior rulemakings. *See* 81 FR 32403 (noting regulatory history reveals that in most prior rulemakings ''the Department examined a broad set of data on actual wages paid to salaried employees'' to set the salary level), *id.* at 32051 (''In keeping with our practice, the Department relies on the most up-to-date data available to derive the final salary level[.]'').

It is also consistent with the Department's historical practice (with only one exception, in 1975) of declining to use inflation to adjust the salary level for the part 541 exemption. *See* 69 FR 12167 (noting the Department's ''long-standing tradition of avoiding the use of inflation indicators for automatic adjustments to these salary requirements''). Additionally, the gap between the latest month covered by the data set—June 2019—and the rule's effective date—January 2020—is only six months. This is a shorter gap than was the case in the 2016 rule, which had an effective date of December 1, 2016 and relied on salary data from the fourth quarter of 2015, and a significantly shorter gap than the 2004 rule, which had an effective date of August 23, 2004 and relied on 2002 CPS data. 81 FR 32391, 32405; 69 FR 22122, 22168. Using a data set that includes such recent earnings data enables the Department to avoid the uncertainty and speculation that would accompany projecting earnings data.

4. Rescission of the 2016 Final Rule

Many employer representatives who commented on the issue supported the NPRM's independent proposal to rescind the 2016 final rule. *See, e.g.,* ASTA; Center for Workplace Compliance; NAHB; NFIB; Wage and Hour Defense Institute; Worldwide Cleaning Industry Association. These employers generally maintained that the 2016 final rule, unlike the proposed rule, was inconsistent with how the Department has previously set the salary level, and some highlighted that the 2016 final rule excluded many workers performing EAP duties. As noted above, employer representatives also asserted that the 2016 final rule salary level would have a number of adverse effects, including reductions in staffing levels, hours, and employee benefits; less flexibility in scheduling; and decreased employee morale. In contrast, other commenters, including the tens of thousands who submitted comments as part of a campaign, maintained that the 2016 final rule was appropriate and would have benefited more employees than the salary level proposed in the NPRM, and urged the Department to defend the 2016 final rule in the

[81] The salary levels that would result from each of the alternatives are set forth in section VI.C.

currently stayed litigation. *See, e.g.,* AFL–CIO; Campaign Comments; Senator Patty Murray; The Leadership Conference on Civil and Human Rights.

The Department is finalizing the formal rescission of the 2016 final rule as proposed. Thus, in addition to replacing the 2016 final rule functionally by revising the part 541 regulatory text in the Code of Federal Regulations, this final rule also formally rescinds the 2016 final rule. This rescission operates independently of the new content in this final rule, as the Department intends it to be severable from the substantive rule for revising part 541. Thus, even if the substantive provisions of this final rule revising part 541 are invalidated, enjoined, or otherwise not put into effect, the Department intends the 2004 final rule to remain operative, not the enjoined 2016 final rule that it is rescinding.

Particularly given the recent history of litigation in this area, the rescission of the 2016 final rule is necessary to provide certainty and clarity to employees and employers about what salary level will be effective if this final rule were to be invalidated, enjoined, or otherwise not put into effect. As explained at length above, the Department believes that the salary level set in the 2016 final rule was inappropriate. Moreover, given the district court's invalidation of the 2016 final rule, the 2004 final rule, which has never been challenged in court, is the logical framework to take the place of this rule if this rule were to be struck down.

B. Special Salary Tests

i. Puerto Rico, Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands [82]

The Department has applied the standard salary level to Puerto Rico since 2004.[83] In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).[84] Section 404 of PROMESA states that ''any final regulations issued related to'' the Department's 2015 overtime rule NPRM—*i.e.,* the 2016 final rule—''shall have no force or effect'' in Puerto Rico until the Comptroller General of the Unites States completes and transmits a report to Congress assessing the impact of applying the final regulations to Puerto Rico, and the Secretary of Labor, ''taking into account the assessment and report of the Comptroller General, provides a written determination to Congress that applying such rule to Puerto Rico would not have a negative impact on the economy of Puerto Rico.'' [85]

It is the Department's belief that PROMESA does not apply to this final rule as it is a new rulemaking, and thus not ''related to'' the 2015 overtime rule NPRM within the meaning of PROMESA. Section 404, however, reflected Congress's apprehension with increasing the salary level in Puerto Rico, and given the current economic climate there, the Department proposed to set a special salary level in Puerto Rico of $455 per week—the level that currently applies under PROMESA.

The Department also currently applies the standard salary level to the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI).[86] The Department understands that U.S. territories face their own economic challenges and that an increase in the salary level affects them differently than the States. In recognition of these challenges, and to promote special salary level consistency across U.S. territories, the Department proposed setting a special salary level of $455 per week for the Virgin Islands, Guam, and the CNMI.

Few commenters addressed this issue, but those who did all supported the Department's proposal. The Saipan Chamber of Commerce, for example, stated that ''U.S. territories face economic challenges not experienced by businesses and employers on the U.S. mainland,'' and the World Floor Covering Association (WFCA) similarly cited the ''unique economies'' in these territories. The Hotel Association of the Northern Mariana Islands referenced several CNMI-specific concerns, including that ''[w]ages across all industries in the CNMI, including the hospitality industry, have been historically lower than their stateside counterparts.'' The CNMI chapter of SHRM expressed similar concerns.

After reviewing the comments received, the Department is finalizing this aspect of the NPRM as proposed. As such, in this final rule the Department will set a special salary level of $455 per week for Puerto Rico, the Virgin Islands, Guam, and the CNMI.

ii. American Samoa

As discussed in the NPRM, the Department has historically applied a special salary level test to employees in American Samoa because minimum wage rates there have remained lower than the federal minimum wage.[87] The Fair Minimum Wage Act of 2007, as amended, provides that industry-specific minimum wage rates in American Samoa will increase every three years until each equals the federal minimum wage.[88] The disparity with the federal minimum wage is expected to remain for the foreseeable future.

The special salary level test for employees in American Samoa has historically equaled approximately 84 percent of the standard salary level.[89] The Department proposed to maintain this percentage and considered whether to set the special salary level in American Samoa equal to 84 percent of the proposed standard salary level ($679 per week)—resulting in a special salary level of $570 per week—or to set it equal to approximately 84 percent of the proposed special salary level applicable to the other U.S. territories ($455 per week)—resulting in a special salary level of $380 per week. The Department proposed a special salary level of $380 per week in American Samoa. It explained that this approach would not only maintain the special salary level that the Department is currently enforcing in American Samoa, but would also ensure that American Samoa, which has a lower minimum wage than the other U.S. territories, would not have a higher special salary level.[90]

The Department received no comments on this proposal and will adopt the methodology set forth in the NPRM. Accordingly, in this final rule the Department will set a special salary level of $380 per week for employees in American Samoa.

iii. Motion Picture Producing Industry

The Department has permitted employers to classify as exempt employees in the motion picture producing industry who are paid a specified base rate per week (or a proportionate amount based on the number of days worked), so long as they meet the duties tests for the EAP exemption.[91] This exception from the

[82] The special salary tests do not apply to employees of the Federal government employed in Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or American Samoa.

[83] *See* 69 FR 22172.

[84] *See* Public Law 114–187, 130 Stat. 549 (June 30, 2016).

[85] *See* 48 U.S.C. 2193(a)–(b). The Comptroller General's report was published on June 29, 2018 and is available at: *https://www.gao.gov/products/GAO-18-483.*

[86] In Guam and the CNMI, the Department has applied the salary level test(s) applicable to the States. In the Virgin Islands, the Department applied a special salary level test prior to 2004, but applied the standard salary level beginning in 2004.

[87] *See* 69 FR 22172.

[88] *See* Sec. 1, Public Law 114–61, 129 Stat. 545 (Oct. 7, 2015).

[89] *See, e.g.,* 69 FR 22172.

[90] *See* 84 FR 10912.

[91] *See* § 541.709.

''salary basis'' requirement was created in 1953 to address the ''peculiar employment conditions existing in the [motion picture producing] industry,'' and applies, for example, when a motion picture producing industry employee works less than a full workweek and is paid a daily base rate that would yield the weekly base rate if 6 days were worked.[92] Consistent with its practice since the 2004 final rule, the Department proposed to increase the required base rate proportionally to the proposed increase in the standard salary level test, resulting in a proposed base rate of $1,036 per week.

The Department did not receive any comments on the proposed base rate for motion picture employees. The final rule adopts the methodology set forth in our proposal, which using the new standard salary level ($684 per week) results in a base rate of $1,043 per week (or a proportionate amount based on the number of days worked).[93]

C. Inclusion of Nondiscretionary Bonuses, Incentive Payments, and Commissions in the Salary Level Requirement

In the 2016 final rule, the Department for the first time allowed employers to count nondiscretionary bonuses and incentive payments toward the standard or special salary levels.[94] Under that rule, such bonuses must be paid quarterly or more frequently and may satisfy up to 10 percent of the standard or special salary level. In the NPRM, the Department again proposed to permit nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard or special salary level tests for the EAP exemption. However, unlike the 2016 final rule's requirement that such payments must be paid on a quarterly or more frequent basis, the Department proposed to allow the crediting of payments made on an annual or more frequent basis. Additionally, the Department proposed to permit employers to make a final ''catch-up'' payment within one pay period after the end of each 52-week period to bring an employee's compensation up to the required level. *See* 84 FR 10912–13.

Most commenters representing employers supported allowing nondiscretionary bonuses and incentive payments to count towards the standard salary level requirement. Employer representatives supporting the bonuses proposal (or an expanded version of it) asserted that nondiscretionary bonuses and incentive payments constitute a large and important part of the total compensation package for many exempt employees. Several commenters, including the Chamber, FMI, IFA, and NRA, noted that, in light of commenter feedback, the Department has previously acknowledged this point in the NPRM and in the 2016 final rule. *See* 81 FR 32423–24; 84 FR 10912. The Chamber additionally cited a survey from 2018 showing that 80 percent of non-profit and government employers surveyed use some type of ''short-term incentive plan.'' The National Association of Truck Stop Operators and PPWO asserted that the majority of employees who receive bonuses and incentive payments otherwise qualify for exempt status, while SIGMA and WFCA asserted that bonuses and incentive payments tied to an employer's success ''foster a sense of ownership'' among the managerial employees who receive them. Many employer representatives specifically approved of the Department's proposal to allow the crediting of nondiscretionary bonuses and incentive payments paid on an annual basis (rather than quarterly, as provided by the 2016 final rule), agreeing that annual bonuses are a common form of compensation for many EAP employees. *See* PPWO; SIGMA.

Although several employer representatives supported the proposal without reservation, a larger number objected to the proposal's restriction that nondiscretionary bonuses and incentive payments could only satisfy up to 10 percent of the standard salary level. Some of these commenters urged the Department to allow bonuses to satisfy more than 10 percent of the standard salary level, but declined to specify an exact amount. *See* Center for Workplace Compliance; National Association of Federally-Insured Credit Unions; NGA. Others specifically proposed a higher percentage limit, including: WFCA (suggesting 20 percent); Small Business Legislative Council and TechServe Alliance (25 percent); ASTA (30 percent); National Independent Automobile Dealers Association (30 or 40 percent); and HR Policy Association and the Kentucky Retail Federation (50 percent). Finally, many employer representatives urged the Department not to impose any limit. *See, e.g.,* American Network of Community Options and Resources; American Staffing Association; IFA; Mortgage Bankers Association; NRF; PPWO; Seyfarth Shaw.

Some commenters critical of the proposed 10 percent limit asserted that it is not reflective of the compensation practices in their industry, where bonuses and incentive payments often exceed 10 percent of an employee's fixed salary. *See, e.g.,* ASTA; NGA; WFCA. Others contended that to ''harmonize'' the respective regulations, any non-hourly payments that count toward an employee's ''regular rate of pay'' when calculating overtime pay, *see* 29 CFR 778.211(c), should count towards the salary threshold as well. *See, e.g.,* AGC; HR Policy Association; PPWO; Worldwide Cleaning Industry Association.[95] The Chamber, IFA, and the National Lumber and Building Material Dealers Association criticized the NPRM's rationale that the 10 percent limit was necessary to help maintain parity between sectors that use such pay methods and those that traditionally have not done so,[96] while ASTA and TechServe Alliance asserted that the 10 percent limit would have a negative impact on employers in industries that rely on incentive pay.

Although few organizations representing employees commented on the bonuses proposal, those who did were unanimous in voicing their opposition. NELA, Nichols Kaster, Rudy Exelrod, and Smith Summerset & Associates LLC (Smith Summerset) asserted that allowing annual bonuses and incentive payments to satisfy any portion of the salary level test would undermine the premise that only workers with a minimum level of dependable and predictable pay should be exempt from the FLSA's overtime protections. Relatedly, the AFL–CIO expressed concern that the proposal would ''provide a means for employers to manipulate employees' salaries to

[92] 18 FR 2881 (May 19, 1953).

[93] The Department calculated this figure by dividing the weekly salary level ($684) by $455, and then multiplying this result (rounded to the nearest hundredth) by the base rate set in the 2004 final rule ($695 per week). This produced a new base rate of $1,043 (per week), when rounded to the nearest whole dollar.

[94] Although a federal district court subsequently invalidated the 2016 final rule, the court's summary judgment decision did not address the bonuses provision. 275 F. Supp. 3d 795.

[95] For the same reason, some commenters specifically requested the Department allow employers to credit the value of board and lodging towards the standard salary level. See AHLA (''If an employer must include a non-hourly payment in the regular rate, that payment should likewise count towards the salary threshold.''); *see also* CUPA–HR; PPWO; Seyfarth Shaw. AHLA and CUPA–HR asserted that board and lodging benefits are especially common for exempt employees in hospitality and higher education, respectively.

[96] The Chamber stated that such a consideration is ''beyond the Department's proper purview.'' The Chamber and IFA additionally stated that government and non-profit employers do not typically compete with for-profit employers over the same employee, and that the proposal would not alter any existing competitive imbalance in any event.

avoid paying overtime[.]'' *See also* NELA. Given these concerns, some employee representatives asserted that the proposal would be particularly inappropriately paired with a salary level substantially lower than the figure adopted in the 2016 final rule. *See, e.g.,* NELA; Smith Summerset.

Several commenters disputed that nondiscretionary bonuses and incentive payments are indicative of exempt status. For example, NELA and TELA emphasized that such payments do not convey ownership interests in the business, and asserted that their members ''have represented many categories of employees who receive various nondiscretionary bonuses, including middle management and lower level employees[.]'' By contrast, Smith Summerset asserted that nondiscretionary bonuses and incentive payments ''are not an important pay component for the relatively lowly paid employees who would be affected by the [proposal],'' who the firm described as ''most in need of the certainty and regularity of a salary'' (emphasis in original).

Finally, employee representatives worried that the proposal would undermine the clarity and effectiveness of the salary level test. For example, AFL–CIO stated that ''[i]ncluding bonuses in the calculation could create confusion as to whether employees meet the salary threshold test and are overtime eligible.'' *See also* Nichols Kaster. Several commenters, including NELA, Rudy Exelrod, and TELA, asserted that the proposal would increase monitoring and compliance costs. Smith Summerset asserted that employers would have to keep new payroll and timekeeping records for their exempt staff, including for some individuals no longer employed by the company who might be awaiting a deferred compensation payment. Several employee representatives predicted that the proposal would result in increased litigation, particularly over the distinction between discretionary and nondiscretionary bonuses.[97] Smith Summerset emphasized that the back wage claims in such disputes would be substantial, and could pose ''a surprising and unexpected liability to those unsophisticated employers who might stumble into the violation simply by reason of administrative oversight.''

After carefully considering commenter feedback, the Department has decided to adopt the proposal without modification—*i.e.,* allowing employers to satisfy up to 10 percent of the standard or special salary levels [98] with nondiscretionary bonuses and incentive payments (including commissions), provided that such payments are paid no less frequently than on an annual basis.[99] This provision appropriately modernizes the regulations to account for EAP compensation practices in a growing number of workplaces, while at the same time preserving the important role of the salary basis and salary level tests in identifying EAP employees, simplifying compliance, and preventing abuse.

Feedback from employer representatives responding to the NPRM has reinforced the Department's view in the previous rulemaking that the provision of nondiscretionary bonus and incentive payments has become sufficiently correlated with EAP status. At the same time, the Department acknowledges that nonexempt employees may receive nondiscretionary bonuses and incentive payments, and that the part 541 regulations have historically looked only to payments made on a salary or fee basis to satisfy the minimum salary level. The Department believes that allowing employers to credit nondiscretionary bonuses towards up to 10 percent of the standard or special salary levels strikes an appropriate balance between accommodating legitimate pay practices for a growing number of bona fide EAP employees, while not undermining the salary basis requirement.

The Department has decided against raising or eliminating the proposal's 10 percent limitation. The Department continues to believe in the basic logic of the salary requirement. Capping the crediting of nondiscretionary bonuses and incentive payments at 10 percent of the standard salary level ensures that the salary level test remains predominantly a test of *salaried* earnings, requiring that EAP employees subject to the salary criteria must earn at least 90 percent of the standard salary level on a salaried basis. Additionally, while several employer commenters asserted that nondiscretionary bonuses and incentive pay often comprise more than 10 percent of the total compensation paid to EAP employees, few specifically asserted that any significant number of EAP employees earn salaries of less than 90 percent of the proposed salary threshold (*i.e.,* $614.70 per week, or $31,964.40 per year). Thus, the Department disagrees that the cumulative effect of raising the standard salary level while limiting the amount that can be satisfied through nondiscretionary bonuses and incentive pay will result in a significant reduction in such payments. The regulations do not limit the amount of bonuses EAP employees may earn; it only limits the amount that can count toward the standard salary level.

For similar reasons, the Department has decided against expanding the proposal to allow additional kinds of payments to count towards the standard salary level, such as discretionary bonuses, employer benefit contributions, or the value of board, lodging, and facilities. The Department has never allowed such payments to count towards any of the earning thresholds required for the EAP exemption, including under the HCE test created in 2004. *See* 541.601(b)(1). The Department did not propose to allow such payments to count towards the salary level test, and declines commenter suggestions to do so in this final rule.

NELA, Smith Summerset, and other commenters questioned how the proposed rule would treat employees affected by the proposal whose employment ends before the end of a 52-week period. Here, consistent with the treatment of employees under the existing HCE test, *see* § 541.601(b)(3), the Department has amended the proposed regulatory text at § 541.602(a)(3) to clarify that employers may pay employees a prorated amount for a designated 52-week period where an employee does not work for the entire period, because the employee either is newly hired after the period's start or ends employment before the period's end. Determining an employer's payment obligation to such employees to maintain their exempt status depends on the number of workweeks that the employee works within the 52-week period. Where employment ends before the end of the 52-week period, employers must ensure that the employee receives enough in pay to satisfy the standard salary level by the end of the next pay period

[97] NELA and other commenters asserted that ''[d]etermining whether bonuses are discretionary or nondiscretionary already generates considerable litigation in the context of whether certain kinds of bonuses must be included in the regular rate for purposes of calculating the overtime rate.'' *See also* Nichols Kaster; Rudy Exelrod; TELA.

[98] Specifically, this rule permits employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level or any of the special salary levels applicable to U.S. territories. As discussed in greater detail below, however, HCEs must receive at least the standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments.

[99] The employer may use any 52-week period, such as a calendar year, a fiscal year, or an anniversary of the hire year.

following the employee's end of employment.

The final rule permits employers to meet the salary level requirement by making a catch-up payment within one pay period of the end of the 52-week period.[100] In plain terms, each pay period an employer must pay the EAP employee on a salary basis at least 90 percent of the standard salary level and, if at the end of the 52-week period the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid does not equal the standard salary level for the 52-week period, the employer has one pay period to make up for the shortfall (up to 10 percent of the required salary level). Any such catch-up payment will count only toward the previous 52-week period's salary amount and not toward the salary amount in the 52-week period in which it was paid.

The Department is sensitive to concerns raised by employee representatives and some employer commenters that the bonuses provision may increase compliance costs and litigation. These effects, however, are mitigated by the fact that crediting nondiscretionary bonuses and incentive pay towards the standard salary level is purely optional. Employers, who would predominantly bear the cost of compliance and litigation expenses, are presumably best positioned to evaluate whether the potential costs of such crediting would outweigh the potential benefits. While the AFL–CIO contends that the bonuses proposal could theoretically ''lead to anomalous results, where employees working side by side performing the same job would be exempt and nonexempt, simply because inclusion of the bonus would raise one employee over the salary threshold[,]'' this has always been true of the salary level test, given that employees performing identical job duties may receive different salaries.

The Department emphasizes that this rulemaking does not change the requirement in § 541.601(b)(1) that highly compensated employees must receive at least the standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments. While nondiscretionary bonuses and incentive payments (including commissions) may be counted toward the HCE total annual compensation requirement, the HCE test does not allow employers to credit these types of payments toward the standard salary requirement. The Department continues to believe that permitting employers to use nondiscretionary bonuses and incentive payments to satisfy the standard salary portion of the HCE test is not appropriate because employers are already permitted to fulfill more than three quarters of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation (paid at least annually). Thus, when conducting the HCE analysis, employers must remain mindful that HCEs must receive the full standard salary amount each pay period on a salary or fee basis.

Finally, nothing adopted in this final rule alters the Department's longstanding position that employers may pay their exempt EAP employees additional compensation of any form beyond the minimum amount needed to satisfy the salary basis and salary level tests. *See* § 541.604(a). Similarly, the Department emphasizes that nonexempt employees may continue to receive bonuses and incentive payments. Where nondiscretionary bonuses or incentive payments are made to nonexempt employees, the payments must be included in the regular rate when calculating overtime pay. The Department's regulations at §§ 778.208–.210 explain how to include nondiscretionary bonuses in the regular rate calculation.

D. Highly Compensated Employees

As noted in the NPRM, the Department's 2004 final rule created a new test under the EAP exemption, known as the highly compensated employee (HCE) test, based on the rationale that it is unnecessary to apply the standard duties test in its entirety to employees who earn at least a certain amount annually—an amount substantially higher than the annual equivalent of the weekly standard salary level—because such employees ''have almost invariably been found to meet all the other requirements of the regulations for exemption.'' [101] The HCE test combines a high compensation requirement with a less-stringent duties test.

To meet the HCE test, an employee must earn at least the amount specified in the regulation in total annual compensation and must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.[102] This test applies ''only to employees whose primary duty includes performing office or non-manual work.'' [103] Such an employee must receive at least the standard salary level each pay period on a salary or fee basis, while the remainder of the employee's total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.[104] An employee is permitted to make a final ''catch-up'' payment ''during the last pay period or within one month after the end of the 52-week period'' to bring an employee's compensation up to the required level.[105] If an employee works for less than a full year, either because the employee is newly hired after the beginning of the 52-week period or ends the employment before the end of this period, the employee may still qualify for exemption under the HCE test if the employee receives a pro rata portion of the required annual compensation, based upon the number of weeks of employment.[106]

The Department stated in the NPRM that it continues to believe that the HCE test is a useful alternative to the standard salary level and duties tests for highly compensated employees.[107] At the time this level was initially set in 2004 at $100,000, the Department concluded that ''white collar'' employees who earn above this threshold would nearly always satisfy any duties test.[108] The Department proposed updating the HCE threshold to ensure that it remains a meaningful and appropriate standard when paired with the more-lenient HCE duties test. Specifically, the Department proposed setting the HCE threshold at the 90th percentile of all full-time salaried workers nationally using 2017 CPS data, then inflated to January 2020, resulting

[100] FMI, IFA, and other employer representatives requested giving employers more than one pay period to make any necessary catch-up payments, pointing out that the HCE test permits employers to make catch-up payments within one month after the end of the 52-week period used for that test. *See* 29 CFR 541.601(b)(2). The Department declines this request because this new provision specifically affects the standard salary level requirement, not additional income received on top of that threshold by highly compensated employees.

[101] 69 FR 22174 (quoting Weiss Report at 22).

[102] § 541.601(a).

[103] § 541.601(d).

[104] § 541.601(b)(1). However, total annual compensation does not include board, lodging, and other facilities, or payments for medical insurance, life insurance, retirement plans, or other fringe benefits. *Id.*

[105] § 541.601(b)(2).

[106] § 541.601(b)(3).

[107] 84 FR 10913.

[108] *Id.* The Department concluded that ''in the rare instances when these employees do not meet all other requirements of the regulations, a determination that such employees are exempt would not defeat the objectives of section 13(a)(1) of the Act.'' 69 FR 22174 (quoting Weiss Report at 22–23).

in a proposed HCE threshold of $147,414, of which $679 would have to be paid weekly on a salary or fee basis.[109]

The Department received fewer comments addressing the HCE proposal than on many other issues in the NPRM, and those who addressed the HCE proposal often did not provide detailed feedback. Nearly all the commenters on the HCE proposal were employer representatives, most of whom opposed the Department's proposal to increase the HCE compensation level to a level equal to the 90th percentile of all full-time salaried workers ($147,414). These commenters instead supported keeping the HCE level at $100,000, *see, e.g.,* HR Policy Association; National Association of Manufacturers; NRF, or increasing the HCE level but by a lower amount (resulting in a threshold between $100,000 and $147,414), *see, e.g.,* Chamber; National Lumber and Building Material Dealers Association; WFCA. For example, some commenters suggested lowering the percentile from 90 percent to 80 percent of full-time salaried employees nationwide. *See, e.g.,* Center for Workplace Compliance; WorldatWork. A few employer representatives noted that they did not object to the proposed HCE salary level. *See* ASTA; Credit Human Federal Credit Union. By and large, employee representatives did not specifically address the HCE proposal.[110]

Commenters who favored keeping the HCE threshold at $100,000 or increasing it by a lower amount expressed concern that the proposed level was so high as to put the HCE test for the EAP exemption out of reach for employers in lower-wage regions and industries. For example, the Chamber stated that such employers would not be able to access the HCE test ''on equal terms,'' because ''[w]hether an employee qualifies for exemption under the highly compensated test would depend more on where the employee works than how much the employer values the employee's duties.'' Some of these commenters suggested that the Department should calculate the HCE threshold using data from a lower-wage region of the country, such as the South Census Region or a subset thereof, which would result in a lower threshold than using a national data set. *See, e.g.,* Chamber; NRA. Others suggested that the Department should continue to use national data, but should lower the threshold by pegging the HCE threshold at the 80th percentile of full-time salaried workers, rather than the 90th percentile proposed in the NPRM. *See* Center for Workforce Opportunity; WorldatWork. WorldatWork asserted that this approach would ''result in a far more workable standard, given the fluctuation in weekly earnings in different parts of the country and in different industries'' and would still ''identify[ ] those individuals who should be eligible for a more relaxed duties test.''

Other commenters objected to the Department's proposed HCE threshold on the ground that it would require employers to reassess the exempt status of many employees using the standard duties test, rather than the simpler HCE test. The HR Policy Association and PPWO explained that ''[a] significant amount of administrative effort will be needed to determine that an employee who had been classified as exempt through application of the HCE test remains exempt under application of the standard duties test.'' The National Association of Manufacturers explained that this process ''is certain to be lengthy'' as ''employers will need to survey managers, conduct follow-up interviews, hold new budget discussions, and plan and implement changes to each individual employee's duties or status.''

The Department has considered the comments regarding the HCE test for exemption and decided to lower the percentile at which to set the HCE threshold from that proposed in the NPRM. The Department agrees with commenters that increasing the HCE threshold so dramatically would result in significant administrative burdens and compliance costs, including costs associated with reassessing the exempt status of many highly paid white collar workers under the standard duties test. Yet while employers would incur these burdens and costs, the vast majority of currently exempt HCE employees would remain exempt (under the standard test).[111] In short, the Department would be imposing significant administrative costs on employers for a limited effect. Additionally, the Department agrees with commenters that the proposed level was so high that it would have excluded employees who should be exempt under the provision, particularly those in lower-wage regions and industries. However, the Department disagrees with commenters who oppose any increase in the HCE threshold beyond the currently enforced level. The number of full-time salaried workers who earn above $100,000 per year has increased significantly.[112] The Department believes that some increase to the HCE threshold is necessary to ensure that the HCE threshold continues to provide a meaningful and appropriate complement to the more lenient HCE duties test.

Accordingly, the Department is setting the HCE total annual compensation level at the 80th percentile of full-time salaried workers nationally using pooled 2018/2019 CPS data.[113] This results in a level of $107,432, of which $684 must be paid weekly on a salary or fee basis.[114] The Department believes this threshold is sufficiently high to ensure that it provides a meaningful and appropriate complement to the more lenient HCE duties test, and that nearly all of the highly-paid white collar workers earning above this threshold ''would satisfy any duties test.'' Additionally, to be consistent with the methodology for setting the standard salary level, the Department now uses three-year pooled data to estimate the HCE compensation level. The Department further believes that this straightforward approach will lower administrative costs, as compared to the initial proposal, while still ensuring that nearly all of the highly paid white collar workers earning above this threshold ''would satisfy any duties test.'' [115]

E. Future Updates to the Earnings Thresholds

As the Department noted in the NPRM, even a well-calibrated salary

[109] 84 FR 10913–14. Consistent with the 2016 final rule, the Department's proposal did not permit employers to use nondiscretionary bonuses to satisfy the weekly standard salary level requirement for HCE workers. *Id.* at 10914 n.129. As previously stated, the Department believes that permitting employers to use nondiscretionary bonuses and incentive payments to satisfy the standard salary portion of the HCE test is not appropriate because employers are already permitted to fulfill the majority of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation (paid at least annually).

[110] At least one individual commenter supported the proposed increase in the HCE compensation level.

[111] In the economic analysis below in section VI.B.v, the Department estimated that, under the baseline scenario in which the HCE threshold remains at $100,000, approximately 9.3 million workers will pass both the standard and HCE tests and 343,000 will pass only the HCE test. Stated differently, of those workers who will earn at least $100,000, approximately 96.4 percent would pass the standard duties test.

[112] 84 FR 10913 n.123.

[113] In the NPRM, the Department used 2017 CPS data to set the HCE compensation level. *See id.* at 10913. To be consistent with the methodology for setting the standard salary level, in the final rule the Department is setting the HCE compensation level using pooled CPS data for July 2016 to June 2019, adjusted to reflect 2018/2019.

[114] The Department notes that no regional adjustment has been made to the HCE threshold in this final rule, just as this was not part of the determination of the HCE threshold in either the 2004 or 2016 final rules.

[115] 84 FR 10914 (internal citation omitted).

level that is fixed becomes obsolete as wages for nonexempt workers increase over time. Long lapses between rulemakings have resulted in EAP salary levels based on outdated salary data. Such levels are ill-equipped to help employers assess which employees are unlikely to meet the duties tests for the part 541 exemptions. As the Department noted in 2004, outdated regulations ''allow unscrupulous employers to avoid their overtime obligations and can serve as a trap for the unwary but well-intentioned employer;'' they can also lead increasing numbers of nonexempt employees to ''resort to lengthy court battles to receive their overtime pay.'' 69 FR 22212.

Throughout the years, various stakeholders have submitted comments asking the Department to establish a mechanism to update the thresholds automatically. The Department has twice declined such requests, once in 1970, when it concluded that ''such a proposal [would] require further study,'' 35 FR 884, and once in 2004, 69 FR 22171–72. However, in the 2016 final rule, the Department for the first time adopted a mechanism to automatically update the earnings thresholds every three years, applying the same methodology used to initially set each threshold in that rulemaking. 81 FR 32430. The district court's summary judgment decision invalidating the 2016 final rule stated that because the standard salary level established by the 2016 final rule was unlawful, the mechanism to automatically update that standard salary level was ''similarly . . . unlawful.'' [116]

In the NPRM, the Department expressed its intent to evaluate the part 541 earnings thresholds more frequently through rulemaking. 84 FR 10914–15. Specifically, the Department stated in the NPRM that it intended to propose updates to the standard salary level and HCE total compensation threshold on a quadrennial basis (*i.e.,* once every four years) through notice-and-comment rulemaking, and that each proposal would use the same methodology as the most recently published final rule. The Secretary, however, could forestall proposed updates if economic or other factors so indicated. The Department also described how it could revise the part 541 regulations if it were to codify this intention in a final rule. *Id.* at 10915 n.140.

Some commenters supported the Department's proposal to propose updates to the earnings thresholds every four years unless unwarranted due to economic or other factors. *See* National Association of Convenience Stores; National Association of Landscape Professionals; NGA; National Multifamily Housing Council and the National Apartment Association; SBA Advocacy. These commenters generally agreed that the Department's proposal would help the salary level keep pace with earnings growth, thus preventing dramatic increases after long gaps between updates. *See, e.g.,* Credit Union National Association; Joint Comment from Golf Industry Representatives. Many of these commenters specifically expressed support for the Department's proposal to use notice-and-comment rulemaking to set future salary thresholds; such as NAHB, which commented that ''[b]y continuing its current practice of engaging the regulated community . . . DOL will receive timely and important information as it moves forward with proposed updates in the future.'' Commenters who supported the Department's proposal generally characterized this reliance on notice-and-comment rulemaking as preferable to the 2016 final rule's automatic updating provision, *see, e.g.,* Job Creators Network; Joint Comment of 5 Senators, with some asserting that automatic updating, without notice-and-comment rulemaking, would be unlawful, *see, e.g.,* Joint Comment by International Public Management Association for Human Resources and others; SIGMA.

Other commenters did not support the Department's commitment to evaluate the thresholds regularly. Many commenters felt that there was no need to adhere to a fixed schedule, with some asserting that doing so could deprive the Department of flexibility to adapt to unanticipated circumstances. These commenters advocated for the Department to continue its practice of updating the salary whenever it deems such updates appropriate. *See, e.g.,* AGC; Argentum and American Seniors Housing Association; HR Policy Association; Independent Bakers Association. A few commenters questioned the Department's authority to bind itself to conducting regular evaluations of the salary level. *See* AHLA; PPWO. Others felt that the proposed updating framework could expose the Department to legal risk because parties might challenge a decision by the Department not to engage in the anticipated rulemaking. *See* Associated Builders and Contractors; FMI. Some commenters who opposed the updating proposal asserted that it was unnecessary since the Department can engage in rulemaking at any time. *See* Associated Builders and Contractors, FMI, NRA.

Other commenters, including employee representatives, took the opposite tack, requesting that the Department automatically update the salary thresholds. *See, e.g.,* Center for Popular Democracy; Demos; Oxfam America. Some of these commenters asserted that past experience, including the long gaps between the most recent updates, has demonstrated that in the absence of regular updates, the salary level becomes obsolete, and that an announced intent to propose updates does not sufficiently ensure that the levels will, in fact, be updated. *See, e.g.,* AARP; Joint Comment from 77 Members of Congress; Nichols Kaster. Many commenters who favored automatic updating specifically supported the updating provision that was included in the 2016 final rule. *See* AARP; NELA; NELP; NWLC; State AGs; The Leadership Conference on Civil and Human Rights. Some maintained that the lack of automatic updating would result in decreased earnings for workers, citing EPI's estimates that the gap in projected earnings transfers to workers between the 2016 final rule and the proposal would increase from $1.2 billion to $1.6 billion due to the lack of automatic updates. *See, e.g.,* EPI; NELP; UAW. NELP further stated that ''[i]ndexing would ensure predictability for workers and employers alike and eliminate the need for time-consuming federal regulations.''

A number of commenters generally supported regular updates to the earnings thresholds, but suggested a frequency other than every four years. For instance, ASTA suggested that a six-year gap ''would strike a better balance in recognizing [its] and [its] member employers' legitimate concerns . . . than the four-year interval included in the NPRM.'' The Pennsylvania Credit Union Association wrote in support of updating the thresholds no less frequently than every three years, while Representative Daniel Lipinski ''urge[d] the Department to review the [standard salary] threshold more frequently than once every four years.'' AFSCME supported annual updates.

In this final rule, the Department reaffirms its intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice-and-comment rulemaking. The Department agrees with those commenters who stated that long periods without updates serve neither employee nor employer interests, since they diminish the usefulness of the salary level test and cause future increases to be larger and

[116] 275 F. Supp. 3d at 808.

more challenging for businesses to absorb. Regular updates, on the other hand, ensure that the salary level test is based on the best available data (and thus remains a meaningful, bright-line test), produce more predictable and incremental changes in the salary level, and therefore provide certainty to employers and promote government efficiency.

After reviewing the comments received on this issue, however, the Department declines to finalize its proposal to propose updates to the part 541 regulations quadrennially. The Department agrees with commenters who stated that this commitment could deprive the Department of flexibility to adapt to unanticipated circumstances, and believes that prevailing economic conditions, rather than fixed timelines, should drive future updates. While some commenters supported the Department's updating proposal, the reasons often underlying that support—*e.g.,* the benefits of notice-and-comment rulemaking and of salary levels that keep pace with earnings growth—are not necessarily tied to updates occurring on a predetermined schedule, and would be met by the Department updating the salary thresholds more regularly. In addition, that many commenters who supported regular updates nonetheless disagreed on the optimal updating frequency reaffirms the Department's approach, as does the fact that few, if any, commenters supported the Department codifying its intent to propose updates quadrennially.

The Department's intention to update the part 541 regulations more regularly using notice-and-comment rulemaking will also ensure ample opportunity for public input, and provide the Department with the flexibility to update the earnings thresholds in a manner that is tailored to wages and economic conditions at the time of the update. Because the Department believes that it is important to preserve the Department's flexibility to adapt to different types of circumstances, the Department declines the suggestions by employee representatives to adopt an automatic updating mechanism as in the 2016 final rule. Lastly, while the Department understands commenter concerns regarding the lengthy time periods between recent rulemakings, in this final rule the Department is reaffirming its commitment to better implement Congress's instruction to define and delimit the EAP exemptions ''from time to time'' [117] through regulations. Regular updates ensure that the salary level test continues to screen from exemption obviously nonexempt employees who are unlikely to be performing the duties of bona fide executive, administrative, or professional employees.

[117] 29 U.S.C. 213(a)(1).

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement, unless it displays a currently valid Office of Management and Budget (OMB) control number. *See* 5 CFR 1320.8(b)(3)(vi). OMB has assigned control number 1235–0018 to the Fair Labor Standards Act (FLSA) information collections. OMB has assigned control number 1235–0021 to Employment Information Form collections, which the Department uses to obtain information from complainants regarding FLSA violations.

In accordance with the PRA, the Department solicited comments on the FLSA information collections and the Employment Information Form collections in the NPRM published March 22, 2019, *see* 84 FR 10900, as the NPRM was expected to impact these collections. 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the FLSA information collections, in accordance with 44 U.S.C. 3507(d). On May 20, 2019, OMB issued a notice for each collection (1235–0018 and 1235–0021) that continued the previous approval of the FLSA information collections and the Employment Information Form collections under the existing terms of clearance. OMB asked the Department to resubmit the information collection request upon promulgation of the final rule and after considering public comments on the proposed rule.

Circumstances Necessitating Collection: The FLSA, 29 U.S.C. 201 *et seq.,* sets the federal minimum wage, overtime pay, recordkeeping, and youth employment standards of most general application. Section 11(c) of the FLSA requires all employers covered by the FLSA to make, keep, and preserve records of employees and of wages, hours, and other conditions and practices of employment. An FLSA covered employer must maintain the records for such period of time and make such reports as prescribed by regulations issued by the Secretary of Labor. The Department has promulgated regulations at part 516 to establish the basic FLSA recordkeeping requirements, which are approved under OMB control number 1235–0018.

FLSA section 11(a) provides that the Secretary of Labor may investigate and gather data regarding the wages, hours, or other conditions and practices of employment in any industry subject to the FLSA, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters deemed necessary or appropriate to determine whether any person has violated any provision of the FLSA. 29 U.S.C. 211(a). The information collection approved under OMB control number 1235–0021 provides a method for the Wage and Hour Division of the U.S. Department of Labor to obtain information from complainants regarding alleged violations of the labor standards the agency administers and enforces. This final rule revises the existing information collections previously approved under OMB control number 1235–0018 (Records to be Kept by Employers—Fair Labor Standards Act) and OMB control number 1235–0021 (Employment Information Form).

This final rule does not impose new information collection requirements; rather, burdens under existing requirements are expected to increase as more employees receive minimum wage and overtime protections due to the proposed increase in the salary level requirement. More specifically, the changes adopted in this final rule may cause an increase in burden on the regulated community because employers will have additional employees to whom certain long-established recordkeeping requirements apply (*e.g.,* maintaining daily records of hours worked by employees who are not exempt from both the minimum wage and overtime provisions). Additionally, the changes adopted in this final rule may cause an initial increase in burden if more employees file complaints with WHD to collect back wages under the overtime pay requirements.

Public Comments: The Department sought public comments regarding the burdens imposed by information collections contained in the proposed rule. The Department received few comments relevant to the PRA. A few commenters stated that employers would need to maintain records of hours worked for more employees as a result of an increase to the salary level.

See, International Bancshares Corporation; Washington Nonprofits. A few individual commenters expressed concerns surrounding costs associated with additional recordkeeping. A CEO of a professional placement firm indicated that tracking of hours would produce increased human resources paperwork and technology costs. Smith Summerset commented that those employers who take advantage of the allowance for up to ten percent of nondiscretionary bonuses and incentive payments to meet the standard salary level will have to maintain records documenting the applicable annual periods and detailing earnings and all payments (including catch-up payments) for each affected worker, including records such employers were not previously required to maintain.

In response to these comments, the Department notes that most employers currently have both exempt and nonexempt workers and therefore have systems already in place for employers to track hours. The Department also notes that commenters did not offer alternatives for estimates or make suggestions regarding the methodology for calculating the PRA burdens. The actual recordkeeping requirements are not changing in the final rule. However, the pool of workers for whom employers will be required to make and maintain records has increased under the final rule, and as a result the burden hours have increased. Included in this PRA section are the regulatory familiarization costs for this final rule. We note, however, that this is a duplication of the regulatory familiarization costs contained in the economic impact analysis, *see* section VI.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department has submitted the identified information collection contained in the proposed rule to OMB for review under the PRA under the Control Numbers 1235–0018 and 1235–0021. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. The Department has resubmitted the revised FLSA information collections to OMB for approval, and intends to publish a notice announcing OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at *http://www.Reginfo.gov* or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Total annual burden estimates, which reflect both the existing and new responses for the recordkeeping and complaint process information collections, are summarized as follows:

Type of Review: Revisions to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

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

OMB Control Number: 1235–0018.

Affected Public: Private sector businesses or other for-profits, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.

Estimated Number of Respondents: 5,621,961 (2,616,667 by this rulemaking).

Estimated Number of Responses: 46,959,856 (2,616,667 added by this rulemaking).

Estimated Burden Hours: 3,625,986 hours (2,616,667 added by this rulemaking).

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

Frequency: Various (unaffected by this rulemaking).

Other Burden Cost: 0.

Title: Employment Information Form.

OMB Control Number: 1235–0021.

Affected Public: Businesses or other for-profit, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.

Total Respondents: 36,278 (651 added by this rulemaking).

Estimated Number of Responses: 36,278 (651 added by this rulemaking).

Estimated Burden Hours: 12,155 (217 hours added by this rulemaking).

Estimated Time per Response: 20 minutes (unaffected by this rulemaking).

Frequency: Once.

Other Burden Cost: 0.

VI. Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of a regulation and to adopt a regulation only upon a reasoned determination that the regulation's net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity) justify its costs. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, the Office of Management and Budget (OMB) determines whether a regulatory action is a ''significant regulatory action,'' which includes an economically significant action that has an annual effect of $100 million or more on the economy. Significant regulatory actions are subject to review by OMB. As described below, this final rule is economically significant.

When the Department uses a perpetual time horizon to allow for cost comparisons under Executive Order 13771,[118] the annualized cost savings of the final rule is $534.8 million with 7 percent discounting. This final rule is accordingly expected to be an Executive Order 13771 deregulatory action.

A. Introduction

i. Background

The FLSA requires covered employers to: (1) Pay employees who are covered and not exempt from the Act's requirements not less than the federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of their employees and of the wages, hours, and other conditions and practices of employment.

The FLSA provides a number of exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional (EAP) employees. The exemption applies to employees employed in a bona fide executive, administrative, or professional capacity and to outside sales employees, as those terms are ''defined and delimited'' by the Department.[119] The Department's regulations implementing these ''white collar'' exemptions are codified at 29 CFR part 541.

In 2004, the Department determined that two earnings level tests should be used to help employers distinguish nonexempt employees from exempt employees: The standard salary test, which it set at $455 a week, and the highly compensated employee (HCE) total-compensation test, which it set at $100,000 per year (see section II.C for further discussion). In 2016, the Department published a final rule setting the standard salary level at $913 per week and the HCE annual compensation level at $134,004. As previously discussed, the U.S. District Court for Eastern District of Texas declared the 2016 final rule invalid.

ii. Need for Rulemaking

The Department has updated the salary level test many times since its implementation in 1938. Table 1 presents the weekly salary levels

[118] 82 FR 9339 (Feb. 3, 2017).

[119] 29 U.S.C. 213(a)(1).

associated with the EAP exemptions since 1938, organized by exemption and long/short/standard duties tests.[120] In the 37 years between 1938 and 1975, the Department increased salary test levels approximately every five to nine years. In subsequent years, the Department revised the levels less frequently, and it is currently enforcing the levels set in 2004.[121]

TABLE 1—HISTORICAL SALARY LEVELS FOR THE EAP EXEMPTIONS

Date enacted	Long test			Short test (all)
	Executive	Administrative	Professional	
1938	$30	$30	.....	.....
1940	30	50	$50	.....
1949	55	75	75	$100
1958	80	95	95	125
1963	100	100	115	150
1970	125	125	140	200
1975	155	155	170	250
Standard test				
2004	$455			

To restore the value of the standard salary level as a line of demarcation between those workers for whom Congress clearly intended to provide minimum wage and overtime protections and other workers who may be bona fide EAPs, and to maintain the salary level's continued validity, the Department is updating the standard salary level by applying the 2004 methodology to current Current Population Survey (CPS) data.[122] Using pooled CPS Merged Outgoing Rotation Group (MORG) [123] data to represent the July 2018 through June 2019 period (hereafter referred to as 2019), the salary level of $684 ($35,568 annually) set in this final rule corresponds to the 20th percentile of earnings for full-time salaried workers in the South Census Region and/or in the retail industry.[124] [125] Similarly, the Department used the pooled 2018/19 CPS MORG data to set the updated HCE total annual compensation requirement at $107,432, which is the earnings for the 80th percentile of all full-time salaried workers nationally.

iii. Summary of Affected Workers, Costs, Benefits, and Transfers

The Department estimated the number of affected workers and quantified costs and transfer payments associated with this final rule, using the currently-enforced 2004 salary level as the baseline. To produce these estimates, the Department used pooled CPS MORG data. *See* section VI.B.ii. Most critically, the Department estimates that 1.2 million workers who would otherwise be exempt under the currently-enforced standard salary level of $455 per week will either become eligible for overtime or have their salary increased to at least $684 per week, and that 4.1 million employees paid between $455 and $684 per week who fail the standard duties test (*i.e.,* that are and will remain nonexempt) will have their overtime eligibility made clearer because their salary will fall below the specified threshold (Table 2).[126] Additionally, an estimated 101,800 workers will be affected by the increase in the HCE compensation test from $100,000 per year to $107,432 per year using the pooled 2018/19 CPS MORG data. By Year 10, the Department estimates that 723,000 workers will be affected by the change in the standard salary level test and 154,000 workers will be affected by the change in the HCE total annual compensation test, compared to a baseline assuming the currently-enforced earnings thresholds (*i.e.,* $455 per week and $100,000 per year) remain unchanged.[127]

This analysis quantifies three direct costs to employers: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs (*see* section VI.D.iii for further discussion on costs). The costs presented here are the combined costs for both the change in the standard salary level test and the HCE total annual compensation level (these will be disaggregated in section VI.D.iii). Total annualized direct employer costs over the first 10 years

[120] From 1949 until 2004 the regulations contained two different tests for exemption—a long test for employees paid a lower salary that included a more rigorous examination of employees' duties, and a short test for employees paid at a higher salary level that included a more flexible duties test. The standard duties test is used in conjunction with the standard salary level test, as set in 2004 and applied to date, to determine eligibility for the EAP exemptions. It replaced the short and long tests in effect from 1949 to 2004.

[121] In 2016, the Department issued a final rule revising the EAP salary levels; however, on August 31, 2017, the U.S. District Court for Eastern District of Texas held that the 2016 final rule's standard salary level exceeded the Department's authority and was therefore invalid. *See Nevada* v. *U.S. Dep't of Labor,* 275 F. Supp. 3d 795 (E.D. Tex. 2017). Until the Department issues a new final rule, it is enforcing the part 541 regulations in effect on November 30, 2016, including the $455 per week standard salary level set in the 2004 final rule.

[122] The Department also notes that the terms *employee* and *worker* are used interchangeably throughout this analysis.

[123] The Merged Outgoing Rotation Group is a supplement to the CPS and is conducted on approximately one-fourth of the CPS sample monthly to obtain information on weekly hours worked and earnings.

[124] Excluding workers who are not subject to the FLSA, not subject to the salary level test, or in agriculture or transportation.

[125] As previously explained, in the 2004 final rule, the Department looked to the 20th percentile of full-time salaried workers in the South and in the retail industry nationally to validate the standard salary level set in the final rule. In this final rule, the Department set the standard salary level at the 20th percentile of the combined subpopulations of full-time salaried employees in the South and full-time salaried employees in the retail industry nationwide. Accordingly, the use of ''and/or'' when describing the salary level methodology in this final rule reflects that this data set includes full-time salaried workers who work: (1) In the South but not in the retail industry; (2) in the retail industry but not in the South; and (3) in the south in the retail industry.

[126] Here and elsewhere in this analysis, numbers are reported at varying levels of aggregation, and are generally rounded to a single decimal point. However, calculations are performed using exact numbers. Therefore, some numbers may not match the reported totals or the calculations shown due to rounding of components.

[127] In later years, earnings growth will cause some workers to no longer be affected because their earnings will exceed the new salary threshold. Additionally, some workers will become newly affected because their earnings will exceed $455 per week, and in the absence of this final rule would have lost their overtime protections. To estimate the total number of affected workers over time, the Department accounts for both of these effects.

were estimated to be $173.3 million, assuming a 7 percent discount rate (Table 2).[128]

In addition to the costs described above, this rule will also transfer income from employers to employees in the form of wages. The Department estimated annualized transfers will be $298.8 million. The majority of these transfers will be attributable to the FLSA's overtime provision; a smaller share will be attributable to the FLSA's minimum wage requirement. Transfers also include salary increases for some affected EAP workers[129] to preserve their exempt status. Employers may incur additional costs, such as hiring new workers. These other potential costs are discussed in section VI.D.iii. Potential benefits of this rule could not be quantified due to data limitations, requiring the Department to discuss such benefits qualitatively. *See* § VI.D.v.

TABLE 2—SUMMARY OF REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS

[Millions in 2019$]

Impact	Year 1	Future years[a]		Annualized value	
		Year 2	Year 10	3% real discount rate	7% real discount rate
Affected Workers (1,000s)					
Standard	1,156	1,069	723		
HCE	101.8	114	154		
Total	1,257	1,183	877		
Costs and Transfers (Millions in 2019$)[b]					
Direct employer costs	$543.0	$134.3	$99.1	$164.0	$173.3
Transfersthnsp;[c]	396.4	307.7	247.4	295.0	298.8

[a] These cost and transfer figures represent a range over the nine-year span.
[b] Costs and transfers for affected workers passing the standard and HCE tests are combined.
[c] This is the net transfer from employers to workers. There may also be transfers of hours and income from some workers to others.

B. Methodology To Determine the Number of Potentially Affected EAP Workers

i. Overview

This section explains the methodology used to estimate the number of workers who are subject to the part 541 regulations and the number of potentially affected EAP workers. In this final rule, as in the 2004 final rule, the Department estimated the number of EAP exempt workers because there is no data source that identifies workers as EAP exempt. Employers are not required to report EAP exempt workers to any central agency or as part of any employee or establishment survey.[130] The methodology described here is largely based on the approach the Department used in the 2004 and 2016 final rules.[131]

ii. Data

The estimates of EAP exempt workers were based on data drawn from the CPS MORG, which is sponsored jointly by the U.S. Census Bureau and BLS. The CPS is a large, nationally representative sample of the labor force. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey.[132] This supplement contains the detailed information on earnings necessary to estimate a worker's exemption status. Responses are based on the reference week, which is always the week that includes the 12th day of the month.

Although the CPS MORG is a large scale survey, administered to approximately 15,000 households monthly representing the entire nation, it is still possible to have relatively few observations when looking at subsets of employees, such as exempt workers in a specific occupation employed in a specific industry, or workers in a specific geographic location. To increase the sample size, the Department pooled together three years of CPS MORG data (July 2016 through June 2019) to represent the single year from July 2018 through June 2019. Earnings for each observation from the last six months of 2016, 2017, and the first six months of 2018 were inflated to 2018/19 dollars using the Consumer Price Index for All Urban Consumers (CPI–U). For ease of presentation and because inflation is low enough for this to be trivial, these will be referred to as 2019 dollars throughout this analysis. The weight of each observation was adjusted so that the total number of potentially affected EAP workers in the pooled sample remained the same as the number for the July 2018 through June 2019 CPS MORG. Thus, the pooled CPS MORG sample uses roughly three times as many observations to represent the same total number of workers in 2018/19. The additional observations allow the Department to better characterize certain attributes of the potentially affected labor force. This pooled dataset

[128] Hereafter, unless otherwise specified, annualized values will be presented using the 7 percent real discount rate.

[129] The term affected EAP workers refers to the population of potentially affected EAP workers who either pass the standard duties test and earn at least $455 but less than the new salary level of $684, or pass only the HCE duties test and earn at least $100,000 but less than the new HCE compensation level of $107,432. This was estimated to be 1.3 million workers.

[130] In 2015, RAND released results from a survey conducted to estimate EAP exempt workers. However, this survey does not have the variables or sample size necessary for the Department to base the RIA on this analysis. Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

[131] *See* 69 FR 22196–209; 81 FR 32453–60. Where the proposal follows the methodology used to determine affected workers in both the 2004 and 2016 final rules citations to both rules are not always included.

[132] This is the outgoing rotation group (ORG); however, this analysis uses the data merged over twelve months and thus will be referred to as MORG.

is used to estimate all impacts of the final rulemaking.[133]

Some assumptions were necessary to use these data as the basis for the analysis. For example, the Department eliminated workers who reported that their weekly hours vary and provided no additional information on hours worked. This was done because the Department cannot estimate effects for these workers since it is unknown whether they work overtime and therefore unknown whether there would be any need to pay for overtime if their status changed from exempt to nonexempt. The Department reweighted the rest of the sample to account for this change (*i.e.,* to keep the same total employment estimates).[134] This adjustment assumes that the distribution of hours worked by workers whose hours do not vary is representative of hours worked by workers whose hours do vary. The Department believes that without more information this is an appropriate assumption.[135]

[133] A few commenters commented on the Department's use of CPS data to calculate the salary level. EPI and NELP asked the Department to set the salary thresholds using a data series that BLS publishes on a regular basis, while the Chamber asked the Department to publish the data sets used to set the salary thresholds. The Department calculated the standard salary level and the HCE total annual compensation level using publicly-available CPS microdata (compiled by the U.S. Census Bureau). The Department has frequently set the salary level using its own enforcement data and/or data that is not publicly available, and believes that using publicly available CPS data to calculate the salary level in this final rule is appropriate.

[134] The Department also reweighted for workers reporting zero earnings. In addition, the Department eliminated, without reweighting, workers who both reported usually working zero hours and working zero hours in the past week.

[135] This is justifiable because demographic and employment characteristics are similar across these two populations (*e.g.,* age, gender, education, distribution across industries, share paid nonhourly). The share of all workers who stated that their hours vary (but provided no additional information) is 5.0 percent. To the extent these excluded workers are exempt, if they tend to work more overtime than other workers, then transfer payments and costs may be underestimated. Conversely, if they work fewer overtime hours, then transfer payments and costs may be overestimated.

iii. Number of Workers Covered by the Department's Part 541 Regulations

To estimate the number of workers covered by the FLSA and subject to the Department's part 541 regulations, the Department excluded workers who are not subject to its regulations or whom the FLSA does not cover. This may happen, for instance, if a worker is not an employee under the FLSA. Excluded workers include military personnel, unpaid volunteers, self-employed individuals, clergy and other religious workers, and federal employees (with a few exceptions described below).

Many of these workers are excluded from the CPS MORG, including members of the military on active duty and unpaid volunteers. Self-employed and unpaid workers are included in the CPS MORG, but have no earnings data reported and thus are excluded from the analysis. The analysis excluded religious workers identified by their occupation codes: 'clergy' (Census occupational code 2040), 'directors, religious activities and education' (2050), and 'religious workers, all other' (2060). Most employees of the federal government are covered by the FLSA but not the Department's part 541 regulations because the Office of Personnel Management (OPM) regulates their entitlement to minimum wage and overtime pay.[136] Exceptions exist for U.S. Postal Service employees, Tennessee Valley Authority employees, and Library of Congress employees.[137] The analysis identified and included these covered federal workers using occupation and/or industry codes.[138] The FLSA also does not cover employees of firms that have annual revenue of less than $500,000 and who are not engaged in interstate commerce. The Department does not exclude them from the analysis, however, because there is no data set that would adequately inform an estimate of the size of this worker population, although the Department believes it is a small percentage of workers. The 2004 final rule analysis similarly did not adjust for these workers.

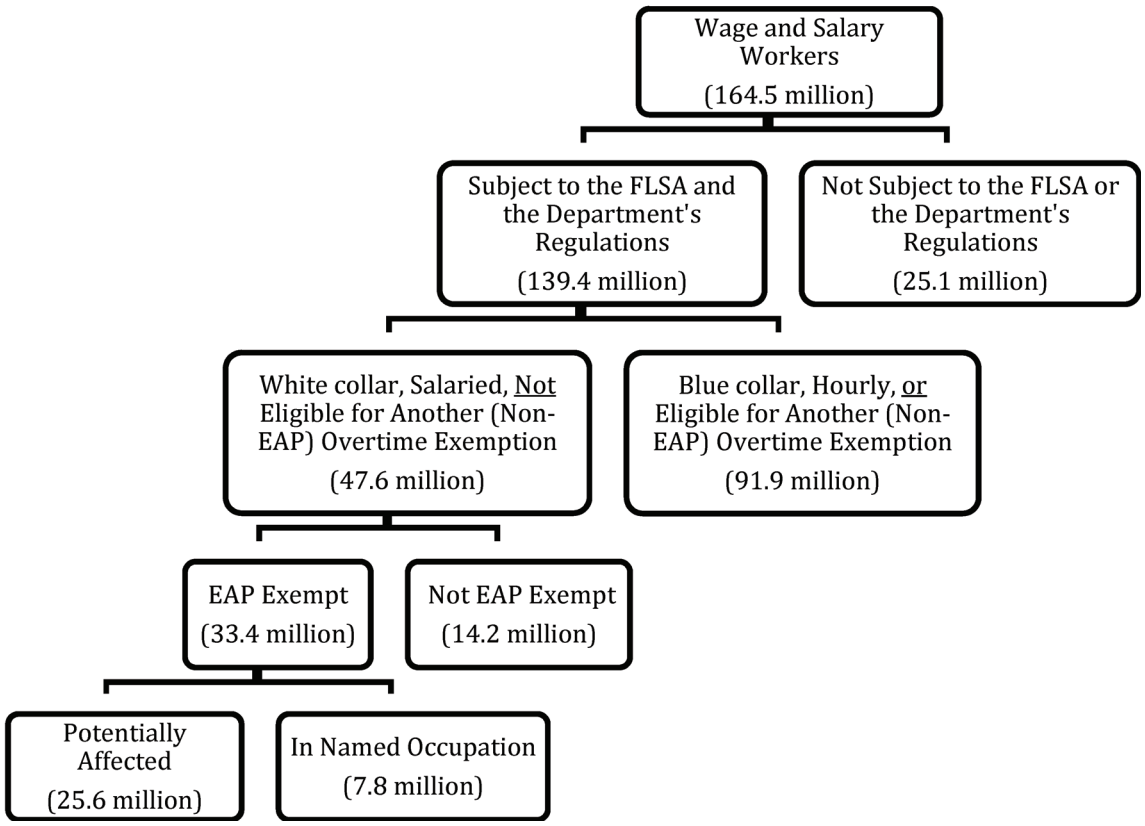
The Department estimated that in Year 1 there will be 164.5 million wage and salary workers in the United States (Figure 1). Of these, 139.4 million will be covered by the FLSA and subject to the Department's regulations (84.7 percent). The remaining 25.1 million workers will be excluded from FLSA coverage for the reasons described above. Figure 1 illustrates how the Department analyzed the U.S. civilian workforce through successive stages to estimate the number of potentially affected EAP workers.

[136] *See* 29 U.S.C. 204(f). Federal workers are identified in the CPS MORG with the class of worker variable PEIO1COW.

[137] *See id.*

[138] Postal Service employees were identified with the Census industry classification for postal service (6370). Tennessee Valley Authority employees were identified as federal workers employed in the electric power generation, transmission, and distribution industry (570) and in Kentucky, Tennessee, Mississippi, Alabama, Georgia, North Carolina, or Virginia. Library of Congress employees were identified as federal workers under Census industry 'libraries and archives' (6770) and residing in Washington DC

Figure 1: Flow Chart of FLSA Exemptions and Estimated Number of Potentially Affected Workers



iv. Number of Workers in the Analysis

After limiting the analysis to workers covered by the FLSA and subject to the Department's part 541 regulations, several other groups of workers were identified and excluded from further analysis since this final rule is unlikely to affect them. These include blue collar workers, workers paid on an hourly basis, and workers who are exempt under certain other (non-EAP) exemptions.

The Department excluded a total of 91.9 million workers from the analysis for one or more of these reasons, which often overlapped (*e.g.,* many blue collar workers are also paid hourly). The Department estimated that in 2018/19 there were 50.0 million blue collar workers. These workers were identified in the CPS MORG data following the methodology from the U.S. Government Accountability Office's (GAO) 1999 white collar exemptions report [139] and the Department's 2004 regulatory impact analysis. *See* 69 FR 22240–44. Supervisors in traditionally blue collar industries were classified as white collar workers because their duties are generally managerial or administrative, and therefore they were not excluded as blue collar workers. Using the CPS variable indicating a respondent's hourly wage status, the Department determined that 81.9 million workers were paid on an hourly basis in 2018/19.[140]

Also excluded from further analysis were workers who were exempt under certain other (non-EAP) exemptions. Although some of these workers may also be exempt under the EAP exemptions, they would independently remain exempt from the minimum wage and/or overtime pay provisions based on the non-EAP exemptions. The Department excluded an estimated 5.0 million workers, including some agricultural and transportation workers, from further analysis because they would be subject to another (non-EAP) overtime exemption. *See* Appendix A: Methodology for Estimating Exemption Status, contained in the rulemaking docket, for details on how this population was identified.

Agricultural and transportation workers are two of the largest groups of workers excluded from the population of potentially affected EAP workers in the current analysis, and with some exceptions, they were similarly excluded in 2004. The 2004 final rule excluded all workers in agricultural industries from the analysis,[141] while the current analysis, similar to the 2016 analysis, only excludes agricultural workers from specified occupational-industry combinations since not all workers in agricultural industries qualify for the agricultural overtime pay exemptions. The exclusion of transportation workers matched the method for the 2004 final rule. Transportation workers were defined as those who are subject to the following FLSA exemptions: Section 13(b)(1), section 13(b)(2), section 13(b)(3), section 13(b)(6), or section 13(b)(10). The Department excluded 1.1 million agricultural workers and 2.1 million transportation workers from the analysis. In addition, the Department excluded another 1.9 million workers who fall within one or more other FLSA minimum wage and overtime

[139] GAO/HEHS. (1999). Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place. GAO/HEHS–99–164, 40–41, *https://www.gao.gov/assets/230/228036.pdf.*

[140] CPS MORG variable PEERNHRY.

[141] 69 FR 22197.

exemptions. The criteria for determining exempt status for agricultural and transportation workers are detailed in Appendix A. However, of these 1.9 million workers, all but 20,000 are either blue collar or hourly, and thus the effect of excluding these workers is negligible.

v. Number of Potentially Affected EAP Workers

After excluding workers not subject to the Department's FLSA regulations and workers who are unlikely to be affected by this final rule (*i.e.,* blue collar workers, workers paid hourly, workers who are subject to another (non-EAP) overtime exemption), the Department estimated there will be 47.6 million salaried white collar workers for whom employers might claim either the standard EAP exemption or the HCE exemption. To be exempt under the standard EAP test, the employee must:

- Be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); [142]
- earn at least a designated salary amount (the 2004 final rule set the salary level at $455 per week (the standard salary level test)); and
- primarily perform exempt work, as defined by the regulations (the standard duties test).

The 2004 final rule's HCE test allows certain highly-paid employees to qualify for exemption as long as they customarily and regularly perform one or more exempt job duties. The HCE annual compensation level set in the 2004 final rule was $100,000, including at least $455 per week paid on a salary or fee basis. The CPS annual earnings variable is topcoded at $150,000 (*i.e.,* workers earning above $2,884.61 ($150,000/52 weeks) per week are reported as earning $2,884.61 per week). The Department imputed earnings for topcoded workers in the CPS data to adequately estimate the cost savings of this rule in comparison to the 2016 final rule under E.O. 13771.[143] [144]

Salary Basis

The Department included only nonhourly workers in the analysis based on CPS data.[145] For this rulemaking, the Department considered data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers. The Department notes that it made the same assumption regarding nonhourly workers in the 2004 final rule.[146]

The CPS population of ''nonhourly'' workers includes workers who are paid on a piece-rate, a day-rate, or largely on bonuses or commissions. Data in the CPS are not available to distinguish between salaried workers and these other nonhourly workers. However, the Panel Study of Income Dynamics (PSID) provides additional information on how nonhourly workers are paid. In the PSID, respondents are asked how they are paid on their main job and are also asked for more detail if their response is other than salaried or hourly. Possible responses include piecework, commission, self-employed/farmer/profits, and by the job/day/mile. The Department analyzed the PSID data and found that relatively few nonhourly workers were paid by methods other than salaried. The Department is not aware of any statistically robust source that more closely reflects salary as defined in its regulations.

Salary Level

Weekly earnings are available in the CPS MORG data, which allowed the Department to estimate how many nonhourly workers pass the salary level tests.[147] However, the CPS earnings variable does not perfectly reflect the Department's definition of earnings. First, the CPS includes all nondiscretionary bonuses and commissions, which may be used to satisfy up to 10 percent of the new standard salary level under this final rule. This discrepancy between the earnings variable used and the FLSA definition of salary may cause a slight overestimation of the number of workers estimated to meet the standard salary level test. Second, CPS earnings data includes overtime pay, commissions, and tips. The Department notes that employers may factor into an employee's salary a premium for expected overtime hours worked. To the extent they do so, that premium would be reflected in the data. Similarly, the Department believes tips will be an uncommon form of payment for these workers since tips are uncommon for white collar workers. The Department also believes that commissions make up a relatively small share of earnings among nonhourly employees.[148]

Duties

The CPS MORG data do not capture information about job duties; therefore, the Department used occupational titles, combined with probability estimates of passing the duties test by occupational title, to estimate the number of workers passing the duties test. This methodology is very similar to the methodology used in the 2004 rulemaking, and the Department believes it is the best available methodology. In 2004, to determine whether a worker met the duties test, the Department used an analysis performed by WHD in 1998 in response to a request from the GAO. Because WHD enforces the FLSA's overtime requirements and regularly assesses workers' exempt status, WHD was uniquely qualified to provide the analysis. The analysis was used in both the GAO's 1999 white collar exemptions report [149] and the Department's 2004 regulatory impact analysis.[150]

WHD examined 499 occupational codes, excluding nine that were not relevant to the analysis for various reasons (one code was assigned to unemployed persons whose last job was in the Armed Forces, some codes were assigned to workers who are not FLSA covered, others had no observations). Of the remaining occupational codes, WHD

[142] Some computer employees may be exempt even if they are not paid on a salary basis. Hourly computer employees who earn at least $27.63 per hour and perform certain duties are exempt under section 13(a)(17) of the FLSA. These workers are considered part of the EAP exemptions but were excluded from the analysis because they are paid hourly and will not be affected by this final rule (these workers were similarly excluded in the 2004 analysis). Salaried computer workers are exempt if they meet the salary and duties tests applicable to the EAP exemptions, and are included in the analysis since they will be impacted by this final rule. Additionally, administrative and professional employees may be paid on a fee basis, as opposed to a salary basis. § 541.605(a). Although the CPS MORG does not identify workers paid on a fee basis, they are considered nonhourly workers in the CPS and consequently are correctly classified as ''salaried'' (as was done in the 2004 final rule).

[143] We used the standard Pareto distribution approach to impute earnings above the topcoded value as described in Armour, P. and Burkhauser, R (2013). Using the Pareto Distribution to Improve Estimates of Topcoded Earnings. Center for Economic Studies (CES).

[144] As a result of the 2016 final rule's automatic updating provision, the HCE compensation level in Year 7 following the 2016 final rule would exceed $150,000. Imputing earnings improves the impact estimates and consequently the estimates of cost savings of this final rule.

[145] The CPS variable PEERNHRY identifies workers as either hourly or nonhourly.

[146] *See* 69 FR 22197.

[147] The CPS MORG variable PRERNWA, which measures weekly earnings, is used to identify weekly salary.

[148] In the PSID, relatively few nonhourly workers were paid by commission. Additionally, according to the BLS ECI, about 5 percent of the private workforce is incentive-paid workers (incentive pay is defined as payment that relates earnings to actual individual or group production). *See* William J. Wiatrowski, Bureau of Labor Statistics, The Effect of Incentive Pay on Rates of Change in Wages and Salaries (November 24, 2009), *http://www.bls.gov/opub/mlr/cwc/the-effect-of-incentive-pay-on-rates-of-change-in-wages-and-salaries.pdf,* at 1.

[149] Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place, *supra note* 139, at 40–41.

[150] *See* 69 FR 22198.

determined that 251 occupational codes likely included EAP exempt workers and assigned one of four probability codes reflecting the estimated likelihood, expressed as ranges, that a worker in a specific occupation would perform duties required to meet the EAP duties tests. The Department supplemented this analysis in the 2004 final rule regulatory impact analysis when the HCE exemption was introduced. The Department modified the four probability codes for highly paid workers based upon its analysis of the provisions of the highly compensated test relative to the standard duties test (Table 3). To illustrate, WHD assigned exempt probability code 4 to the occupation ''first-line supervisors/managers of construction trades and extraction workers'' (Census code 6200), which indicates that a worker in this occupation has a 0 to 10 percent likelihood of meeting the standard EAP duties test. However, if that worker earned at least $100,000 annually, he or she was assigned a 15 percent probability of passing the more lenient HCE duties test.[151]

The occupations identified in GAO's 1999 report and used by the Department in the 2004 final rule map to an earlier occupational classification scheme (the 1990 Census occupational codes). For this final rule, the Department used occupational crosswalks to map the previous occupational codes to the 2002 Census occupational codes and then to the 2010 Census occupational codes, which are used in the CPS MORG 2016 through 2019 data.[152] If a new occupation comprises more than one previous occupation, then the new occupation's probability code is the weighted average of the previous occupations' probability codes, rounded to the closest probability code.

TABLE 3—PROBABILITY WORKER IN CATEGORY PASSES THE DUTIES TEST

Probability code	The standard EAP test		The HCE test	
	Lower bound %	Upper bound %	Lower bound %	Upper bound %
0	0	0	0	0
1	90	100	100	100
2	50	90	94	96
3	10	50	58.4	60
4	0	10	15	15

These codes provide information on the likelihood that an employee in a category met the duties test but they do not identify the workers in the CPS MORG who actually passed the test. Therefore, the Department designated workers as exempt or nonexempt based on the probabilities. For example, for every ten public relations managers, between five and nine were estimated to pass the standard duties test (based on probability category 2). However, it is unknown which of these ten workers are exempt; therefore, the Department must determine the status for these workers. Exemption status could be randomly assigned with equal probability, but this would ignore the earnings of the worker as a factor in determining the probability of exemption. The probability of qualifying for the exemption increases with earnings because higher paid workers are more likely to perform the required duties, an assumption to which both the Department in the 2004 final rule and the GAO in its 1999 Report adhered.[153]

The Department estimated the probability of exemption for each worker as a function of both earnings and the occupation's exempt probability category using a gamma distribution.[154] Based on these revised probabilities, each worker was assigned exempt or nonexempt status based on a random draw from a binomial distribution using the worker's revised probability as the probability of success. Thus, if this method is applied to ten workers who each have a 60 percent probability of being exempt, six workers would be expected to be designated as exempt.[155] However, which particular workers are designated as exempt may vary with each set of ten random draws. For details, see Appendix A (in the rulemaking docket).

The Department acknowledges that the probability codes used to determine the share of workers in an occupation who are EAP exempt are 21 years old. However, the Department believes the probability codes continue to estimate exemption status accurately given the fact that the standard duties test is not substantively different from the former short duties tests reflected in the codes. For the 2016 rulemaking, the Department looked at O*NET [156] to determine the extent to which the 1998 probability codes reflected current occupational duties. The Department's review of O*NET verified the continued appropriateness of the 1998 probability codes.[157]

Potentially Affected Exempt EAP Workers

The Department estimated that of the 47.6 million salaried white collar workers considered in the analysis, 33.4 million qualified for the EAP exemption under the currently-enforced regulations. Some of these workers were

[151] The HCE duties test is used in conjunction with the HCE total annual compensation requirement, as set in 2004 and applied to date, to determine eligibility for the HCE exemption. It is much less stringent than the standard and short duties tests to reflect that very highly paid employees are much more likely to be properly classified as exempt.

[152] References to occupational codes in this analysis refer to the 2002 Census occupational codes. Crosswalks and methodology available at: *https://www.census.gov/topics/employment/industry-occupation/guidance/code-lists.html.*

[153] For the standard exemption, the relationship between earnings and exemption status is not linear and is better represented with a gamma distribution. For the HCE exemption, the relationship between earnings and exemption can be well represented with a linear function because the relationship is linear at high salary levels (as determined by the Department in the 2004 final rule). Therefore, the gamma model and the linear model would produce similar results. *See* 69 FR 22204–08, 22215–16.

[154] The gamma distribution was chosen because, during the 2004 revision, this non-linear distribution best fit the data compared to the other non-linear distributions considered (*i.e.,* normal and lognormal). A gamma distribution is a general type of statistical distribution that is based on two parameters that control the scale (alpha) and shape (in this context, called the rate parameter, beta).

[155] A binominal distribution is frequently used for a dichotomous variable where there are two possible outcomes; for example, whether one owns a home (outcome of 1) or does not own a home (outcome of 0). Taking a random draw from a binomial distribution results in either a zero or a one based on a probability of ''success'' (outcome of 1). This methodology assigns exempt status to the appropriate share of workers without biasing the results with manual assignment.

[156] The O*NET database contains hundreds of standardized and occupation-specific descriptions. *See http://www.onetcenter.org.*

[157] 81 FR 32459.

excluded from further analysis because the final rule will not affect them. This excluded group contains workers in named occupations who are not required to pass the salary requirements (although they must still pass a duties test) and therefore whose exemption status does not depend on their earnings. These occupations include physicians (identified with Census occupation codes 3010, 3040, 3060, 3120), lawyers (2100), teachers (occupations 2200–2550 and industries 7860 or 7870), academic administrative personnel (school counselors (occupation 2000 and industries 7860 or 7870) and educational administrators (occupation 0230 and industries 7860 or 7870)), and outside sales workers (a subset of occupation 4950). Out of the 33.4 million workers who were EAP exempt, 7.8 million, or 23.4 percent, were expected to be in named occupations. Thus, changes in the standard salary level and HCE compensation tests will not affect these workers. The 25.6 million EAP exempt workers remaining in the analysis are referred to in this final rule as ''potentially affected.''

Based on analysis of the occupational codes and CPS earnings data (described above), the Department has concluded that in Year 1, in the baseline scenario in which the rule does not take effect, of the 25.6 million potentially affected EAP workers, approximately 16.0 million will pass only the standard EAP test, 9.3 million will pass both the standard and the HCE tests, and approximately 343,000 will pass only the HCE test.

C. Determining the Revised Salary and Compensation Levels

For the reasons discussed in section IV.A, the Department has decided to update the 2004 standard salary level by reapplying the 2004 methodology. Using pooled 2018/19 CPS MORG data, the 20th percentile of earnings for full-time salaried workers in the South Census region and/or in the retail industry nationally roughly corresponds to a standard salary level of $684. For the HCE compensation level, the Department used the 80th percentile of all full-time salaried workers nationwide, calculated using the 2018/19 CPS MORG. This results in an HCE annual compensation level of $107,432.

i. The Policy Methodologies Chosen

This final rule uses the same methodology used in 2004 for the standard salary level, setting it at the 20th percentile of full-time salaried workers in the South and/or in the retail industry nationally. After considering public comments pertaining to the HCE total annual compensation requirement, as discussed in section IV.D, the Department has set this threshold so as to be equivalent to the earnings of the 80th percentile of all full-time salaried workers nationally, as opposed to the 90th percentile as proposed in the NPRM. Additionally, to be consistent with the methodology for setting the standard salary level, the Department now uses three-year pooled data to estimate the HCE compensation level. Lastly, the Department has chosen not to project the earnings levels to January 2020 as proposed in the NPRM.

ii. Alternative Methods for Setting the Standard Salary Level

For this final rule, the Department also considered several alternatives for setting the standard salary level. Table 4 presents alternative standard salary levels calculated using pooled 2018/19 CPS data for each alternative approach considered.

- *Alternative 1:* No change (*i.e.,* keep the salary level at the currently-enforced level of $455 per week).
- *Alternative 2:* Maintain the average minimum wage protection in place since 2004 by using the weighted average of hours at minimum wage and overtime pay represented by the minimum salary level.
- *Alternative 3:* Use the 2004 method but exclude the relatively high-wage areas from the South Census Region (Washington, DC, Maryland, and Virginia).
- *Alternative 4:* Use the Kantor method to determine the long test salary level, and set the salary level at that level. The Kantor method calculates a long test salary level by selecting the 10th percentile of earnings of likely exempt workers.
- *Alternative 5:* Use the 2016 method (*i.e.,* the 40th percentile of earnings of nonhourly full-time workers in the South Census Region).

Section VI.D details the transfers, costs, and benefits of the new salary level and the above alternatives.

TABLE 4—STANDARD SALARY LEVEL AND ALTERNATIVES IN 2018/19

Alternative	Salary level (weekly/annually)	Total increase [a]	
		$	%
Alt. #1: No change	$455/$23,660	$0	0.0
Alt. #2: Maintain average minimum wage protection since 2004 [b]	502/26,082	47	10.3
Alt. #3: 2004 Method, South (excluding Washington D.C., MD & VA) or Retail [c]	673/34,996	218	47.9
Final rule: 2004 method [c]	684/35,568	229	50.3
Alt. #4: Kantor long test [d]	724/37,648	269	59.1
Alt. #5: 2016 Method [e]	976/50,752	521	114.5

[a] Change between salary level or alternative and the salary level set in 2004 ($455 per week).
[b] When the $455 weekly threshold was established in 2004, the federal minimum wage was $5.15, so the salary threshold equated to minimum wage and overtime pay at time and one-half for hours over 40 for an employee working no more than 72.2 hours. That amount fell with increases in the minimum wage and is now 55.2 hours. The weighted average across the 15 years since the overtime threshold was last changed is 59.5 hours, and a threshold that would provide 59.5 hours of $7.25 minimum wage and overtime pay would be $502.
[c] Full-time salaried workers with various industry/region exclusions (excludes workers not subject to the FLSA, not subject to the salary level test, and in some workers in agriculture or transportation). Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[d] 10th percentile of likely exempt workers. Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[e] 40th percentile earnings of nonhourly full-time workers in the South Census region, provided by BLS. The salary level reflects the first automatic update that would have taken place under the 2016 final rule.

iii. Alternative Methods for Setting the HCE Total Annual Compensation Level

As described above, the Department is updating the HCE compensation level using earnings for the 80th percentile of all full-time salaried workers nationally, $107,432 per year. The Department also evaluated the following alternative HCE compensation levels:

- *HCE alternative 1:* No change (*i.e.,* leave the HCE compensation level at the

currently-enforced level of $100,000 per year).

• *HCE alternative 2:* Use the methodology proposed in the NPRM (*i.e.,* use the 90th percentile earnings of full-time salaried workers nationally).[158]

Table 5 presents possible 2018/19 HCE levels as calculated using each alternative approach considered.

Section VI.D details the transfers, costs, and benefits of the new HCE compensation level and the two alternatives.

TABLE 5—HCE COMPENSATION LEVELS AND ALTERNATIVES IN 2018/19

Alternative	Salary level (weekly/annually)	Total increase [a]	
		$	%
HCE alt. #1: No change	$1,923/$100,000	$0	0.0
Final rule: 80th percentile of full-time salaried workers [b]	2,066/107,432	7,432	7.4
HCE alt. #2: 90th percentile of full-time salaried workers [b]	2,807/145,964	45,964	46.0

[a] Change between updated/alternative compensation level and the compensation level set in 2004 ($100,000 annually).
[b] Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

The Department believes that HCE alternative 1 is inappropriate because some increase to the HCE threshold is necessary to ensure that the HCE threshold continues to appropriately complement the more lenient HCE duties test. However, as explained in section IV.D, the Department does not believe the significantly higher threshold equal to the 90th percentile of full-time salaried workers nationally is necessary. Further, setting the HCE threshold at such a high level will result in significant administrative burdens, including the costs associated with the need to reassess, under the standard duties test, the exempt status of highly paid white collar workers, many of whom would remain exempt under that test. Accordingly, the Department rejected the second alternative because it believes that the HCE threshold set in this final rule is sufficiently high to ensure that those who meet that threshold will almost invariably pass the standard duties test.

D. Effects of Revised Salary and Compensation Levels

i. Overview and Summary of Quantified Effects

The economic effects of increasing the EAP salary and compensation levels will depend on how employers respond. Employer response is expected to vary by the characteristics of the affected EAP workers. Transfers from employers to employees and between employees, and direct employer costs, depend on how employers respond to the final rule.

The Department has derived the standard salary level using the 2004 methodology, and has set the HCE compensation level at the 80th percentile of all full-time salaried workers nationwide. In both cases we used pooled 2018/19 CPS data to calculate the levels. Given that at the time this analysis was performed data was available through June 2019, the Department believes that using current data to estimate the economic effects of the rule taking effect in January 2020 is appropriate.

Table 6 presents the estimated number of affected workers, costs, and transfers associated with increasing the salary and compensation levels. The Department estimated that the direct employer costs of this final rule will total $543.0 million in the first year, with 10-year annualized direct costs of $164.0 million per year using a 3 percent real discount rate and $173.3 million per year using a 7 percent real rate.

In addition to these direct costs, this final rule will transfer income from employers to employees. Estimated Year 1 transfers will equal $396.4 million, with annualized transfers estimated at $295.0 million and $298.8 million per year using the 3-percent and 7-percent real discount rates, respectively. Potential employer costs due to reduced profits and additional hiring were not quantified but are discussed in section VI.D.iii.5.

TABLE 6—SUMMARY OF AFFECTED WORKERS AND REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE EARNINGS THRESHOLDS

Impact [a]	Year 1	Future years [b]		Annualized value	
		Year 2	Year 10	3% Real discount rate	7% Real discount rate
Affected Workers (1000s)					
Standard	1,156	1,069	723		
HCE	102	114	154		
Total	1,257	1,183	877		
Direct Employer Costs (Millions in 2019$)					
Regulatory familiarization	$340.4	$0.0	$0.0	$38.7	$45.3
Adjustment [c]	68.2	2.0	4.6	10.5	11.7
Managerial	134.4	132.3	94.5	114.8	116.3

[158] Because in the final rule the Department is using pooled CPS MORG data to set the HCE compensation level, it used the same data set to calculate this alternative compensation level. Thus, this method differs slightly from that proposed in the NPRM, which was calculated using the most recent year of data provided by BLS.

TABLE 6—SUMMARY OF AFFECTED WORKERS AND REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE EARNINGS THRESHOLDS—Continued

Impact [a]	Year 1	Future years [b]		Annualized value	
		Year 2	Year 10	3% Real discount rate	7% Real discount rate
Total direct costs [d]	543.0	134.3	99.1	164.0	173.3
Transfers from Employers to Workers (Millions in 2019) [e]					
Due to minimum wage	75.4	42.8	26.1	36.9	38.1
Due to overtime pay	321.0	264.9	221.3	258.1	260.6
Total transfers [d]	396.4	307.7	247.4	295.0	298.8

[a] Additional costs and benefits of the rule that could not be quantified or monetized are discussed in the text.
[b] These costs/transfers represent a range over the nine-year span.
[c] Adjustment costs occur in all years when there are newly affected workers.
[d] Components may not add to total due to rounding.
[e] This is the net transfer from employers to workers. There may also be transfers between workers.

ii. Affected EAP Workers

1. Overview

The Department estimated there are 25.6 million potentially affected EAP workers—that is, EAP workers who either (1) passed the salary basis test, the standard salary level test, and the standard duties test, or (2) passed the salary basis test, the standard salary level test, the HCE total compensation level test, and the HCE duties test (but not the standard duties test). This number excluded workers in named occupations, who are not subject to the salary tests, or those who qualify for another (non-EAP) exemption.

Using the method described above, the Department estimated that the increase in the standard salary level from $455 per week to $684 per week will affect 1.2 million exempt workers in Year 1, while the increase in the HCE annual compensation level from $100,000 to $107,432 will impact 101,800 workers (Figure 2).[159] [160] In total, the Department expects that 1.3 million workers will be affected in Year 1 by the final rule earnings threshold increases, composing about 4.9 percent of the pool of potentially affected EAP workers.

Figure 2: Number of Affected Workers in Year 1

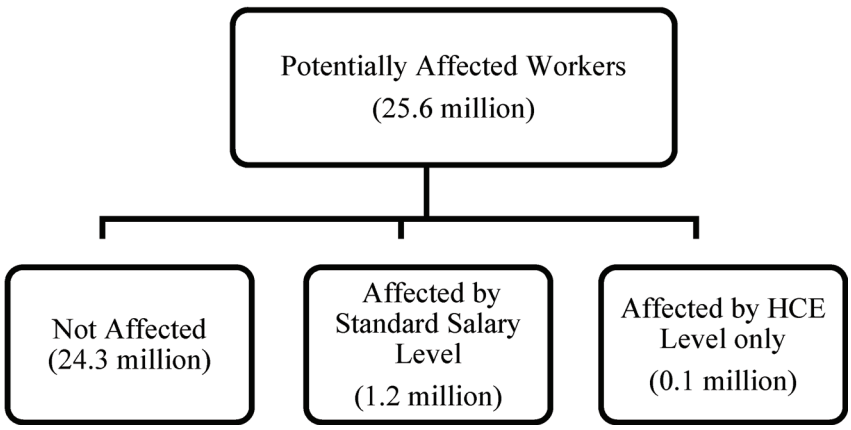


Table 7 presents the number of affected EAP workers, the mean number of overtime hours they work per week, and their average weekly earnings. The 1.2 million workers affected by the increase in the standard salary level work on average 1.6 usual hours of overtime per week and earn on average $581 per week.[161] However, the majority of these workers (about 86 percent) work zero usual hours of overtime. The 14 percent of affected workers who regularly work overtime average 11.7 hours of overtime per week. The 101,800 EAP workers affected by the change in the HCE compensation level average 4.2 hours of overtime per week and earn an average of $1,989 per week ($103,450 per year). About 65 percent of these workers work zero usual hours of overtime while the 35 percent who work usual hours of overtime average 11.9 hours of overtime per week.

Although most affected EAP workers who typically do not work overtime are unlikely to experience significant

[159] This group includes workers who may currently be nonexempt under more protective state EAP laws and regulations, such as some workers in Alaska, California, and New York.

[160] The 2016 final rule applied joint probabilities to estimate the number of affected HCE workers (*i.e.,* the number of HCE workers who pass the HCE duties test but fail the standard duties test). In order to provide a more accurate estimate, this final rule applies conditional probabilities to determine the number of affected HCE workers.

[161] CPS defines ''usual hours'' as hours worked 50 percent or more of the time.

changes in their daily work routine, those who regularly work overtime may experience significant changes. Moreover, affected EAP workers who routinely work overtime and earn less than the minimum wage are most likely to experience significant changes because of the revised standard salary level.[162] Employers might respond by paying overtime premiums; reducing or eliminating overtime hours; reducing employees' regular wage rates (provided that the reduced rates still exceed the minimum wage); increasing employees' salaries to the updated salary level to preserve their exempt status (although this will be less common for affected workers earning below the minimum wage); or using some combination of these responses.

TABLE 7—NUMBER OF AFFECTED EAP WORKERS, MEAN OVERTIME HOURS, AND MEAN WEEKLY EARNINGS, YEAR 1

Type of affected EAP worker	Affected EAP workers [a]		Mean overtime hours	Mean usual weekly earnings
	Number (1,000s)	% of Total		
Standard Salary Level				
All affected EAP workers	1,156	100%	1.6	$581
Earn less than the minimum wage [b]	22	1.9	21.4	524
Regularly work overtime	158	13.7	11.7	582
CPS occasionally work overtime [c]	42	3.7	8.3	581
HCE Compensation Level				
All affected EAP workers	102	100	4.2	1,989
Earn less than the minimum wage [b]				
Regularly work overtime	36	35.1	11.9	1,968
CPS occasionally work overtime [c]	4	3.5	9.7	1,995

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).
[b] The applicable minimum wage is the higher of the federal minimum wage and the state minimum wage. HCE workers will not be affected by the minimum wage provision. These workers all regularly work overtime and are also included in that row.
[c] Workers who do not usually work overtime but did in the CPS reference week. Mean overtime hours are actual overtime hours in the reference week. Other workers may occasionally work overtime in other weeks. These workers are identified later.

The Department considered two types of overtime workers in this analysis: Regular overtime workers and occasional overtime workers.[163] Regular overtime workers typically worked more than 40 hours per week. Occasional overtime workers typically worked 40 hours or less per week, but they worked more than 40 hours in the week they were surveyed. The Department considered these two populations separately in the analysis because labor market responses to overtime pay requirements may differ for these two types of workers.

In a representative week, the increases in the standard salary level and the HCE compensation level affected an estimated 45,900 occasional overtime workers (3.7 percent of all affected EAP workers). They averaged 8.4 hours of overtime in the weeks they worked overtime. This group represents the number of workers with occasional overtime hours in the week the CPS MORG survey was conducted. Because the survey week is a representative week, the Department believes the prevalence of occasional overtime in the survey week, and the characteristics of these workers, is representative of other weeks (even though a different group of workers would be identified as occasional overtime workers in a different week).

2. Characteristics of Affected EAP Workers

In this section, the Department examined the characteristics of affected EAP workers. Table 8 presents the distribution of affected EAP workers by industry and occupation, using Census industry and occupation codes. The industry with the most affected EAP workers is education and health services (288,000), while the industry with the highest percentage of affected EAP workers is leisure and hospitality (about 10 percent). The occupation category with the most affected EAP workers is management, business, and financial (506,000), while the occupation category with the highest percentage of affected EAP workers is services (about 15 percent).

Finally, 6.1 percent of potentially affected workers in private nonprofits are affected compared with 4.6 percent in private for-profit firms. However, as discussed in section VI.B.iii, the estimates of workers subject to the FLSA include workers employed by enterprises that do not meet the enterprise coverage requirements because there is no data set that would adequately inform an estimate of the size of this worker population. Although failing to exclude workers who work for non-covered enterprises would only affect a small percentage of workers generally, it may have a larger effect (and result in a larger overestimate) for workers in nonprofits because when determining enterprise coverage only

[162] A small proportion (1.9 percent) of affected EAP workers earn implicit hourly wages that are less than the applicable minimum wage (the higher of the state or federal minimum wage). The implicit hourly wage is calculated as an affected EAP employee's total weekly earnings divided by total weekly hours worked. For example, workers earning the currently-enforced $455 per week standard salary level would earn less than the federal minimum wage if they work 63 or more hours in a week ($455/63 hours = $7.22 per hour).

[163] Regular overtime workers were identified in the CPS MORG with variable PEHRUSL1. Occasional overtime workers were identified with variables PEHRUSL1 and PEHRACT1.

revenue derived from business operations, not charitable activities, is included.

TABLE 8—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND UPDATED SALARY LEVELS, BY INDUSTRY AND OCCUPATION, YEAR 1

Industry/occupation/nonprofit	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (%)
Total	139.43	25.59	24.33	1.26	4.9
By Industry [d]					
Agriculture, forestry, fishing, & hunting	1.33	0.04	0.04	0.00	5.4
Mining	0.73	0.19	0.18	0.00	2.6
Construction	8.49	1.02	0.97	0.05	5.0
Manufacturing	15.56	3.61	3.52	0.09	2.5
Wholesale & retail trade	19.08	2.60	2.44	0.17	6.4
Transportation & utilities	7.65	0.92	0.88	0.04	4.1
Information	2.73	1.01	0.97	0.04	4.2
Financial activities	9.66	3.81	3.64	0.17	4.3
Professional & business services	15.80	5.75	5.53	0.21	3.7
Education & health services	34.24	4.15	3.86	0.288	6.9
Leisure & hospitality	13.13	0.92	0.83	0.09	9.8
Other services	5.62	0.64	0.59	0.05	8.3
Public administration	5.40	0.93	0.88	0.05	5.5
By Occupation [d]					
Management, business, & financial	21.12	12.76	12.25	0.51	4.0
Professional & related	32.96	9.02	8.61	0.41	4.6
Services	24.16	0.22	0.18	0.03	14.6
Sales and related	13.78	2.44	2.26	0.18	7.6
Office & administrative support	17.64	0.95	0.84	0.11	11.7
Farming, fishing, & forestry	1.01	0.00	0.00	0.00	0.0
Construction & extraction	6.75	0.02	0.02	0.00	3.2
Installation, maintenance, & repair	4.59	0.04	0.04	0.00	3.9
Production	8.48	0.11	0.10	0.00	3.9
Transportation & material moving	8.93	0.03	0.03	0.00	9.1
By Nonprofit and Government Status					
Nonprofit, private	9.65	2.04	1.91	0.12	6.1
For profit, private	111.04	21.52	20.52	1.00	4.6
Government (state, local, and federal)	18.73	2.03	1.90	0.13	6.5

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Exempt workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers' weekly earnings do not increase to the new salary level).
[c] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).
[d] Census industry and occupation categories.

Table 9 presents the distribution of affected EAP workers based on Census Regions and Divisions, and metropolitan statistical area (MSA) status. The region with the most affected workers will be the South (544,000), but the South's percentage of potentially affected workers who are affected is still small (6.1 percent). Although 90 percent of affected EAP workers will reside in MSAs (1.13 of 1.26 million), so do a corresponding 88 percent of all workers subject to the FLSA.[164]

Employers in low-wage industries, regions, and in non-metropolitan areas may be more affected because they typically pay lower wages and salaries. However, the Department believes the salary level adopted in this final rule is appropriate for these lower-wage sectors because the methodology used in 2004, and applied for this rulemaking, used earnings data in the low-wage retail industry and the low-wage South Region. Effects by region and industry are considered in section VI.D.vi.

[164] Identified with CPS MORG variable GTMETSTA.

TABLE 9—ESTIMATED NUMBER OF POTENTIALLY AFFECTED EAP WORKERS WITH THE CURRENT AND UPDATED SALARY LEVELS, BY REGION, DIVISION, AND MSA STATUS, YEAR 1

Region/division/metropolitan status	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (%)
Total	139.43	25.59	24.33	1.26	4.9
By Region/Division					
Northeast	*25.38*	*5.30*	*5.07*	*0.23*	*4.4*
New England	7.03	1.56	1.50	0.06	3.7
Middle Atlantic	18.35	3.74	3.57	0.17	4.6
Midwest	*30.59*	*5.23*	*5.01*	*0.23*	*4.4*
East North Central	20.77	3.56	3.40	0.16	4.4
West North Central	9.82	1.67	1.60	0.07	4.4
South	*50.90*	*8.93*	*8.39*	*0.54*	*6.1*
South Atlantic	26.77	5.01	4.72	0.30	5.9
East South Central	7.59	1.09	1.01	0.08	7.7
West South Central	16.55	2.83	2.67	0.16	5.7
West	*32.56*	*6.12*	*5.87*	*0.25*	*4.1*
Mountain	10.30	1.74	1.66	0.08	4.7
Pacific	22.26	4.38	4.21	0.17	3.9
By Metropolitan Status					
Metropolitan	122.63	23.98	22.84	1.13	4.7
Non-metropolitan	15.85	1.51	1.39	0.12	7.7
Not identified	0.95	0.10	0.10	0.01	6.0

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Exempt workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers' weekly earnings do not increase to the new salary level).
[c] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

3. NPRM Comments on Affected Worker Calculation

EPI and a few other commenters asserted that the Department's use of pooled 2015–2017 data to calculate the number of affected workers ''leads to an underestimate because it doesn't account for employment growth and other changes in the three years between 2017 and 2020.'' The Department is using pooled CPS MORG data for July 2016 through June 2019, adjusted to reflect 2018/2019, in this final rule. The Department is not modeling employment growth between 2018/19 and the final rule's effective date because of uncertainty in the appropriate growth rates to project earnings and employment, and because of the relatively short period of time separating June 2019—the most recent CPS MORG data available at the time this impact analysis was developed—and January 1, 2020—the effective date of the final rule. However, as a sensitivity analysis undertaken in response to these comments, the Department used the BLS National Employment Matrix (NEM) for 2016 to 2026 to calculate growth rates for each occupation-industry category. Using these rates to adjust the number of affected employees in 2018/19 for one and a half years of employment growth increased the estimated number of affected workers by less than 1.8 percent.

iii. Costs

1. Summary

The Department quantified three direct costs to employers in this analysis: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. The Department estimated that in Year 1 (2020), regulatory familiarization costs will be $340.4 million, adjustment costs will be $68.2 million, and managerial costs will be $134.4 million (Table 10). Total direct employer costs in Year 1 will be $543.0 million.

TABLE 10—SUMMARY OF YEAR 1 DIRECT EMPLOYER COSTS

[Millions]

Direct employer costs	Standard salary level	HCE compensation level	Total
Regulatory familiarization [a]	.....	.....	$340.4
Adjustment	$62.7	$5.5	68.2
Managerial	121.5	12.9	134.4
Total direct costs	184.1	18.4	543.0

[a] Regulatory familiarization costs are assessed jointly for the change in the standard salary level and the HCE compensation level.

Adjustment costs and managerial costs are recurring, so we also projected them for years 2 through 10 in section VI.D.viii. The Department discusses costs that are not quantified in section VI.D.iii.5.

2. Regulatory Familiarization Costs

This rule will impose direct costs on firms by requiring them to review the regulation. To estimate these ''regulatory familiarization costs,'' three pieces of information must be estimated: (1) The number of affected establishments; (2) a wage level for the employees reviewing the rule; and (3) the amount of time employees spend reviewing the rule.

It is unclear whether regulatory familiarization costs are a function of the number of establishments or the number of firms. To avoid underestimating these costs, the Department assumed that regulatory familiarization occurs at a decentralized level and used the number of establishments in its cost estimate; this results in a higher estimate than would result from using the number of firms. The most recent data on private sector establishments at the time this final rule was drafted are from the 2016 Statistics of U.S. Businesses (SUSB), which reports 7.76 million establishments with paid employees.[165] Additionally, there were an estimated 90,126 state and local governments in 2017, the most recent data available.[166] The Department thus estimated 7.85 million establishments altogether (for ease, the Department uses the term ''establishments'' to refer to the total of establishments and government entities) might incur regulatory familiarization costs.

The Department believes that all establishments will incur some regulatory familiarization costs, even if they do not employ exempt workers, because all establishments will need to confirm whether this rule includes any provisions that may affect their employees. Firms with more affected EAP workers will likely spend more time reviewing the regulation than firms with fewer or no affected EAP workers (since a careful reading of the regulation will probably follow the initial decision that the firm is affected). However, the Department did not know the distribution of affected EAP workers across firms, so it used an average cost per establishment.

The Department believes one hour per establishment is appropriate because the EAP exemptions have existed in one form or another since 1938. The most significant change in this rulemaking is setting a new standard salary level for exempt workers, and the changed regulatory text is only a few pages. The Department thus believes that one hour is an appropriate average estimate for the time each establishment will spend reviewing the changes made by this rulemaking. Time spent to implement the necessary changes was included in adjustment costs. The Department's analysis assumed that mid-level human resource workers with a median wage of $26.56 per hour will review the final rule.[167] The Department also assumed that benefits are paid at a rate of 46 percent of the base wage [168] and overhead costs are paid at a rate of 17 percent of the base wage,[169] resulting in an hourly rate of $43.38. The Department thus estimates regulatory familiarization costs in Year 1 will be $340.4 million ($43.38 per hour × 1 hour × 7.85 million establishments).[170]

Some commenters asserted these cost estimates are too low. For example, SBA Office of Advocacy (SBA Advocacy) wrote: ''we spoke to a small retail business in Alabama, who retained the services of an attorney for 10–15 hours to review the 2016 final rule.'' International Bancshares Corporation described the necessary hours for regulatory familiarization and adjustment costs as ''countless.'' An individual commenter stated that the Department's estimated costs are too low but did not provide any information on what costs should be.

The Department continues to believe that an average of one hour per establishment is appropriate. The EAP exemptions have been in existence in one form or another since 1938, and a final rule was published as recently as 2016. Furthermore, employers who use the exemptions must apply them every time they hire an employee whom they seek to classify as exempt. Thus, employers should be familiar with the exemptions. The most significant change promulgated in this rulemaking is setting new earnings thresholds for exempt workers. The Department believes that, on average, one hour is sufficient to time to read and understand, for example, the changes to these thresholds, and we note that the regulatory text changes comprise only a few pages. Additionally, the estimated one hour for regulatory familiarization represents an average for all establishments in the U.S., even those without any affected or exempt workers, which are unlikely to spend much time reviewing the rule. Some businesses, of course, will spend more than one hour, and some will spend less, but for the reasons stated above, the Department believes that an average of one hour is an appropriate estimate.

3. Adjustment Costs

This rule will also impose direct costs on firms by requiring them to evaluate the exemption status of employees, update and adapt overtime policies, notify employees of policy changes, and adjust their payroll systems.[171] The Department believes the size of these ''adjustment costs'' will depend on the number of affected EAP workers and will occur in any year when exemption status is changed for any workers. To estimate adjustment costs, three pieces of information must be estimated: (1) A wage level for the employees making the adjustments; (2) the amount of time spent making the adjustments; and (3) the estimated number of newly affected EAP workers. The Department again estimated that the average wage with benefits and overhead costs for a mid-level human resource worker will be $43.38 per hour (as explained above).

The Department estimated that it will take establishments an average of 75

[165] Statistics of U.S. Businesses 2016, *https://www.census.gov/programs-surveys/susb.html.*

[166] 2017 Census of Governments. Table 1, *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[167] The median wage in the pooled 2018/19 CPS data for workers with the Census 2010 occupations ''human resources workers'' (0630); ''compensation, benefits, and job analysis specialists'' (0640); and ''training and development specialists'' (0650). The Department determined these occupations include most of the workers who would conduct these tasks. *See* Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook.

[168] The benefits-earnings ratio is derived from BLS's Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D. This fringe benefit rate includes some fixed costs such as health insurance.

[169] The Department believes that the overhead costs associated with this rule are small because existing systems maintained by employers to track currently hourly employees can be used for newly overtime-eligible workers. However, acknowledging that there might be additional overhead costs, we have included an overhead rate of 17 percent. Because the 2016 final rule did not include overhead costs in its cost and transfer estimates, estimated costs and transfers associated with the 2016 final rule have been recalculated for comparison purposes in section VI.D.ix.

[170] As previously noted, the Department used the number of establishments rather than the number of firms, which results in a higher estimate of the regulatory familiarization cost. Using the number of firms, 6.0 million, would result in a reduced regulatory familiarization cost estimate of $262.2 million in Year 1.

[171] While some companies may need to reconfigure information technology systems to include both exempt and overtime-protected workers, the Department notes that most organizations affected by the rule already employ overtime-eligible workers and have in place payroll systems and personnel practices (*e.g.,* requiring advance authorization for overtime hours) such that additional costs associated with the rule should be relatively small in the short run.

minutes per affected worker to make the necessary adjustments. Little applicable data were identified from which to estimate the amount of time required to make these adjustments.[172] Therefore, in the NPRM the Department used the estimate of 1.25 hours from the 2016 final rule after reviewing public comments on the 2015 NPRM, and it is again using this estimate in this final rule. The estimated number of affected EAP workers in Year 1 is 1.3 million (as discussed in section VI.D.ii). Therefore, total estimated Year 1 adjustment costs will be $68.2 million ($43.38 × 1.25 hours × 1.3 million workers).

A reduction in the cost to employers of determining employees' exempt status may partially offset adjustment costs. Currently, to determine whether an employee is exempt, employers must apply the duties test to salaried workers who earn at least $455 per week. However, when the rule takes effect, firms will no longer be required to apply the potentially time-consuming duties test to employees earning less than the new standard salary level. This will be a clear cost savings to employers for the approximately 4.1 million salaried employees (2.2 million in white collar occupations and 1.9 million in blue collar occupations) who do not pass the duties test and earn at least $455 per week but less than the updated salary level. The Department did not estimate the potential size of this cost savings.

A few commenters expressed concern that the time estimate is too low. For example, as noted above, International Bancshares Corporation described the necessary hours for regulatory familiarization and adjustment costs as ''countless.'' SBA Advocacy wrote: ''Small businesses have told Advocacy that it may take them many hours and several weeks to understand and implement this rule for their small businesses.'' Two commenters, the National Association of Manufacturers and the HR Policy Association, expressed particular concern with adjustment costs stemming from the proposed increase in the HCE compensation level, noting that for each worker earning between $100,000 and the new HCE compensation level, the employee's job duties will need to be reassessed to determine whether the worker remains exempt under the standard salary level exemption. The National Association of Manufacturers elaborated that ''across the manufacturing sector, the change in HCE threshold [proposed in the NPRM] may be even more difficult and consequential than updating the standard salary threshold.''

The Department is retaining its estimate of adjustment costs as 75 minutes per affected worker in the final rule. The Department notes that the vast majority of commenters, including employer representatives, did not contest this estimate. Additionally, this estimate is drawn from the 2016 final rule, and represents a 25 percent increase, in response to concerns from employer representatives, over the Department's original estimate of one hour per worker in the 2015 NPRM.[173] Moreover, SBA Advocacy's numbers are not necessarily inconsistent with the Department's estimates. For example, if a small business has 15 affected employees, then the Department estimated it will (on average) take 19.75 hours to make the appropriate adjustments, an amount of time that some small businesses might consider ''many hours'' and that could take place over ''several weeks.''

The Department also believes that the 75-minute-per-worker average time estimate appropriately takes into account adjustment time for HCE-affected workers (those passing only the HCE duties test and not the standard duties test). This estimate assumes that the average is concentrated in the subset of employees requiring more analysis to make a decision. For example, employers are likely to incur relatively low adjustment costs for some workers, such as those who work no overtime (described below as Type 1 workers). This leaves more time for employers to spend on adjustment costs for other workers, such as affected HCE employees who become newly subject to the more rigorous standard duties test. The Department further notes that in this final rule, the number of affected HCE employees has declined from the NPRM as a result of the Department's decision to decrease the HCE threshold from the proposed amount of $147,414 to $107,432. This adjustment also addresses concerns about the burdens that would have been associated, under the NPRM, with applying the standard duties test to a large number of formerly HCE exempt employees, many of whom would have remained exempt under the standard duties test. Thus, although some employers may spend more time adjusting for HCE-affected workers than for other workers, HCE workers will now comprise a smaller portion of the of the total number of affected workers, further affirming the Department belief that its estimate of 75 minutes per worker on average is appropriate.

4. Managerial Costs

If employers reclassify employees as overtime-eligible due to the changes in the salary levels, then firms may incur ongoing managerial costs because the employer may spend more time developing work schedules and closely monitoring an employee's hours to minimize or avoid overtime. For example, the manager of a reclassified worker may have to assess whether the marginal benefit of scheduling the worker for more than 40 hours exceeds the marginal cost of paying the overtime premium. Additionally, the manager may have to spend more time monitoring the employee's work and productivity since the marginal cost of employing the worker per hour has increased. Unlike regulatory familiarization and adjustment costs, which occur primarily in Year 1, managerial costs are incurred more uniformly every year. The Department applied managerial costs to workers who (1) are reclassified as nonexempt, overtime-protected and (2) either regularly work overtime or occasionally work overtime, but on a predictable basis—an estimated 304,500 workers (*see* Table 13 and accompanying explanation). The Department estimated these costs assuming that management spends an additional ten minutes per week scheduling and monitoring each affected worker expected to be reclassified as nonexempt, overtime-eligible as a result of this rule, and whose hours are adjusted. As discussed in detail below, most affected workers do not currently work overtime, and there is no reason to expect their hours worked to change when their status changes from exempt to nonexempt. For that group of workers, management will have little or no need to increase their monitoring of hours worked; therefore, these workers are not included in the managerial cost calculation. Under these assumptions, the additional managerial hours worked per week will be 50,751 hours ((10 minutes/60 minutes) × 304,500 workers).

The median hourly wage in 2018/19 for a manager was $31.18 and benefits were estimated to be paid at a rate of 46 percent of the base wage.[174] Together

[172] Costs from the 2004 final rule were considered, but because that revision included changes to the duties test, the cost estimates are not directly applicable; in addition, the 2004 final rule did not separately account for managerial costs. The 2015 NPRM separately accounted for managerial costs. Some commenters responded with higher time estimates, but these estimates were not substantiated with data.

[173] 81 FR at 32475.

[174] Calculated as the median wage in the pooled 2018/19 CPS MORG data for workers in management occupations (excluding chief

Continued

with the 17 percent overhead costs used for this analysis, this totals $50.92 per hour. Thus, the estimated Year 1 managerial costs total $134.4 million (50,751 hours/week × 52 weeks × $50.92/hour). Although the exact magnitude will vary with the number of affected EAP workers each year, the Department anticipates that employers will incur managerial costs annually.

There was little precedent or data to aid in evaluating managerial costs. With the exception of the 2016 rulemaking, prior part 541 rulemakings did not estimate managerial costs. The Department likewise found no estimates of managerial costs after reviewing the literature. Thus, in the NPRM, the Department used the same methodology as the 2016 final rule, which the Department adopted after considering comments on the 2015 NPRM. However, for this final rule, the Department has increased the time estimate from 5 minutes to 10 minutes.

A few commenters generally expressed concern about the managerial costs for businesses. For example, one commenter noted: ''There is no easy way to track hours for salaried folks easily, in most businesses. As a result, companies will be forced to begin this practice, adding more costs in administrative ways.'' Another individual wrote that the proposed rule ''would create a challenge by placing a burden on the employers to exaustively [sic] track these newly nonexempt employees' hours to ensure compliance with overtime pay and other requirements. This tracking of hours would also produce increased human resources paperwork and technology costs to our company.'' The Kentucky Retail Federation wrote: ''Reclassifying managers to hourly workers will require hours spent scheduling work hours to avoid overtime costs.'' SBA Advocacy, asserting that the Department underestimated compliance costs, wrote: ''Employers reclassifying managers to hourly staff may spend many hours a week scheduling and keeping track of employee work to avoid these extra overtime costs.''

The Department acknowledges that firms may incur costs monitoring and managing the hours of formerly exempt staff. In addition, the Department acknowledges that to the extent workers who lose their exempt status as a result of the change in the standard salary level telecommute, but hourly and other nonexempt salaried workers do not telecommute, it may be necessary to develop ways of tracking such work by newly nonexempt workers. However, the Department does not expect that such firms will spend ''many hours a week'' on such tasks, and believes an estimate of 10 minutes per worker per week is appropriate. First, the Department notes that EAP exempt employees account for less than 20 percent of the U.S. labor force; as such, the Department expects that the vast majority of employers of EAP exempt workers also employ nonexempt workers. Such employers already have in place recordkeeping systems and standard operating procedures for ensuring employees work overtime under only employer-prescribed circumstances. Thus, such systems generally do not need to be invented for managing formerly-exempt EAP employees. Second, the Department also notes that under the FLSA recordkeeping regulations in part 516, employers determine how to make and keep an accurate record of hours worked by employees; for example, employers may tell their workers to write their own time records and any timekeeping plan is acceptable as long as it is complete and accurate. Additionally, if the nonexempt employee works a fixed schedule, *e.g.,* 9:00 a.m.–5:30 p.m. Monday–Friday, the employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate exceptions to that schedule. *See* Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (*https://www.dol.gov/whd/regs/compliance/whdfs21.pdf*). However, as previously noted, in response to concerns raised by commenters the Department has doubled the amount of time attributed to managerial costs.

5. Other Potential Costs

In addition to the costs discussed above, the final rule may impose additional costs that have not been quantified. These costs are discussed qualitatively below, but we note that in some cases (*e.g.,* schedule flexibility, salaried status) these costs may directly affect workers' wages because workers face a tradeoff in the labor market between cash wages and the nonpecuniary aspects of jobs.[175]

Reduced Scheduling Flexibility

Exempt workers may enjoy more scheduling flexibility because their hours are less likely to be monitored than nonexempt workers. If so, the final rule could impose costs on newly nonexempt, overtime-eligible workers by, for example, limiting their ability to adjust their schedules to meet personal and family obligations. But the rule does not require employers to reduce scheduling flexibility. Employers can continue to offer flexible schedules and require workers to monitor their own hours and to follow the employers' timekeeping rules. Additionally, some exempt workers already monitor their hours for billing purposes. For these reasons, and because there is little data or literature on these costs, the Department did not quantify potential costs regarding scheduling flexibility.

Preference for Salaried Status

Some of the workers who become nonexempt as a result of the final rule and whose pay is changed by their employer from salaried to hourly status may have preferred to remain salaried. Research has shown that salaried workers are more likely than hourly workers to receive benefits such as paid vacation time and health insurance,[176] and are more satisfied with their benefits.[177] Additionally, when employer demand for labor decreases, hourly workers tend to see their hours cut before salaried workers, making earnings for hourly workers less predictable.[178] However, this literature generally does not control for differences between salaried and hourly workers such as education, job title, or earnings; therefore, this correlation is not necessarily attributable to hourly status.

If workers are reclassified as hourly, and hourly workers have fewer benefits than salaried workers, reclassification could reduce workers' benefits. But the Department notes that this rule does not require such reclassification. These newly nonexempt workers may continue to be paid a salary, as long as that salary is equivalent to a base wage at least equal to the minimum wage rate for every hour worked, and the employee receives a 50 percent

executives). The adjustment ratio is derived from BLS' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

[175] *See, e.g.,* Ashenfelter, O. & Layard, R. (1986). Handbook of Labor Economics. Volume 1 641–92. *https://www.sciencedirect.com/science/article/abs/pii/S1573446386010155.*

[176] Lambert, S.J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A.C. Crouter, *Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities.* Washington, DC: Urban Institute Press.

[177] Balkin, D.B., & Griffeth, R.W. (1993). The Determinants of Employee Benefits Satisfaction. *Journal of Business and Psychology,* 7(3), 323–339.

[178] Lambert, S.J., & Henly, J.R. (2009). *Scheduling in Hourly Jobs: Promising Practices for the Twenty-First Century Economy.* The Mobility Agenda. Lambert, S.J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A.C. Crouter, *Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities.* Washington, DC: Urban Institute Press.

premium on that base wage for any overtime hours each week.[179] Similarly, employers may continue to provide these workers with the same level of benefits as previously, whether paid on an hourly or salary basis.

Quality of Public Services

To the extent that employers respond to this rule by restricting employee work hours, this rulemaking could negatively affect the quality of public services provided by local governments and nonprofits. However, the Department believes the effect of the rule on public services will be small. The Department acknowledges that some employees who work overtime providing public services may see a reduction in hours as an effect of the rulemaking. But if the services are in demand, the Department believes additional workers may be hired, as funding availability allows, to make up some of these hours, and productivity increases may offset some reduction in services. In addition, the Department expects many employers will adjust base wages downward to some degree so that even after paying the overtime premium, overall pay and hours of work for many employees will be relatively minimally impacted. Additionally, as noted above, many nonprofits are non-covered enterprises because when determining enterprise coverage only revenue derived from business operations, not charitable activities, is included.

Increased Prices

Business firms may pass along increased labor costs to consumers through higher prices. The Department anticipates that some firms may offset part of the additional labor costs through charging higher prices for the firms' goods and services. However, because costs and transfers are, on average, small relative to payroll and revenues, the Department does not expect the final rule to have a significant effect on prices. The Department estimated that, on average, costs and transfers make up less than 0.02 percent of payroll and less than 0.003 percent of revenues, although for specific industries and firms this percentage may be larger. Therefore, any potential change in prices would be modest. Further, any significant price increases would not represent a separate category of effects from those estimated in this economic analysis; rather, such price increases (where they occur) would be the channel through which consumers, rather than employers or employees, bear rule-induced costs (including transfers).

International Bancshares Corporation commented that the increased salary level could lead to increased prices, if ''anticipated wage gains do not result in productivity increases.'' As noted above, however, costs and transfers make up less than 0.02 percent of payroll; furthermore, payroll comprises only a fraction of the costs of producing goods and services in the U.S. economy. Therefore, the Department concludes the final rule will add little upward pressure to prices. To the extent that EAP-exempt employees are concentrated in some industries more than others, and thus specific industries might experience more pressure on wages, the Department notes that even in the industry where costs and transfers compose the highest percentage of payroll (agriculture, forestry, fishing, and hunting), that percentage is only 0.038 percent.

Reduced Profits

The increase in workers' earnings resulting from the revised salary level is a transfer of income from firms to workers, not a cost. The Department acknowledges that the increased employer costs and transfer payments as a result of this final rule may reduce the profits of business firms, although (1) some firms may offset some of these costs and transfers by making payroll adjustments, and (2) some firms may mitigate their reduced profits due to these costs and transfers through increased prices. To the extent that the final rule reduces profits at some business firms after all these adjustments are made, these firms would have marginally lower after-tax returns on new investments in equipment, structures, and intellectual property and could therefore make fewer such investments going forward. All else equal, less business investment slows economic growth and reduces employment. However, the Department expects that any anti-growth effects of the final rule would be minimal.

Hiring Costs

To the extent that firms respond to an update to the salary level test by reducing overtime hours, they may do so by spreading hours to other workers, including current workers employed for less than 40 hours per week by that employer, current workers who retain their exempt status, and newly hired workers. If new workers are hired to absorb these transferred hours, then the associated hiring costs are a cost of this final rule.

Other Costs Raised by Commenters

Some commenters asserted that the proposed rule would entail additional costs not detailed above. A few believe that the rule will result in increased employee turnover. SBA Advocacy wrote: ''Small businesses that reclassified their salaried staff to hourly staff as a result of the 2016 final rule reported that their employee turnover increased by up to 50 percent,'' forcing them to incur costs to hire and train new workers. According to SBA Advocacy, small businesses attributed this turnover to previously-exempt managers feeling ''demoralized'' by having to ''clock in'' due to their changed status, and suggested that this rule may have similar effects. Similarly, International Bancshares Corporation predicted that the proposed rule would result in layoffs, asserting that costs associated with ''reviewing the final regulations and building a software system to implement and monitor their compliance with the regulations'' would make it ''extremely difficult for community and regional banks to . . . [avoid] laying off employees or curtailing their operations.''

The Department believes these concerns are overstated. First, this final rule's increases to the earnings thresholds are much more modest than the 2016 final rule's, and the associated impacts are correspondingly more moderate. Thus, the Department believes that any adverse effects, such as increased turnover, will be minimal. Therefore, the Department has not quantified the potential costs associated with increased turnover. Likewise, the Department does not believe that this final rule will cause a significant number of layoffs. As explained above, the vast majority of firms employ both exempt and nonexempt workers and therefore have systems in place for managing nonexempt employees, and affected employees comprise less than 4 percent of EAP exempt employees. As such, the Department does not believe that the increased earnings thresholds in this final rule will cause layoffs to any significant extent, and has not quantified such costs.

iv. Transfers

1. Overview

Transfer payments occur when income is redistributed from one party to another. The Department has quantified two transfers from employers to employees that will result from the final rule: (1) Transfers to ensure compliance with the FLSA minimum wage provision; and (2) transfers to ensure compliance with the FLSA

[179] §§ 778.113–.114.

overtime pay provision. Transfers in Year 1 due to the minimum wage provision were estimated to be $75.4 million. The increase in the HCE compensation level does not affect minimum wage transfers because workers eligible for the HCE exemption earn well above the minimum wage. The Department estimates that transfers due to the overtime pay provision will be $321.0 million: $220.7 million from the increased standard salary level and $100.3 million from the increased HCE compensation level. Total Year 1 transfers are estimated at $396.4 million (Table 11).

TABLE 11—SUMMARY OF YEAR 1 REGULATORY TRANSFERS

[Millions]

Transfer from employers to workers	Standard salary level	HCE compensation level	Total
Due to minimum wage	$75.4	$0.0	$75.4
Due to overtime pay	220.7	100.3	321.0
Total transfers	296.1	100.3	396.4

Because the overtime premium depends on the base wage, the estimates of minimum wage transfers and overtime transfers are linked. This can be considered a two-step approach. The Department first identified affected EAP workers with an implicit regular hourly wage lower than the minimum wage, and then calculated the wage increase necessary to reach the minimum wage.

2. Transfers Due to the Minimum Wage Provision

For purposes of this analysis, the hourly rate of pay was calculated as usual weekly earnings divided by usual weekly hours worked. To earn less than the federal or most state minimum wages, this set of workers must work many hours per week. For example, a worker paid $455 per week must work 62.8 hours to earn less than the federal minimum wage of $7.25 per hour ($455/$7.25 = 62.8).[180] The applicable minimum wage is the higher of the federal minimum wage and the state minimum wage as of July 1, 2018. Most affected EAP workers already receive at least the minimum wage; only an estimated 1.8 percent of them (22,200 in total) earn an implicit hourly rate of pay less than the minimum wage. The Department estimated transfers due to payment of the minimum wage by calculating the change in earnings if wages rose to the minimum wage for workers who become nonexempt.[181]

In response to an increase in the regular rate of pay to the minimum wage, employers may reduce the workers' hours. Since the quantity of labor hours demanded is inversely related to wages, a higher mandated wage will result in fewer hours of labor demanded. For the first year, the Department estimated the potential disemployment effects (*i.e.,* the estimated reduction in hours) of the transfer attributed to the minimum wage by multiplying the percent change in the regular rate of pay by a labor demand elasticity of −0.2 (years 2–10 use a long run elasticity of −0.4) [182] [183]

At the new standard salary level, the Department estimated that 22,200 affected EAP workers will, on average, see an hourly wage increase of $1.39, work 2.4 fewer hours per week, and receive an increase in weekly earnings of $65.29 as a result of coverage by the minimum wage provisions (Table 12). The total change in weekly earnings due to the payment of the minimum wage was estimated to be $1.4 million per week ($65.29 × 22,200) or $75.4 million in Year 1.

TABLE 12—MINIMUM WAGE ONLY: MEAN HOURLY WAGES, USUAL OVERTIME HOURS, AND WEEKLY EARNINGS FOR AFFECTED EAP WORKERS, YEAR 1

	Hourly wage [a]	Usual weekly hours	Usual weekly earnings	Total weekly transfer (1,000s)
Before Final Rule	$8.75	61.4	$524.37	.....
After Final Rule	10.14	59.0	589.66	.....
Change	1.39	−2.4	65.29	1,450

Note: Pooled data for 7/2016–6/2018 adjusted to reflect 2018/2019.
[a] The applicable minimum wage is the higher of the federal minimum wage and the state minimum wage.

[180] Workers in states with minimum wages higher than the federal minimum wage could earn less than the state minimum wage working fewer hours.

[181] Because these workers' hourly wages will be set at the minimum wage after this final rule, their employers will not be able to adjust their wages downward to offset part of the cost of paying the overtime pay premium (which will be discussed in the following section). Therefore, these workers will generally receive larger transfers attributed to the overtime pay provision than other workers.

[182] Labor demand elasticity is the percentage change in labor hours demanded in response to a one percent change in wages.

[183] This elasticity estimate represents a short run demand elasticity for general labor, and is based on the Department's analysis of Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958. We selected a general labor demand elasticity because employers will adjust their demand based on the cumulative change in employees' earnings, not on a conceptual differentiation between increases attributable to the minimum wage and the overtime provisions of the FLSA.

3. Transfers Due to the Overtime Pay Provision

Introduction

The final rule will transfer income to affected workers who work in excess of 40 hours per week. Requiring an overtime premium increases the marginal cost of labor, which employers will likely try to offset by adjusting wages and/or hours of affected workers. The size of the transfer will depend largely on how employers respond to the updated salary levels. Employers may respond by: (1) Paying overtime premiums to affected workers; (2) reducing overtime hours of affected workers and potentially transferring some of these hours to other workers; (3) reducing the regular rate of pay for affected workers working overtime (provided that the reduced rates still exceed the minimum wage); (4) increasing affected workers' salaries to the updated salary or compensation level to preserve their exempt status; or (5) using some combination of these responses. How employers will respond depends on many factors, including the relative costs of each of these alternatives; in turn, the relative costs of each of these alternatives are a function of workers' earnings and hours worked.

Literature on Employer Adjustments

Two conceptual models are useful for thinking about how employers may respond to reclassifying certain employees as overtime-eligible: (1) The ''fixed-wage'' or ''labor demand'' model, and (2) the ''fixed-job'' or ''employment contract'' model.[184] These models make different assumptions about the demand for overtime hours and the structure of the employment agreement, which result in different implications for predicting employer responses. The fixed-wage model assumes that the standard hourly wage is independent of the statutory overtime premium. Under the fixed-wage model, a reclassification of workers from overtime exempt to overtime nonexempt would cause a reduction in overtime hours for affected workers, an increase in the prevalence of a 40-hour workweek among affected workers, and an increase in the earnings of affected workers who continue to work overtime.

In contrast, the fixed-job model assumes that the standard hourly wage is affected by the statutory overtime premium. Thus, employers can neutralize any reclassification of workers from overtime exempt to overtime nonexempt by reducing the standard hourly wage of affected workers so that their weekly earnings and hours worked are unchanged, except when minimum wage laws prevent employers from lowering the standard hourly wage below the minimum wage. Under the fixed-job model, a reclassification of workers from overtime exempt to overtime nonexempt would have different effects on minimum-wage workers and above-minimum-wage workers. Similar to the fixed-wage model, minimum-wage workers would experience a reduction in overtime hours, an increase in the prevalence of a 40-hour workweek at a given employer (though not necessarily overall), and an increase in earnings for the portion of minimum-wage workers who continue to work overtime for a given employer. Unlike the fixed-wage model, however, above-minimum-wage workers would experience no change.

The Department conducted a literature review to evaluate studies of how labor markets adjust to a change in the requirement to pay overtime. In general, these studies are supportive of the fixed-job model of labor market adjustment, in that wages adjust to offset the requirement to pay an overtime premium as predicted by the fixed-job model, but do not adjust enough to completely offset the overtime premium as predicted by the model.

The Department believes the two most important papers in this literature are the studies by Trejo (1991) and Barkume (2010). Analyzing the economic effects of the overtime pay provisions of the FLSA, Trejo (1991) found ''the data analyzed here suggest the wage adjustments occur to mitigate the purely demand-driven effects predicted by the fixed-wage model, but these adjustments are not large enough to neutralize the overtime pay regulations completely.'' Trejo noted, ''In accordance with the fixed job model, the overtime law appears to have a greater impact on minimum-wage workers.'' He also stated, ''[T]he finding that overtime pay coverage status systematically influences the hours-of-work distribution for non-minimum wage works is supportive of the fixed-wage model. No significant differences in weekly earnings were discovered between the covered and non-covered sectors, which is consistent with the fixed-job model.'' However, ''overtime pay compliance is higher for union than for nonunion workers, a result that is more easily reconciled with the fixed wage model.'' Trejo's findings are supportive of the fixed-wage model whose adjustment is incomplete largely due to the minimum-wage requirement.[185]

A second paper by Trejo (2003) took a different approach to testing the consistency of the fixed-wage adjustment models with overtime coverage and data on hours worked. In this paper, he examined time-series data on employee hours by industry. After controlling for underlying trends in hours worked over 20 years, he found changes in overtime coverage had no impact on the prevalence of overtime hours worked. This result supports the fixed-job model. Unlike the 1991 paper, however, he did not examine impacts of overtime coverage on employees' weekly or hourly earnings, so this finding in support of the fixed-job model only analyzes one implication of the model.[186]

Barkume (2010) built on the analytic method used in Trejo (1991).[187] However, Barkume observed that Trejo did not account for ''quasi-fixed'' employment costs (*e.g.,* benefits) that do not vary with hours worked, and therefore affect employers' decisions on overtime hours worked. After incorporating these quasi-fixed costs in the model, Barkume found results consistent with those of Trejo (1991): ''though wage rates in otherwise similar jobs declined with greater overtime hours, they were not enough to prevent the FLSA overtime provisions from increasing labor costs.'' Barkume also determined that the 1991 model did not account for evidence that in the absence of regulation some employers may voluntarily pay workers some overtime premium to entice them to work longer hours, to compensate workers for unexpected changes in their schedules, or as a result of collective bargaining.[188] Barkume found that how much wages and hours worked adjusted in response to the overtime pay requirement

[184] *See* Trejo, S.J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. *American Economic Review,* 81(4), 719–740, and Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[185] Trejo, S. J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. *American Economic Review,* 81(4), 719–740.

[186] Trejo, S. J. (2003). Does the Statutory Overtime Premium Discourage Long Workweeks? Industrial and Labor Relations Review, 56(3), 375–392.

[187] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[188] Barzel, Y. (1973). The Determination of Daily Hours and Wages. *The Quarterly Journal of Economics,* 87(2), 220–238, demonstrated that modest fluctuations in labor demand could justify substantial overtime premiums in the employment contract model. Hart, R. A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163, showed that establishing an overtime premium in an employment contract can reduce inefficiencies.

depended on what overtime pay would be in absence of regulation.

In addition, Bell and Hart (2003) examined the standard hourly wage, average hourly earnings (including overtime), the overtime premium, and overtime hours worked in Britain. Unlike the United States, Britain does not have national labor laws regulating overtime compensation. Bell and Hart found that after accounting for overtime, average hourly earnings are generally uniform in a given industry because firms paying below-market level straight-time wages tend to pay above-market overtime premiums and firms paying above-market level straight-time wages tend to pay below-market overtime premiums. Bell and Hart concluded ''this is consistent with a model in which workers and firms enter into an implicit contract that specifies total hours at a constant, market-determined, hourly wage rate.[189] Their research is also consistent with studies showing that employers may pay overtime premiums either in the absence of a regulatory mandate (*e.g.,* Britain), or when the mandate exists but the requirements are not met (*e.g.,* United States).[190]

Finally, Kuroda and Yamamoto (2009) examined ''name only managers'' in Japanese labor markets and found essentially 100 percent adjustment of implicit hourly wages to offset the overtime pay requirement.[191] [192] This study suggests that these affected workers are all employed under the pure fixed-job model, so the implicit wage adjusted so that workers received no additional pay, and had essentially no change to hours worked. If applied to this rulemaking, transfers from employers to employees would occur only in cases in which the implicit hourly rate is less than the minimum wage. The Department estimates transfers would be about $193.4 million in Year 1 with 100 percent adjustment to the fixed-job model (compared with the Department's estimate of $396.4 million using the substantial, but incomplete fixed-job model, described in further detail below).

However, there are some challenges in generalizing Kuroda and Yamamoto's results to U.S. labor markets. First, ''name-only-managers would not be exempt in the U.S. because they do not meet the duties test for exemption. ''Name-only-managers'' are essentially identical to their peers, have no managerial responsibilities, and are distinguished only by their job title. This is not directly analogous to the case of EAP exempt employees, who do have managerial responsibilities, and must pass the duties test while other similar (but nonexempt) employees do not. Second, Kuroda also found that the pure fixed-job model results may not hold under all conditions. For example, in a following paper he found that during a recession, the labor market for ''name-only-managers'' behaved more like the fixed-wage model than the fixed-job model.[193] Third, some commenters on the NPRM provided survey results supporting that, among other responses, employers planned to respond to this rule (or responded or planned to respond to the 2016 final rule) by increasing salaries of some exempt employees to maintain their exempt status (*see* section VI.D.iv.5). This is inconsistent with Kuroda and Yamamoto's findings.

On balance, the Department finds strong support for the fixed-job model as the best approximation for the likely effects of a reclassification of above-minimum-wage workers from overtime exempt to overtime nonexempt and the fixed-wage model as the best approximation of the likely effects of a reclassification of minimum-wage workers from overtime exempt to overtime nonexempt. In addition, the studies suggest that although observed wage adjustment patterns are consistent with the fixed-job model, this evidence also suggests that the actual wage adjustment might, especially in the short run, be less than 100 percent as predicted by the fixed-job model. Thus, the hybrid model used in this analysis may be described as a substantial, but incomplete fixed-job model.

To determine the magnitude of the adjustment, the Department accounted for the following findings. Earlier research had demonstrated that in the absence of regulation some employers may voluntarily pay workers some overtime premium to entice them to work longer hours, to compensate workers for unexpected changes in their schedules, or as a result of collective bargaining.[194] Barkume (2010) found that the measured adjustment of wages and hours to overtime premium requirements depended on what overtime premium might be paid in absence of any requirement to do so. Thus, when Barkume assumed that workers would receive an average voluntary overtime pay premium of 28 percent in the absence of an overtime pay regulation, which is the average overtime premium that Bell and Hart (2003) found British employers paid in the absence of any overtime regulations, the straight-time hourly wage adjusted downward by 80 percent of the amount that would occur with the fixed-job model.[195] When Barkume assumed workers would receive no voluntary overtime pay premium in the absence of an overtime pay regulation, the results were more consistent with Trejo's (1991) findings that the adjustment was a smaller percentage. The Department modeled an adjustment process between these two findings. Although it seemed reasonable that some premium was paid for overtime in the absence of regulation, Barkume's assumption of a 28 percent initial overtime premium is likely too high for the salaried workers potentially affected by a change in the salary and compensation level requirements for the EAP exemptions because this assumption is based on a study of workers in Britain. British workers were likely paid a larger voluntary overtime premium than American workers because Britain did not have a required overtime pay regulation and so collective bargaining played a larger role in implementing overtime pay.[196] If the Department were to use only Barkume's assumptions and results to model employer adjustment to the overtime wage premium requirement for affected workers, estimated Year 1 transfers would total $247.9 million; further estimates derived from Barkume's findings will be presented later in the analysis. However, in the sections that

[189] Bell, D. N. F. and Hart, R. A. (2003). Wages, Hours, and Overtime Premia: Evidence from the British Labor Market, *Industrial and Labor Relations Review,* 56(3), 470–480.

[190] Hart, R. A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163.

[191] Kuroda, S. and Yamamoto, I. (2009). How Are Hours Worked and Wages Affected by Labor Regulations?: The White-Collar Exemption and 'Name-Only Managers' in Japan. University of Tokyo Institute of Social Science. *Discussion Paper Series* No. F–147.

[192] The implicit hourly wage is calculated by dividing reported weekly earnings by reported hours worked.

[193] Kuroda, S. and Yamamoto, I. (2012). Impact of Overtime Regulations on Wages and Work Hours, *Journal of the Japanese and International Economies,* 26(2), 249–262.

[194] Barzel, Y. (1973). The Determination of Daily Hours and Wages. *The Quarterly Journal of Economics,* 87(2), 220–238, demonstrated that modest fluctuations in labor demand could justify substantial overtime premiums in the employment contract model. Hart, R. A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163, showed that establishing an overtime premium in an employment contract can reduce inefficiencies.

[195] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[196] Bell, D. N. F. and Hart, R. A. (2003). Wages, Hours, and Overtime Premia: Evidence from the British Labor Market, *Industrial and Labor Relations Review,* 56(3), 470–480.

immediately follow, the Department uses both papers to model transfers.

Identifying Types of Affected Workers

The Department identified four types of workers whose work characteristics affect how it modeled employers' responses to the changes in both the standard and HCE salary levels:

- *Type 1:* Workers who do not work overtime.
- *Type 2:* Workers who do not regularly work overtime but occasionally work overtime.
- *Type 3:* Workers who regularly work overtime and become overtime eligible (nonexempt).
- *Type 4:* Workers who regularly work overtime and remain exempt, because it is less expensive for the employer to pay the updated salary level than to pay overtime and incur additional managerial costs.

The Department began by identifying the number of workers in each type. After modeling employer adjustments, it estimated transfer payments. Type 3 and 4 workers were identified as those who regularly work overtime (CPS variable PEHRUSL1 greater than 40). Distinguishing Type 3 workers from Type 4 workers involved a four-step process. First, the Department identified all workers who regularly work overtime. Then the Department estimated each worker's weekly earnings if they became nonexempt, to which it added weekly managerial costs for each affected worker of $8.49 ($50.92 per hour × (10 minutes/60 minutes)).[197] Last, the Department identified as Type 4 those workers whose expected nonexempt earnings plus weekly managerial costs exceeds the updated standard salary level, and, conversely, as Type 3 those whose expected nonexempt earnings plus weekly managerial costs are less than the new standard salary.[198] The Department assumed that firms will include incremental managerial costs in their determination of whether to treat an affected employee as a Type 3 or Type 4 worker because those costs are only incurred if the employee is a Type 3 worker.

Identifying Type 2 workers involved two steps. First, using CPS MORG data, the Department identified those who do not usually work overtime but did work overtime in the survey week (the week referred to in the CPS questionnaire, variable PEHRACT1 greater than 40). Next, the Department supplemented the CPS data with data from the Survey of Income and Program Participation (SIPP) to look at likelihood of working some overtime during the year. Based on 2012 data, the most recent available, the Department found that 39.4 percent of non-hourly workers worked overtime at some point in a year. Therefore, the Department classified a share of workers who reported they do not usually work overtime, and did not work overtime in the reference week (previously identified as Type 1 workers), as Type 2 workers such that a total of approximately 39.4 percent of affected workers were Type 2, 3, or 4.

Modeling Changes in Wages and Hours

The substantial, but incomplete fixed-job model (hereafter referred to as the incomplete fixed-job model) predicts that employers will adjust wages of regular overtime workers but not to the full extent indicated by fixed-job model, and thus some employees may receive a small increase in weekly earnings due to overtime pay coverage. When modeling employer responses with respect to the adjustment to the regular rate of pay, the Department used the incomplete fixed-job model.

In this portion of the analysis, the Department presents an estimate of the effect on the implicit hourly rate of pay for regular overtime workers should be determined using the average of two estimates of the incomplete fixed-job model adjustments: Trejo's (1991) estimate that the overtime-induced wage change is 40 percent of the adjustment toward the amount predicted by the fixed-job model, assuming an initial zero overtime pay premium, and Barkume's (2010) estimate that the wage change is 80 percent of the predicted adjustment assuming an initial 28 percent overtime pay premium.[199] This is approximately equivalent to assuming that salaried overtime workers implicitly receive the equivalent of a 14 percent overtime premium in the absence of regulation (the midpoint between 0 and 28 percent).

Modeling changes in wages, hours, and earnings for Type 1 and Type 4 workers was relatively straightforward. Type 1 affected EAP workers will become overtime-eligible, but because they do not work overtime, they will see no change in their weekly earnings. Type 4 workers will remain exempt because their earnings will be raised to at least the updated EAP level (either the standard salary level or HCE compensation level). These workers' earnings will increase by the difference between their current earnings and the amount necessary to satisfy the new salary or compensation level. It is possible employers will increase these workers' hours in response to paying them a higher salary, but the Department did not have enough information to model this potential change.[200]

Modeling changes in wages, hours, and earnings for Type 2 and Type 3 workers was more complex. The Department distinguished those who regularly work overtime (Type 3 workers) from those who occasionally work overtime (Type 2 workers) because employer adjustment to the final rule may differ accordingly. Employers are more likely to adjust hours worked and wages for regular overtime workers because their hours are predictable. However, in response to a transient, perhaps unpredicted, shift in market demand for the good or service such employers provide, employers are more likely to pay for occasional overtime rather than adjust hours worked and pay.

The Department treated Type 2 affected workers in two ways due to the uncertainty of the nature of these occasional overtime hours. The Department assumed that 50 percent of these occasional overtime workers worked *expected* overtime hours and the other 50 percent worked *unexpected* overtime. Workers were randomly assigned to these two groups. Workers with *expected* occasional overtime hours were treated like Type 3 affected workers (incomplete fixed-job model adjustments). Workers with *unexpected* occasional overtime hours were assumed to receive a 50 percent pay premium for the overtime hours worked and receive no change in base wage or hours (full overtime premium

[197] *See supra* § VI.D.iii.4 (managerial costs).

[198] When analyzing impacts of increasing the standard salary level, Rohwedder and Wenger conducted a similar analysis; however, they use straight-time pay rather than overtime pay to calculate earnings in the absence of a pay raise to remain exempt. Rohwedder, S. and Wenger, *supra* note 130.

[199] Both studies considered a population that included hourly workers. Evidence is not available on how the adjustment towards the employment contract model differs between salaried and hourly workers. The employment contract model may be more likely to hold for salaried workers than for hourly workers since salaried workers directly observe their weekly total earnings, not their implicit equivalent hourly wage. Thus, applying the partial adjustment to the employment contract model as estimated by these studies may overestimate the transfers from employers to salaried workers. We do not attempt to quantify the magnitude of this potential overestimate.

[200] Cherry, Monica, ''Are Salaried Workers Compensated for Overtime Hours?'' *Journal of Labor Research* 25(3): 485–494, September 2004, found that exempt full-time salaried employees earn more when they work more hours, but her results do not lend themselves to the quantification of the effect *on* hours of an increase in earnings.

model).[201] When modeling Type 2 workers' hour and wage adjustments, the Department treated those identified as Type 2 using the CPS data as representative of all Type 2 workers. The Department estimated employer adjustments and transfers assuming that the patterns observed in the CPS reference week are representative of an average week in the year. Thus, the Department assumes total transfers for the year are equal to 52 times the transfers estimated for the single representative week for which the Department has CPS data. However, these transfers are spread over a larger group including those who occasionally work overtime but did not do so in the CPS reference week.[202]

Since employers must now pay more for the same number of labor hours, for Type 2 and Type 3 EAP workers, the quantity of labor hours demanded by employers will decrease. It is the net effect of these two changes that will determine the final weekly earnings for affected EAP workers. The reduction in hours is calculated using the elasticity of labor demand with respect to wages. The Department used a short-term demand elasticity of -0.20 to estimate the percentage decrease in hours worked in Year 1 and a long-term elasticity of -0.4 to estimate the percentage decrease in hours worked in Years 2–10.[203]

For Type 3 affected workers, and the 50 percent of Type 2 affected workers who worked *expected* overtime, the Department estimated adjusted total hours worked after making wage adjustments using the incomplete fixed-job model. To estimate adjusted hours worked, the Department set the percent change in total hours worked equal to the percent change in average wages multiplied by the wage elasticity of labor demand.[204]

Figure 3 is a flow chart summarizing the four types of affected EAP workers. Also shown are the effects on exempt status, weekly earnings, and hours worked for each type of affected worker.

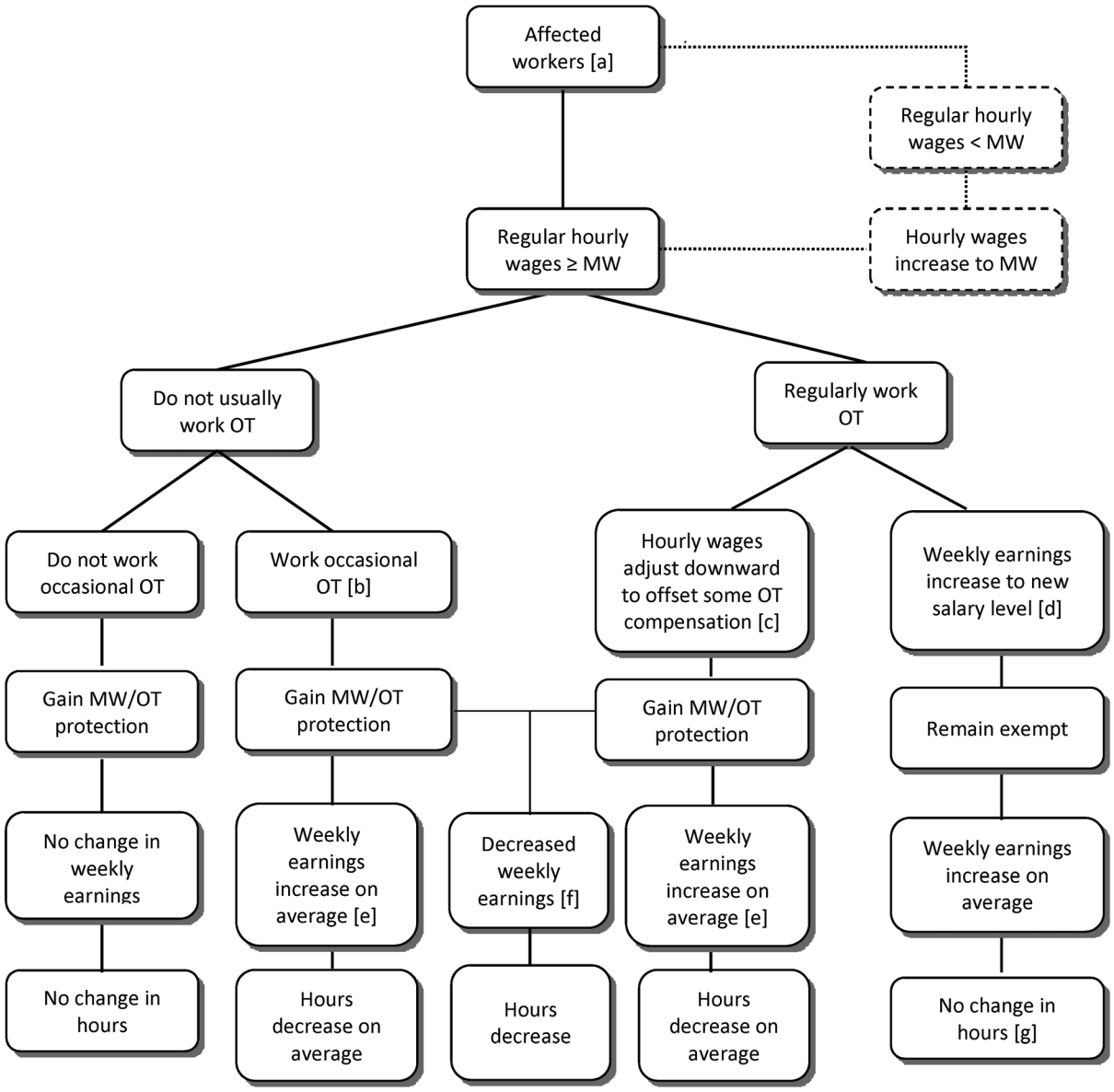
[201] We use the term ''full overtime premium'' to describe the adjustment process as modeled. The full overtime premium model is a special case of the general fixed-wage model in that the Department assumes the demand for labor under these circumstances is completely inelastic. That is, employers make no changes to employees' hours in response to these temporary, unanticipated changes in demand.

[202] If a different week was chosen as the survey week, then likely some of these workers would not have worked overtime. However, because the data are representative of both the population and all twelve months in a year, the Department believes the share of Type 2 workers identified in the CPS data in the given week is representative of an average week in the year.

[203] This elasticity estimate is based on the Department's analysis of Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958. Some researchers have estimated larger impacts on the number of overtime hours worked (Hamermesh, D. and S. Trejo. (2000)). The Demand for Hours of Labor: Direct Evidence from California. *The Review of Economics and Statistics,* 82(1), 38–47 concludes the price elasticity of demand for overtime hours is at least -0.5. The Department decided to use a general measure of elasticity applied to the average change in wages since the increase in the overtime wage is somewhat offset by a decrease in the non-overtime wage as indicated in the fixed-job model.

[204] In this equation, the only unknown is adjusted total hours worked. Since adjusted total hours worked is in the denominator of the left side of the equation and is also in the numerator of the right side of the equation, solving for adjusted total hours worked requires solving a quadratic equation.

Figure 3: Flow Chart of Final Rule's Effect on Earnings and Hours Worked



Type 1 Type 2 Type 3 Type 4

[a] Affected EAP workers are those who are exempt under the current EAP exemptions and will gain minimum wage and overtime protection or receive a raise to the increased salary or compensation level.

[b] There are two methods the Department uses to identify occasional overtime workers. The first includes workers who report they usually work 40 hours or less per week (identified with variable PEHRUSL1 in CPS MORG) but in the reference week worked more than 40 hours (variable PEHRACT1 in CPS MORG). The second includes reclassifying some additional workers who usually work 40 hours or less per week, and in the reference week worked 40 hours

or less, to match the proportion of workers measured in other data sets who work overtime at any point in the year.
[c] The amount wages are adjusted downwards depends on whether the fixed-job model or the fixed-wage model holds. The Department's preferred method uses a combination of the two. Employers reduce the regular hourly wage rate somewhat in response to overtime pay requirements, but the wage is not reduced enough to keep total compensation constant.
[d] Based on hourly wage and weekly hours it is more cost efficient for the employer to increase the worker's weekly salary to the updated salary level than to pay overtime pay.
[e] On average, the Department expects employees' overall weekly earnings will increase despite a small decrease in average hours worked.
[f] In some cases, employers might decrease employees' hours enough to cause those employees' weekly earnings to decrease. If so, such employees may seek a second job to offset their lost weekly earnings. In extreme cases, some workers may become unemployed.
[g] The Department assumed hours would not change, due to lack of data and relevant literature; however, it is possible employers will increase these workers' hours in response to paying them a higher salary or to avoid paying overtime premiums to newly nonexempt coworkers.

Estimated Number of and Effects on Affected EAP Workers

The Department estimated the final rule will affect 1.3 million workers (Table 13), of which 762,200 were Type 1 workers (60.6 percent of all affected EAP workers), 300,900 were estimated to be Type 2 workers (23.9 percent of all affected EAP workers), 154,000 were Type 3 workers (12.3 percent of all affected EAP workers), and 40,100 were estimated to be Type 4 workers (3.2 percent of all affected workers). All Type 3 workers and half of Type 2 employees (304,500) are assumed to work predictable overtime.

TABLE 13—AFFECTED EAP WORKERS BY TYPE (1,000S), YEAR 1

	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard salary level	1,155.6	700.3	296.8	126.8	31.7
HCE compensation level	101.8	62.0	4.1	27.2	8.5
Total	1,257.3	762.2	300.9	154.0	40.1

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
* *Type 1:* Workers without regular OT and without occasional OT and become overtime eligible.
* *Type 2:* Workers without regular OT but with occasional OT. These workers become overtime eligible.
* *Type 3:* Workers with regular OT who become overtime eligible.
* *Type 4:* Workers with regular OT who remain exempt (i.e., earnings increase to the updated salary level).

The final rule will affect some affected workers' hourly wages, hours, and weekly earnings. Predicted changes in implicit wage rates are outlined in Table 14, changes in hours in Table 15, and changes in weekly earnings in Table 16. How these will change depends on the type of worker, but on average the Department projects that weekly earnings will be unchanged or increase while hours worked will be unchanged or decrease.

Type 1 workers will have no change in wages, hours, or earnings.[205]

Employers were assumed to be unable to adjust the hours or regular rate of pay for the occasional overtime workers whose overtime is irregularly scheduled and unpredictable. The Department used the incomplete fixed-job model to estimate changes in the regular rate of pay for Type 3 workers and the 50 percent of Type 2 workers who regularly work occasional overtime. As a group, Type 2 workers will see a decrease in their average regular hourly wage; however, because these workers will now receive a 50 percent premium on their regular hourly wage for each hour worked in excess of 40 hours per week, average weekly earnings for Type 2 workers will increase.[206]

Similarly, Type 3 workers will also receive decreases in their regular hourly wage as predicted by the incomplete fixed-job model but an increase in weekly earnings because these workers will now be eligible for the overtime premium. Type 4 workers' implicit hourly rates of pay will increase to meet the updated standard salary level or HCE annual compensation level.

[205] It is possible that these workers may experience an increase in hours and weekly earnings because of transfers of hours from other newly nonexempt workers who do usually work overtime. Due to the high level of uncertainty in employers' responses regarding the transfer of hours, the Department did not have credible evidence to support an estimation of the number of hours transferred to other workers.

[206] Type 2 workers do not see increases in regular earnings to the new salary level (as Type 4 workers do) even if their new earnings in this week exceed that new level. This is because the estimated new earnings only reflect their earnings in that week when overtime is worked; their earnings in typical weeks that they do not work overtime do not exceed the salary level.

TABLE 14—AVERAGE REGULAR RATE OF PAY BY TYPE OF AFFECTED EAP WORKER, YEAR 1

	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard Salary Level					
Before Final Rule	$15.85	$16.71	$16.15	$11.39	$11.91
After Final Rule	$15.81	$16.71	$16.09	$10.97	$12.51
Change ($)	−$0.04	$0.00	−$0.06	−$0.42	$0.60
Change (%)	−0.3%	0.0%	−0.4%	−3.7%	5.1%
HCE Compensation Level					
Before Final Rule	$46.94	$51.63	$49.81	$38.80	$37.46
After Final Rule	$46.32	$51.63	$47.53	$36.55	$38.27
Change ($)	−$0.63	$0.00	−$2.29	−$2.26	$0.81
Change (%)	−1.3%	0.0%	−4.6%	−5.8%	2.2%

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
* *Type 1:* Workers without regular OT and without occasional OT and become overtime-eligible.
* *Type 2:* Workers without regular OT but with occasional OT. These workers become overtime eligible.
* *Type 3:* Workers with regular OT who become overtime eligible.
* *Type 4:* Workers with regular OT who remain exempt (i.e., earnings increase to the updated salary level).

Hours for Type 1 workers will not change. Similarly, hours will not change for the half of Type 2 workers who work irregular overtime. Half of Type 2 and all Type 3 workers will see a small decrease in their hours of overtime worked. This reduction in hours is relatively small and is due to the effect on labor demand from the increase in the average hourly wage as predicted by the incomplete fixed-job model (Table 15). Type 4 workers' hours may increase, but due to lack of data, the Department assumed hours would not change.

TABLE 15—AVERAGE WEEKLY HOURS FOR AFFECTED EAP WORKERS BY TYPE, YEAR 1

	Total	No overtime worked (T1)	Occasional OT (T2)	Regular OT	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard Salary Level [a]					
Before Final Rule	39.9	37.5	39.2	50.4	56.6
After Final Rule	39.8	37.5	39.1	49.8	56.6
Change (hours)	−0.1	0.0	0.0	−0.6	0.0
Change (%)	−0.2%	0.0%	−0.1%	−1.2%	0.0%
HCE Compensation Level [a]					
Before Final Rule	44.2	39.4	48.4	51.0	54.9
After Final Rule	44.1	39.4	48.2	50.7	54.9
Change (hours)	−0.1	0.0	−0.3	−0.3	0.0
Change (%)	−0.2%	0.0%	−0.5%	−0.7%	0.0%

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Usual hours for Types 1, 3, and 4 but actual hours for Type 2 workers identified in the CPS MORG.
* *Type 1:* Workers without regular OT and without occasional OT and become overtime eligible.
* *Type 2:* Workers without regular OT but with occasional OT. These workers become overtime eligible.
* *Type 3:* Workers with regular OT who become overtime eligible.
* *Type 4:* Workers with regular OT who remain exempt (i.e., earnings increase to the updated salary level).

Because most Type 1 workers will not experience a change in their regular rate of pay or hours, they will have no change in earnings due to the final rule (Table 16).[207] Although Type 2 and Type 3 workers will, on average, experience a decrease in both their regular rate of pay and hours worked, their weekly earnings will increase as a result of the overtime premium. Weekly earnings after the standard salary level increased were estimated using the new wage (*i.e.,* the incomplete fixed-job model wage) and the reduced number of overtime hours worked. Type 4 workers' salaries will increase to the new standard salary level or the HCE compensation level.

[207] The small increase in average weekly earnings for Type 1 workers is due to increasing the weekly earnings in the District of Columbia to the minimum wage ($13.25 per hour).

TABLE 16—AVERAGE WEEKLY EARNINGS FOR AFFECTED EAP WORKERS BY TYPE, YEAR 1

	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard Salary Level [a]					
Before Final Rule	$581.42	$575.71	$594.52	$566.67	$643.94
After Final Rule	$586.34	$575.72	$599.48	$589.91	$684.00
Change ($)	$4.93	$0.01	$4.96	$23.24	$40.06
Change (%)	0.8%	0.0%	0.8%	4.1%	6.2%
HCE Compensation Level [a]					
Before Final Rule	$1,989.41	$1,973.57	$2,415.63	$1,950.93	$2,021.82
After Final Rule	$2,008.37	$1,973.57	$2,467.78	$2,000.16	$2,066.00
Change ($)	$18.96	$0.00	$52.15	$49.24	$44.18
Change (%)	1.0%	0.0%	2.2%	2.5%	2.2%

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] The mean of the hourly wage multiplied by the mean of the hours does not necessarily equal the mean of the weekly earnings because the product of two averages is not necessarily equal to the average of the product.
* *Type 1:* Workers without regular OT and without occasional OT and become overtime eligible.
* *Type 2:* Workers without regular OT but with occasional OT. These workers become overtime eligible.
* *Type 3:* Workers with regular OT who become overtime eligible.
* *Type 4:* Workers with regular OT who remain exempt (i.e., earnings increase to the updated salary level).

At the new standard salary level, the average weekly earnings of affected workers will increase $4.93 (0.8 percent), from $581.42 to $586.34. Multiplying the average change of $4.93 by the 1.2 million EAP workers affected by the change in the standard salary level and 52 weeks equals an increase in earnings of $296.1 million in the first year (Table 17). For workers affected by the change in the HCE compensation level, average weekly earnings will increase by $18.96. When multiplied by 101,800 affected workers and 52 weeks, the national increase will be $100.3 million in the first year. Thus, total Year 1 transfer payments attributable to this final rule will total $396.4 million.

TABLE 17—TOTAL CHANGE IN WEEKLY AND ANNUAL EARNINGS FOR AFFECTED EAP WORKERS BY PROVISION, YEAR 1

Provision	Annual change in earnings (1,000s)
Total	$396,424
Standard salary level:	
Total	296,078
Minimum wage only	75,376
Overtime pay only [a]	220,702
HCE compensation level:	
Total	100,345
Minimum wage only	.....
Overtime pay only [a]	100,345

[a] Estimated by subtracting the minimum wage transfer from the total transfer.

Rohwedder and Wenger (2015) analyzed the effects of increasing the standard salary level.[208] They compared hourly and salaried workers in the CPS using quantile treatment effects. This methodology estimates the effect of a worker becoming nonexempt by comparing similar workers who are hourly and salaried. They found no statistically significant change in hours or wages on average. However, their point estimates, averaged across all affected workers, show small increases in earnings and decreases in hours, similar to our analysis. For example, using a salary level of $750, they estimated weekly earnings may increase between $2 and $22 and weekly hours may decrease by approximately 0.4 hours. The Department estimated weekly earnings for workers affected by the standard salary level will increase by $4.93 and hours will decrease by 0.1 hours.

4. Potential Transfers Not Quantified

There may be additional transfers attributable to this final rule; however, the magnitude of these other transfers could not be quantified and therefore are discussed only qualitatively.

Reduced Earnings for Some Workers

Holding regular rate of pay and work hours constant, payment of an overtime premium will increase weekly earnings for workers who work overtime. However, as discussed previously, employers may try to mitigate cost increases by reducing the number of overtime hours worked, either by transferring these hours to other workers or monitoring hours more closely. Depending on how hours are adjusted, a specific worker may earn less pay after this final rule.

Additional Work for Some Workers

Affected workers who remain exempt will see an increase in pay but may also see an increase in workload. The Department estimated the net changes in hours, but due to the data limitations as noted in section VI.D.iv.3, did not estimate changes in hours for affected workers whose salary is increased to the new threshold so they remain overtime exempt.

Reduction in Bonuses and Benefits for Some Workers

Employers may offset increased labor costs by reducing bonuses or benefits instead of reducing base wages or hours worked. Due to data limitations, the Department has not modeled this effect separately. The Department observes that any reductions in bonuses or benefits would be likely accompanied by smaller reductions in base wages or hours worked.

Several commenters stated that in order to pay for the higher payroll costs, they would decrease employee benefits. These comments were mostly general statements, often included in a list of changes the employer intends to make in response to the increased salary threshold. Others stated that employees would lose benefits due to being reclassified as hourly workers. However, as the Department previously noted, this regulation does not require that workers who become nonexempt must be

[208] Rohwedder and Wenger, *supra* note 130.

reclassified as hourly nor does it require that hourly workers receive fewer benefits than salaried workers. Additionally, some commenters stated that these employees would have reductions in their ability to earn commissions, bonuses, or other types of incentive payments, but these commenters generally did not discuss the net impact on these employees' earnings. These comments did not provide information that would allow the Department to estimate the purported impact of the final rule on employee benefits.

5. NPRM Comments on Transfer Calculations

In response to the NPRM, the Department's RFI, and at listening sessions, some commenters provided information concerning their proposed wage and hour adjustments in anticipation of an increase to the standard salary level and HCE total compensation level. In comments on the NPRM, Capital Associated Industries submitted the results from a survey of their members, which conveyed that employers plan to respond in different ways such as increasing salaries of exempt employees so that they remain exempt, or decreasing the hours or hourly rates of newly nonexempt employees. A survey of members of the International Public Management Association for Human Resources found ''an almost even split between those who would increase salaries of exempt employees to the new threshold and those who would shift currently exempt employees to nonexempt status'' in response to the proposed standard salary level.

In responses to the Department's RFI, commenters representing employer interests indicated that employers would respond to a new salary level by making a variety of adjustments to wages, hours worked, or both. Some commenters' feedback supports adoption of an incomplete fixed-job model. For example, Littler Mendelson and the U.S. Chamber of Commerce reported that, among surveyed employers with exempt employees who would become nonexempt under the 2016 final rule, 28.7 percent reported that they planned to ''allow [newly nonexempt employees] to work the same number of hours and earn overtime compensation without restriction,'' compared to just 18.6 percent who planned to reduce effective hourly rates ''so that their total pay remained the same.'' The Chamber's survey did not ask whether employers planned to adopt a combination of those two responses (*i.e.,* paying overtime premiums while partially reducing effective hourly rates).

In this final rule, the Department estimated that some workers will see their earnings increase to the new earnings levels and remain exempt. There is some evidence that employers will respond in this manner. For example, in response to the RFI, the Chamber reported that, of surveyed employers who had implemented or made plans to implement changes to comply with the 2016 final rule, 76.4 percent reported that they had increased or planned to increase the salaries of some exempt employees to retain their exempt status. Similarly, the American Hotel and Lodging Association reported that 43 percent of their members raised the salaries of at least one worker to a figure above the 2016 final rule's salary threshold. It is possible that employers will increase the salaries paid to some ''occasional'' overtime workers to maintain the exemption for those workers, but the Department has no way of identifying these workers.

Regarding the proposed transfer calculations, SBA Advocacy took issue with the Department's estimates that affected small business establishments would have, on average, $422 to $3,187 in additional payroll costs in the first year of the proposed rule. Rather, SBA Advocacy stated that ''[s]mall businesses have told Advocacy that their [additional] payroll costs will be in the thousands of dollars.'' This comment, however, does not explain what methodological approach the Department should use to estimate transfers; what error(s), if any, the Department's method contains; or how much, if at all, the Department's approach underestimated such transfers. Therefore, the Department has not made any changes to the methodology in response to this comment.

The National Association of Manufacturers (NAM), in its comment opposing the proposed rule's HCE total annual compensation threshold of $147,414, stated that such a threshold would impact many manufacturers who currently employ numerous exempt HCE employees. It contended that ''[i]n the representative case of one large manufacturer, approximately 1,200 individuals—nearly 11% of the company's workforce—are exempt employees earning between $100,000 and $147,414 annually. For this manufacturer, the difference between 'exempt' and 'almost exempt' is estimated to be between $8 million and $20 million in potential overtime exposure per year.'' Using the upper end of NAM's transfer cost range, this equates to $16,667 per affected worker. This single anecdote, however, does not provide a sufficient basis for the Department to change the methodology used to calculate transfers. Moreover, NAM's concerns are mitigated by the Department's decision to set the HCE total annual compensation level to $107,432 instead of to $147,414.

The Department further notes that its estimates of transfers are informed by its projection that employers will respond to the final rule in a number of ways. If, for example, an employer simply pays each affected employee the overtime premium for each hour worked in excess of 40 hours per week, without making any adjustments to wages, hours or duties, such an approach would maximize transfers from employers to employees. However, as discussed above, the Department believes that employers will respond to the final rule by adjusting wages, hours, and duties to minimize the cost of the rule. The Department's approach is supported by both the literature the Department reviewed examining employers' response to overtime premium pay requirements, as well as survey data and anecdotal evidence provided in response to the NPRM and RFI regarding employers' responses to the 2016 final rule and planned responses to this rulemaking. Accordingly, the actual amount of transfers will fall well short of the transfers that would result if employers simply paid each affected employee overtime premiums without adjusting wages, hours, or duties.

v. Benefits and Cost Savings

Potential Benefits and Effects Not Discussed Elsewhere

The Department has determined that the final rule will provide some benefits; however, these benefits could not be quantified due to data limitations, requiring the Department to discuss such benefits only qualitatively.

1. Reduce Employee Misclassification

The revised salary level reduces the likelihood of workers being misclassified as exempt from overtime pay, providing an additional measure of the effectiveness of the salary level as a bright-line test delineating exempt and nonexempt workers. The Department's analysis of misclassification drew on CPS data and looked at workers who are white collar, salaried, subject to the FLSA and covered by part 541 regulations, earn a weekly salary of at least $455 but less than $684, and fail the duties test. Because only workers who work overtime may receive overtime pay, when determining the share of workers who are misclassified

the sample was limited to those who usually work overtime. Workers were considered misclassified if they did not receive overtime pay.[209] The Department estimated that 9.3 percent of workers in this analysis who usually worked overtime did not receive overtime compensation and are therefore misclassified as exempt. Applying this estimate to the sample of white collar salaried workers who fail the duties test and earn at least $455 but less than $684, the Department estimated that there are approximately 206,900 white collar salaried workers who are overtime-eligible but whose employers do not recognize them as such.[210] These employees' entitlement to overtime pay will now be abundantly evident.

RAND has conducted a survey to identify the number of workers who may be misclassified as EAP exempt. The survey, a special module to the American Life Panel, asks respondents: (1) Their hours worked, (2) whether they are paid on an hourly or salary basis, (3) their typical earnings, (4) whether they perform certain job responsibilities that are treated as proxies for whether they would justify exempt status, and (5) whether they receive any overtime pay. Using these data, Susann Rohwedder and Jeffrey B. Wenger [211] found that ''11.5 percent of salaried workers were classified as exempt by their employer although they did not meet the criteria for being so.'' Using RAND's estimate of the rate of misclassification (11.5 percent), the Department estimated that approximately 255,400 salaried workers earning between $455 and $684 per week who fail the standard duties test are currently misclassified as exempt.[212] By raising the salary level the final rule will increase the likelihood that these workers will be correctly classified as nonexempt.

[209] Overtime pay status was based on worker responses to the CPS MORG question concerning whether they receive overtime pay, tips, or commissions at their job (''PEERNUOT'' variable).

[210] The Department applies the misclassification estimate derived here to both the group of workers who usually work more than 40 hours and to those who do not.

[211] Rohwedder and Wenger, *supra* note 130.

[212] The number of misclassified workers estimated based on the RAND research cannot be directly compared to the Department's estimates because of differences in data, methodology, and assumptions. Although it is impossible to reconcile the two different approaches without further information, by calculating misclassified workers as a percent of all salaried workers in its sample, RAND uses a larger denominator than the Department. If calculated on a more directly comparable basis, the Department expects the RAND estimate of the misclassification rate would still be higher than the Department's estimate.

2. Reduced Litigation

One result of enforcing the 2004 standard salary level for 15 years is that the established ''dividing line'' between EAP workers who are exempt and not exempt has gradually eroded and no longer holds the same relative position in the distribution of nominal wages and salaries. Therefore, as nominal wages and salaries for workers have increased over time, while the standard salary level has remained constant, more workers earn above the ''dividing line'' and have moved from nonexempt to potentially exempt. The Department's enforcement of the 2004 salary levels has burdened employers with performing duties tests to determine overtime exemption status of white collar workers for a larger proportion of workers than in 2004 and has created uncertainty regarding the correct classification of workers as nonexempt or exempt. This may have contributed to an increase in FLSA lawsuits since 2004,[213] much of which has involved cases regarding whether workers who satisfy the salary level test also meet the duties test for exemption.

Updating the standard salary level should restore the relative position of the standard salary level in the overall distribution of nominal wages and salaries as set forth in the 2004 rule. Increasing the standard salary level from $455 per week to the level set in this final rule of $684 per week will increase the number of white collar workers for whom the standard salary level test is determinative of their nonexempt status, and employers will no longer have to perform a duties analysis for these employees. This final rule's update to the standard salary level will reduce the burden on employers and may reduce legal challenges and the overall cost of litigation faced by employers in FLSA overtime lawsuits, specifically litigation that turns on whether workers earning above the current salary and earnings thresholds but below the levels set in this final rule pass the duties test. The size of the potential social benefit from fewer legal challenges and the corresponding decline in overall litigation costs is difficult to quantify, but a reduction in litigation costs would benefit employers and workers.

To provide a general estimate of the size of the potential benefits from reducing litigation, the Department used data from the federal courts' Public Access to Court Electronic Records (PACER) system and the CPS to estimate the number and percentage of FLSA cases that concern EAP exemptions and are likely to be affected by the final rule. For this step of the analysis, to avoid using data that could reflect changed behavior in anticipation of the 2016 final rule, the Department used the data gathered during the 2016 rulemaking. As explained in that rule, to determine the potential number of cases that will likely be affected by the final rule, the Department obtained a list of all FLSA cases closed in 2014 from PACER (8,256 cases).[214] From this list, the Department selected a random sample of 500 cases. The Department identified the cases within this sample that were associated with the EAP exemptions. The Department found that 12.0 percent of these FLSA cases (60 of 500) were related to the EAP exemptions. Next, the Department determined what share of these cases could potentially be avoided by an increase in the standard salary and HCE compensation levels.

The Department estimated the share of EAP cases that may be avoided due to the final rule by using data on the salaried earnings distribution from the 2018/19 CPS MORG to determine the share of EAP cases in which workers earn at least $455 but less than $684 per week or at least $100,000 but less than $107,432 annually. From CPS, the Department selected white collar, nonhourly workers as the appropriate reference group for defining the earnings distribution rather than exempt workers because if a worker is litigating his or her exempt status, then we do not know if that worker is exempt or not. Based on this analysis, the Department determined that 13.5 percent of white collar nonhourly workers had earnings within these ranges. Applying these findings to the 12 percent of cases associated with the EAP exemption yields an estimated 1.6 percent of FLSA cases, or about 133 cases, that may be avoidable. The assumption underlying this method is that workers who claim they are misclassified as EAP exempt have a similar earnings distribution as all white collar nonhourly workers.

After determining the potential number of EAP cases that the final rule may avoid, the Department examined a selection of 56 FLSA cases concluded between 2012 and 2015 that contained litigation cost information to estimate the average costs of litigation to assign

[213] *See* Lydia DePillis, *Why wage and hour litigation is skyrocketing,* Washington Post (Nov. 25, 2015), *https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours; Uptick in FLSA Litigation Expected to Continue in 2016,* BNA Daily Labor Report (Nov. 25, 2015), *https://bnanews.bna.com/daily-labor-report/uptick-in-flsa-litigation-expected-to-continue-in-2016.*

[214] *See* 81 FR 32501.

to the potentially avoided EAP cases.[215] To calculate average litigation costs associated with these cases, the Department looked at records of court filings in the Westlaw Case Evaluator tool and on PACER to ascertain how much plaintiffs in these cases were paid for attorney fees, administrative fees, and/or other costs, apart from any monetary damages attributable to the alleged FLSA violations. (The FLSA provides for successful plaintiffs to be awarded reasonable attorney's fees and costs, so this data is available in some FLSA cases.) After determining the plaintiff's total litigation costs for each case, the Department then doubled the figures to account for litigation costs that the defendant employers incurred.[216] According to this analysis, the average litigation cost for FLSA cases concluded between 2012 and 2015 was $654,182.[217] Applying this figure to the approximately 133 EAP cases that could be prevented as a consequence of this rulemaking, the Department estimated that avoided litigation costs resulting from the rule may total approximately $87.0 million per year. The Department believes these totals may underestimate total litigation costs because some FLSA overtime cases are heard in state court and thus were not captured by PACER; some FLSA overtime matters are resolved before litigation or by alternative dispute resolution; and some attorneys representing FLSA overtime plaintiffs may take a contingency fee atop their statutorily awarded fees and costs.

The Department did not receive any comments on the methodology it used to estimate potential reduced litigation costs.

[215] The 56 cases used for this analysis were retrieved from Westlaw's Case Evaluator database using a keyword search for case summaries between 2012 and 2015 mentioning the terms ''FLSA'' and ''fees.'' Although the initial search yielded 64 responsive cases, the Department excluded one duplicate case, one case resolving litigation costs through a confidential settlement agreement, and six cases where the defendant employer(s) ultimately prevailed. Because the FLSA only entitles prevailing plaintiffs to litigation cost awards, information about litigation costs was only available for the remaining 56 FLSA cases that ended in settlement agreements or court verdicts favoring the plaintiff employees.

[216] This is likely a conservative approach to estimate the total litigation costs for each FLSA lawsuit, as defendant employers tend to incur greater litigation costs than plaintiff employees because of, among other things, typically higher discovery costs.

[217] The median cost was $111,835 per lawsuit.

3. NPRM Comments on Benefits

Some commenters contended that the proposed salary level would not yield the benefits that a higher salary level would. They asserted that raising the salary level higher than the proposed level would result in less misclassification and less litigation. The law firm Winebrake & Santillo, LLC estimated that ''if the executive exemption carried a $50,000/year salary threshold, over 75% of the [lawsuits the firm litigated involving alleged misclassification under the executive exemption] would never have been filed.'' NELA provided an example of a misclassification case involving managers at a fast food chain earning $32,000-$40,000 whom a jury found had been misclassified, and stated that such litigation would have been unnecessary under a higher salary level such as the one in the 2016 final rule. EPI, a group of 14 State attorneys general and the Attorney General for the District of Columbia, and other commenters similarly stated that a higher salary level was necessary to further reduce the risk of employee misclassification and the costs of litigation.

While a higher salary level would likely result in fewer workers being misclassified as exempt, and potentially less litigation as a result, as explained above, the aim of reducing misclassification cannot be prioritized over the statutory text, which grounds an analysis of exemption status in the ''capacity'' in which someone is employed—*i.e.,* that employee's duties. The salary level test's limited purpose is therefore to screen out only those employees who are clearly nonexempt because they are not performing bona fide EAP duties.

Likewise, many commenters expressed concern that the proposed salary level is too low and thus does not do enough to address income inequality. Other commenters asserted that a higher salary level would create jobs and/or stimulate the economy. As explained in greater detail above, however, the Department declined to set a higher salary level because it believes that the salary level set in this final rule appropriately screens out obviously nonexempt workers and distinguishes between nonexempt and potentially exempt employees, without threatening to supplant the role of the duties test. Accordingly, the Department declines to change the salary level methodology in response to these comments.

vi. Sensitivity Analysis

This section includes estimated costs and transfers using either different assumptions or segments of the population. First, the Department presents bounds on transfer payments estimated using alternative assumptions. Second, the Department considers costs and transfers by region and by industry.

1. Bounds on Transfer Payments

Because the Department cannot predict employers' precise reactions to the final rule, the Department calculated bounds on the size of the estimated transfers from employers to workers. These bounds on transfers do not generate bounded estimates for costs.

For a reasonable upper bound on transfer payments, the Department assumed that all occasional overtime workers and half of regular overtime workers will receive the full overtime premium (*i.e.,* such workers will work the same number of hours but be paid 1.5 times their implicit initial hourly wage for all overtime hours) (Table 18). The full overtime premium model is a special case of the fixed-wage model where there is no change in hours. For the other half of regular overtime workers, the Department assumed in the upper-bound method that they will have their implicit hourly wage adjusted as predicted by the incomplete fixed-job model (wage rates fall and hours are reduced but total earnings continue to increase, as in the preferred method). In the preferred model, the Department assumed that only 50 percent of occasional overtime workers and no regular overtime workers will receive the full overtime premium.

The plausible lower-transfer bound also depends on whether employees work regular overtime or occasional overtime. For those who regularly work overtime hours and half of those who work occasional overtime, the Department assumes the employees' wages will fully adjust as predicted by the fixed-job model.[218] For the other half of employees with occasional overtime hours, the lower bound assumes they will be paid one and one-half times their implicit hourly wage for overtime hours worked (full overtime premium).

[218] The straight-time wage adjusts to a level that keeps weekly earnings constant when overtime hours are paid at 1.5 times the straight-time wage. In cases where adjusting the straight-time wage results in a wage less than the minimum wage, the straight-time wage is set to the minimum wage.

TABLE 18—SUMMARY OF THE ASSUMPTIONS USED TO CALCULATE THE LOWER ESTIMATE, PREFERRED ESTIMATE, AND UPPER ESTIMATE OF TRANSFERS

Lower transfer estimate	Preferred estimate	Upper transfer estimate
Occasional Overtime Workers (Type 2)		
50% fixed-job model 50% full overtime premium	50% incomplete fixed-job model 50% full overtime premium.	100% full overtime premium.
Regular Overtime Workers (Type 3)		
100% fixed-job model	100% incomplete fixed-job model	50% incomplete fixed-job model. 50% full overtime premium.

* Full overtime premium model: Regular rate of pay equals the implicit hourly wage prior to the regulation (with no adjustments); workers are paid 1.5 times this base wage for the same number of overtime hours worked prior to the regulation.
* Fixed-job model: Base wages are set at the higher of: (1) A rate such that total earnings and hours remain the same before and after the regulation; thus the base wage falls, and workers are paid 1.5 times the new base wage for overtime hours (the fixed-job model) or (2) the minimum wage.
* Incomplete fixed-job model: Regular rates of pay are partially adjusted to the wage implied by the fixed-job model.

The cost and transfer payment estimates associated with the bounds are presented in Table 19. Regulatory familiarization costs and adjustment costs do not vary across the scenarios. Managerial costs are lower under these alternative employer response assumptions because fewer workers' hours are adjusted by employers and thus managerial costs, which depend in part on the number of workers whose hours change, will be smaller.[219] Depending on how employers adjust the implicit regular hourly wage, estimated transfers may range from $233.7 million to $644.8 million, with the preferred estimate equal to $396.4 million.

TABLE 19—BOUNDS ON YEAR 1 COST AND TRANSFER PAYMENT ESTIMATES, YEAR 1

[Millions]

Cost/transfer	Lower transfer estimate	Preferred estimate	Upper transfer estimate
Direct employer costs	$413.5	$476.6	$422.9
Reg. familiarization	340.4	340.4	340.4
Adjustment costs	68.2	68.2	68.2
Managerial costs	9.8	134.4	27.7
Transfers	233.7	396.4	644.8

Note 1: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

2. Effects by Regions and Industries

This section presents estimates of the effects of this final rule by region and by industry. The Department compared the number of affected workers, costs, and transfers across the four Census Regions. The region with the largest number of affected workers will be the South (544,000). As a share of potentially affected workers in the region, the South has somewhat more affected workers relative to other regions (6.1 percent are affected compared with 4.1 to 4.4 percent in other regions). However, as a share of all workers in the region, the South will not be particularly affected relative to other regions (1.1 percent are affected compared with 0.7 to 0.9 percent in other regions).

TABLE 20—POTENTIALLY AFFECTED AND AFFECTED WORKERS, BY REGION, YEAR 1

Region	Workers subject to FLSA (millions)	Potentially affected workers (millions) [a]	Affected workers			
			Number (millions) [b]	Percent of total affected workers	Affected workers as a percent of potentially affected workers	Affected workers as a percent of all workers
All	139.4	25.6	1.257	100	4.9	0.9
Northeast	25.4	5.3	0.231	18.4	4.4	0.9
Midwest	30.6	5.2	0.229	18.2	4.4	0.7
South	50.9	8.9	0.544	43.2	6.1	1.1
West	32.6	6.1	0.253	20.2	4.1	0.8

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] EAP exempt workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.

[219] In the lower transfer estimate, managerial costs are for employees whose hours change because their hourly rate increased to the minimum wage.

[b] Currently EAP exempt workers who will be entitled to overtime protection under the updated earnings levels or whose weekly earnings will increase to the new earnings levels to remain exempt.

Total transfers in the first year were estimated to be $396.4 million (Table 21). As expected, the transfers in the South will be the largest portion because the largest number of affected workers will be in the South; however, transfers per affected worker will be the lowest in the South. Annual transfers per worker will be $255 in the South, and $317 to $436 in other regions.

TABLE 21—TRANSFERS BY REGION, YEAR 1

Region	Total change in earnings (millions)	Percent of total	Per affected worker
All	$396.4	100	$315.29
Northeast	73.3	18.5	317.35
Midwest	73.8	18.6	321.60
South	138.8	35.0	255.39
West	110.6	27.9	436.18

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

Direct employer costs are composed of regulatory familiarization costs, adjustment costs, and managerial costs. The Department estimates that total direct employer costs will be the highest in the South ($208.3 million) and lowest in the Northeast ($100.4 million) (Table 22). Direct employer costs in each region, as a percentage of the total direct costs, will range from 18.5 percent in the Northeast to 38.4 percent in the South. These proportions are almost the same as the proportions of the total workforce in each region: 18.2 percent in the Northeast and 36.5 percent in the South.

TABLE 22—DIRECT EMPLOYER COSTS BY REGION, YEAR 1

Region	Regulatory familiarization	Adjustment	Managerial	Total direct costs
Costs (Millions)				
All	$340.4	$68.2	$134.4	$543.0
Northeast	65.7	12.5	22.2	100.4
Midwest	74.8	12.4	27.7	114.9
South	119.6	29.5	59.2	208.3
West	80.3	13.7	25.3	119.4
Percent of Total Costs by Region				
All	100.0	100.0	100.0	100.0
Northeast	19.3	18.4	16.5	18.5
Midwest	22.0	18.2	20.6	21.2
South	35.1	43.2	44.0	38.4
West	23.6	20.2	18.9	22.0

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

Another way to compare the relative effects of this final rule by region is to consider the transfers and costs as a proportion of payroll and revenues (Table 23). Nationally, employer costs and transfers will be approximately 0.012 percent of payroll. By region, direct employer costs and transfers as a percent of payroll will be approximately the same (between 0.010 and 0.013 percent of payroll). Employer costs and transfers as a percent of revenue will be 0.002 percent nationally and in each region.

TABLE 23—ANNUAL TRANSFERS AND COSTS AS PERCENT OF PAYROLL AND OF REVENUE BY REGION, YEAR 1

Region	Payroll (billions)	Revenue (billions)	Costs and transfers	
			As percent of payroll	As percent of revenue
All	$7,867	$45,023	0.012	0.002
Northeast	1,733	9,048	0.010	0.002
Midwest	1,673	10,251	0.011	0.002
South	2,618	16,109	0.013	0.002

TABLE 23—ANNUAL TRANSFERS AND COSTS AS PERCENT OF PAYROLL AND OF REVENUE BY REGION, YEAR 1—Continued

Region	Payroll (billions)	Revenue (billions)	Costs and transfers	
			As percent of payroll	As percent of revenue
West	1,843	9,616	0.012	0.002

Notes: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019. Payroll, revenue, costs, and transfers all exclude the federal government.

Sources: Private sector payroll and revenue data from 2012 SUSB. State and local payroll and revenue data from State and Local Government Finances Summary: FY2016. Inflated to 2018$ using GDP deflator.

In order to gauge the effect of the final rule on industries, the Department compared estimates of combined direct costs and transfers as a percent of payroll, profit, and revenue for the 13 major industry groups (Table 24).[220] This provides a common method of assessing the relative effects of the rule on different industries, and the magnitude of adjustments the rule may require on the part of enterprises in each industry. The relative costs and transfers expressed as a percentage of payroll are particularly useful measures of the relative size of adjustment faced by organizations in an industry because they benchmark against the cost category directly associated with the labor force. Measured in these terms, costs and transfers as a percent of payroll will be highest in agriculture, forestry, fishing, and hunting; leisure and hospitality; and other services. However, the magnitude of the relative shares will be small, representing less than 0.04 percent of payroll costs in all industries.

The Department also estimated transfers and costs as a percent of profits.[221] Benchmarking against profits is potentially helpful in the sense that it provides a measure of the final rule's effect against returns on investment. However, this metric must be interpreted carefully as it does not account for differences across industries in risk-adjusted rates of return, which are not readily available for this analysis. The ratio of costs and transfers to profits also does not reflect differences in the firm-level adjustment to changes in profits reflecting cross-industry variation in market structure.[222] Nonetheless, the magnitude of costs and transfers as a percentage of profits will be small, with total costs and transfers as a percent of profits will vary among industries, ranging from a low of 0.01 percent (financial activities and manufacturing) to a high of 0.18 percent (other services). However, because the share is not more than 0.2 percent, even for the industry with the largest impact, we believe this final rule will not disproportionately affect any industries.

Finally, the Department's estimates of transfers and costs as a percent of revenue by industry also indicated very small effects (Table 24) of less than 0.01 percent of revenues in any industry. The industry with the largest costs and transfers as a percent of revenue will be leisure and hospitality. However, the difference between this industry and the industry with the lowest costs and transfers as a percent of revenue (public administration) is only 0.008 percentage points. Table 24 illustrates that the differences in costs relative to revenues will be quite small across industry groupings.

TABLE 24—ANNUAL TRANSFERS, TOTAL COSTS, AND TRANSFERS AND COSTS AS PERCENT OF PAYROLL, REVENUE, AND PROFIT BY INDUSTRY, YEAR 1

Industry	Transfers (millions)	Direct costs (millions)	Costs and transfers		
			As percent of payroll	As percent of revenue	As percent of profit [a]
All	$396.3	$528.6	0.012	0.002	0.03
Agriculture, forestry, fishing, & hunting	1.5	1.4	0.038	0.007	0.16
Mining	2.0	2.1	0.005	0.001	0.02
Construction	20.1	37.4	0.017	0.003	0.10
Manufacturing	36.0	27.5	0.008	0.001	0.01
Wholesale & retail trade	64.5	97.2	0.017	0.001	0.04
Transportation & utilities	9.7	16.4	0.008	0.002	0.06
Information	22.8	13.5	0.011	0.002	0.03
Financial activities	38.6	60.4	0.013	0.002	0.01
Professional & business services	73.5	90.9	0.010	0.005	0.06
Education & health services	57.3	81.4	0.012	0.005	0.09
Leisure & hospitality	47.6	49.7	0.029	0.008	0.16
Other services	12.5	40.2	0.028	0.007	0.18

[220] Note that the totals in this table do not match the totals in other sections due to the exclusion of transfers to federal workers and costs to federal entities. Federal costs and transfers are excluded to be consistent with payroll and revenue which exclude the federal government.

[221] Internal Revenue Service. (2013). Corporation Income Tax Returns. Available at: *https://www.irs.gov/statistics/soi-tax-stats-corporation-complete-report.* Table 5 of the IRS report provides information on total receipts, net income, and deficits. The Department calculated the ratio of net income (column (7)) less any deficit (column (8)) to total receipts (column (3)) for all firms by major industry categories. Costs and transfers as a percent of revenues were divided by the profit to receipts ratios to calculate the costs and transfers as a percent of profit.

[222] In particular, a basic model of competitive product markets would predict that highly competitive industries with lower rates of return would adjust to increases in the marginal cost of labor arising from the rule through an overall, industry-level increase in prices and a reduction in quantity demanded based on the relative elasticities of supply and demand. Alternatively, more concentrated markets with higher rates of return would be more likely to adjust through some combination of price increases and profit reductions based on elasticities as well as interfirm pricing responses.

TABLE 24—ANNUAL TRANSFERS, TOTAL COSTS, AND TRANSFERS AND COSTS AS PERCENT OF PAYROLL, REVENUE, AND PROFIT BY INDUSTRY, YEAR 1—Continued

Industry	Transfers (millions)	Direct costs (millions)	Costs and transfers		
			As percent of payroll	As percent of revenue	As percent of profit [a]
Public administration	10.2	10.6	0.002	0.001	[b]

Notes: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019. Payroll, revenue, costs, and transfers all exclude the federal government.

Sources: Private sector payroll and revenue data from 2012 Economic Census. State and local payroll and revenue data from State and Local Government Finances Summary: FY2016 are used for the Public Administration industry. Profit to revenue ratios calculated from 2012 Internal Revenue Service Corporation Income Tax Returns. Inflated to 2018$ using GDP deflator.

[a] Profit data based on corporations only.

[b] Profit is not applicable for public administration.

Although labor market conditions vary by Census Region and industry, the effects from updating the standard salary level and the HCE compensation level will not unduly affect any of the regions or industries. The proportion of total costs and transfers in each region will be fairly consistent with the proportion of total workers in each region. Additionally, although the shares will be larger for some firms and smaller for others, the average estimated costs and transfers from this final rule are very small relative to current payroll or current revenue—less than a tenth of a percent of payroll and less than one-hundredth of a percent of revenue in each region and in each industry.

vii. Regulatory Alternatives

As mentioned earlier, the Department considered a range of alternatives before selecting its methods for updating the standard salary level and the HCE compensation level (*see* § VI.C). As seen in Table 25, the Department has calculated the salary levels, the number of affected workers, and the associated costs and transfers for the alternative methods that the Department considered.

TABLE 25—UPDATED STANDARD SALARY AND HCE COMPENSATION LEVELS AND ALTERNATIVES, AFFECTED EAP WORKERS, COSTS, AND TRANSFERS, YEAR 1

Alternative	Salary level [a]	Affected EAP workers (1,000s)	Year 1 effects (millions)	
			Adj. & managerial costs [b]	Transfers
Standard Salary Level (Weekly)				
Alt. #1: No change	$455	0	.....	.....
Alt. #2: Maintain average minimum wage protection since 2004 [b]	502	218	27.1	29.6
Alt. #3: 2004 Method, South (excluding Washington D.C., MD & VA) or Retail [c]	673	1,043	169.4	276.7
Final rule: 2004 method [c]	684	1,156	184.1	296.1
Alt. #4: Kantor long test [d]	724	1,552	247.4	406.1
Alt. #5: 2016 method [e]	976	4,345	732.9	1,325.8
HCE Compensation Level (Annually)				
HCE alt. #1: No change	100,000	0	.....	.....
Final rule: 80th percentile of full-time salaried workers	107,432	102	18.4	100.3
HCE alt. #2: 90th percentile of full-time salaried workers	145,964	246	53.3	301.7

Note: Impacts estimated using pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Regulatory familiarization costs are excluded because they do not vary significantly based on the selected values of the salary levels.

[b] When the $455 weekly threshold was established in 2004, the federal minimum wage was $5.15, so the salary threshold equated to minimum wage and overtime pay at time-and-one-half for hours over 40 for an employee working no more than 72.2 hours. That amount fell with increases in the minimum wage and is now 55.2 hours. The weighted average across the 15 years since the overtime threshold was last changed is 59.5 hours, and a threshold that would provide 59.5 hours of $7.25 minimum wage and overtime pay would be $502.

[c] Full-time salaried workers with various industry/region exclusions (excludes workers not subject to the FLSA, not subject to the salary level test, and in some workers in agriculture or transportation). Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[d] 10th percentile of likely exempt workers. Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[e] 40th percentile earnings of nonhourly full-time workers in the South Census region, provided by BLS. The salary level reflects the first automatic update that would have taken place under the 2016 final rule.

viii. Projections

1. Methodology

The Department projected affected workers, costs, and transfers forward for ten years. This involved several steps.

First, the Department calculated workers' projected earnings in future years. The wage growth rate is calculated as the compound annual growth rate in median wages using the historical CPS MORG data for occupation-industry categories from 2007 to 2017.[223] This is the annual

[223] To increase the number of observations, three years of data were pooled for each of the endpoint years. Specifically, data from 2006, 2007, and 2008 (converted to 2007 dollars) were used to calculate the 2007 median wage and data from 2016, 2017, and 2018 (converted to 2017 dollars) were used to calculate the 2017 median wage.

growth rate that when compounded (applied to the first year's wage, then to the resulting second year's wage, etc.) yields the last historical year's wage. In occupation-industry categories where the CPS MORG data had an insufficient number of observations to reliably calculate median wages, the Department used the growth rate in median wages calculated from BLS' Occupational Employment Statistics (OES).[224] Any remaining occupation-industry combinations without estimated median growth rates were assigned the median of the growth rates in median wages from the CPS MORG data for all industries and occupations. For projecting costs, we similarly projected wage rates for the human resource and managerial workers whose time is spent on these tasks.

Second, the Department compared workers' counter-factual earnings (*i.e.,* absent this final rule) to the earnings levels. If the counter-factual earnings are below the relevant level (*i.e.,* standard or HCE) then the worker is considered affected. In other words, in each year affected EAP workers were identified as those who would be exempt in Year 1 absent any change to the current regulations but have projected earnings in the future year that are less than the relevant salary level.

Third, sampling weights were adjusted to reflect employment growth. The employment growth rate is the compound annual growth rate based on the ten-year employment projection from BLS' National Employment Matrix (NEM) for 2016 to 2026 within an occupation-industry category.

Adjusted hours for workers affected in Year 1 were re-estimated in Year 2 using a long-run elasticity of labor demand of -0.4.[225] For workers newly affected in Year 2 through Year 10, employers' wage and hour adjustments are estimated in that year, as described in section VI.D.iv, except the long-run elasticity of labor demand of -0.4 is used. Employer adjustments are made in the first year the worker is affected and then applied to all future years in which the worker continues to be affected (unless the worker switches to a Type 4 worker). Workers' earnings in predicted years are earnings post employer adjustments, with overtime pay, and with ongoing wage growth based on historical growth rates (as described above).

2. Estimated Projections

The Department estimated that the final rule will affect 1.3 million EAP workers in Year 1 and 0.9 million workers in Year 10 (Table 26). The projected number of affected workers includes workers who were not EAP exempt in the base year but would have become exempt in the absence of this final rule in Years 2 through 10. For example, a worker who passes the standard duties test may earn less than $455 in Year 1 but between $455 and the new salary level in subsequent years; such a worker will be counted as an affected worker.

The Department quantified three types of direct employer costs in the ten-year projections: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. Regulatory familiarization costs only occur in Year 1. Although start-up firms must still become familiar with the FLSA following Year 1, the difference between the time necessary for familiarization with the current part 541 regulations and the regulations as modified by the final rule is essentially zero. Therefore, projected regulatory familiarization costs for new entrants over the next nine years are zero.

Adjustment costs will occur in any year in which workers are newly affected. After Year 1, these costs will be relatively small since the majority of workers will be affected in Year 1. Management costs will recur each year for all affected EAP workers whose hours are adjusted. However, managerial costs generally decrease over time as the number of affected EAP workers decreases. The Department estimated that Year 1 managerial costs will be $134.4 million; by Year 10 these costs decline to $94.5 million.

The Department projected two types of transfers from employers to employees associated with workers affected by the regulation. Transfers due to the minimum wage provision will be $75.4 million in Year 1 and will fall to $26.1 million in Year 10 as increased earnings over time move workers' implicit rate of pay above the minimum wage.[226] Transfers due to overtime pay also decrease because wage growth raises workers' earnings above the earnings thresholds over time thus decreasing the number of affected workers. Thus, transfers due to the overtime pay provision are estimated to decrease from $321.0 million in Year 1 to $221.3 million in Year 10. Projected costs and transfers were deflated to 2019 dollars using the Congressional Budget Office's projections for the CPI–U.[227]

TABLE 26—PROJECTED COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS

Year (year #)	Affected EAP workers (millions)	Costs				Transfers		
		Reg. fam.	Adjustment [a]	Managerial	Total	Due to MW	Due to OT	Total
		(Millions 2019$)						
Year:								
Year 1	1.3	$340.4	$68.2	$134.4	$543.0	$75.4	$321.0	$396.4
Year 2	1.2	0.0	2.0	132.3	134.3	42.8	264.9	307.7
Year 3	1.1	0.0	1.9	126.7	128.5	37.4	266.5	303.9
Year 4	1.1	0.0	2.7	121.4	124.1	33.2	248.7	281.9
Year 5	1.1	0.0	3.1	116.8	119.9	31.2	269.0	300.1
Year 6	1.0	0.0	2.9	110.7	113.6	29.5	257.3	286.8
Year 7	1.0	0.0	3.2	103.9	107.1	29.5	236.9	266.5
Year 8	0.9	0.0	3.8	99.8	103.6	28.0	241.8	269.7
Year 9	0.9	0.0	4.1	95.3	99.4	26.4	235.0	261.4
Year 10	0.9	0.0	4.6	94.5	99.1	26.1	221.3	247.4
Annualized value:								

[224] To lessen small sample bias, this rate was only calculated using CPS MORG data when these data contained at least 30 observations in each period.

[225] This elasticity estimate is based on the Department's analysis of the following paper: Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

[226] Increases in minimum wages were not projected. If state or federal minimum wages increase during the projected timeframe then projected minimum wage transfers may be underestimated.

[227] Congressional Budget Office. 2018. The Budget and Economic Outlook: 2018 To 2028. *See https://www.cbo.gov/publication/53651.*

TABLE 26—PROJECTED COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS—Continued

Year (year #)	Affected EAP workers (millions)	Costs				Transfers		
		Reg. fam.	Adjustment [a]	Managerial	Total	Due to MW	Due to OT	Total
		(Millions 2019$)						
3% real discount rate		38.7	10.5	114.8	164.0	36.9	258.1	295.0
7% real discount rate		45.3	11.7	116.3	173.3	38.1	260.6	298.8

[a] Adjustment costs occur in all years when there are newly affected workers.

Table 26 also summarizes annualized costs and transfers over the ten-year projection period, using 3 percent and 7 percent real discount rates. The Department estimated that total direct employer costs have an annualized value of $173.3 million per year over ten years when using a 7 percent real discount rate. The annualized value of total transfers was estimated to equal $298.8 million.

ix. Alternative Regulatory Baseline, Including Calculation of Cost Savings Under Executive Order 13771

Other portions of this regulatory impact analysis contain estimates of the impacts of this final rule relative to the 2004 final rule, which is the rule that the Department is currently enforcing. However, OMB Circular A–4 states that multiple regulatory baselines may be analytically relevant. In this case, a second informative baseline is the 2016 final rule, which is currently in the Code of Federal Regulations (CFR).[228] Moreover, for purposes of determining whether this rule is deregulatory under E.O. 13771, the economic impacts should be compared to what is currently published in the CFR. As such, most of this section presents an estimate of the cost savings of this final rule relative to the 2016 rule, and in addition to estimating annualized cost savings for the final rule using a 10-year time horizon, we also estimated annualized cost savings in perpetuity in accordance with E.O. 13771 accounting standards. This perpetual time horizon makes it especially important to avoid overemphasizing short-run compensation stickiness in the estimation approach; as such, the quantitative estimates will incorporate a relatively high compensation adjustment, the 80 percent derived from Barkume (2010), which assumes an initial overtime premium is paid, rather than the adjustment reflected in the estimates that are elsewhere identified as primary.[229] Later in this section, the Department presents transfer and benefits estimates from the analysis accompanying the 2016 final rule—values that are also relevant to this second regulatory baseline.

To ensure that the estimated costs of the 2016 final rule can be directly and appropriately compared with the costs estimated for this final rule, the Department started with the analytic model for this final rule and replaced this final rule's salary and compensation thresholds with the thresholds that would be required by the 2016 final rule, including that rule's provision to automatically update the salary level on a triennial basis. The Department assumed that initial regulatory familiarization costs would be identical under adoption of either this final rule or the 2016 final rule, because the same number of employers would be potentially affected in Year 1. In addition, implementation of the 2016 rule would have resulted in the first automatic update occurring in 2020, and therefore the Department used that value to represent Year 1 of the 2016 rule for 2020. Similarly, automatic updates in Years 7 and 10 from the 2016 final rule become the second and third automatic updates in the comparison. Finally, the Department projected earnings levels for year 13 of the 2016 rule to use as the final automatic update in the comparison. Therefore, the *only* differences in estimated costs presented here between the 2016 final rule and this final rule are attributable to the difference in earnings thresholds and the effects of the 2016 final rule's automatic updating mechanism.

TABLE 27—WEEKLY EARNINGS THRESHOLDS USED IN COMPARISON OF 2016 AND 2019 FINAL RULES

Year	2016 Final rule [a]		2019 Final rule	
	Standard salary threshold	HCE compensation threshold	Standard salary threshold	HCE compensation threshold
2020 [b]	$984	$2,837	$684	$2,066
2023	1,049	3,080	684	2,066
2026	1,118	3,345	684	2,066
2029	1,192	3,632	684	2,066

[a] Earnings levels in 2020, 2023, and 2026 are the projected salary levels as reported in the 2016 final rule. The 2029 levels were calculated using the same growth rate as was used in the 2016 final rule to estimate the projected levels in 2023 and 2026; the growth rate of the 40th percentile in the South from FY2005 to FY2015.

[b] Standard salary threshold reflects the 2016 final rule projection for 2020. If the earnings levels were recalculated using current data (2018Q3 through 2019Q2) they would be $976 and $2,888.

However, this approach means that the estimated costs presented here for the 2016 final rule are not directly comparable to those published in the **Federal Register** (81 FR 32391). The differences between the previously

[228] 29 CFR part 541.

[229] As noted previously, even Barkume's result was estimated for a population that included hourly workers. The fixed-job model is probably more likely to hold for salaried workers than for hourly workers because salaried workers directly observe their weekly total earnings, not their implicit equivalent hourly wage; therefore, applying the partial adjustment to the fixed-job model as estimated by these studies may overestimate the transfers between employers and salaried workers and other associated impacts.

published 2016 cost estimates and those presented here are primarily due to: Earnings levels associated with 2020; an increase in the number of establishments that would incur regulatory familiarization costs to account for economic growth between 2012 (estimates for the 2016 final rule were based on 2012 SUSB data) and 2016 (estimates for this final rule are based on 2016 SUSB data); the use of more recent CPS MORG data (the 2016 final rule used pooled CPS data for 2013 through 2015 inflated to represent FY 2017); the use of the Barkume-derived 80 percent compensation adjustment estimate, rather than the estimate that averages Barkume's findings with Trejo's; an increase in the wage rates used to value staff time spent on regulatory familiarization, adjustment, and monitoring; an increase in the managerial time estimate from 5 to 10 minutes; incorporating a 17 percent overhead rate in those wage rates; and minor improvements to the model.[230]

The estimated total perpetual annualized costs of the 2016 rule are $676.9 million using a 7 percent discount rate. For purposes of this E.O. 13771 analysis, the estimated total perpetual annualized costs of this final rule are $142.0 million using a 7 percent discount rate. The Department then subtracted direct regulatory costs expected to have been incurred under the 2016 final rule from the direct costs estimated under this final rule. Direct employer costs of this final rule are estimated to be, on average, $534.8 million lower per year in perpetuity than the 2016 final rule (using a 7 percent discount rate).

The cost savings from this final rule are primarily attributable to two factors. First, a lower standard salary level will result in fewer affected workers in any given year. If fewer workers are affected, then management must consider and make earnings adjustments for fewer employees, and must monitor hours worked for fewer employees. Second, this analysis does not incorporate automatic updating whereas the 2016 final rule incorporated a triennial automatic updating mechanism. Therefore, regulatory familiarization costs are now only incurred in Year 1 and adjustment costs are primarily incurred in Year 1. Additionally, managerial costs now gradually decrease over time rather than increasing every three years.

In the 2016 final rule, the Department estimated average annualized transfers of $1,189.1 million over a ten-year period using a discount rate of 7 percent. The Department also estimated that avoided litigation costs resulting from the rule could total approximately $31.2 million per year.[231] The Department includes these values here for reference.

EPI compared the estimated number of affected workers under the 2016 final rule to the estimate in the proposed rule, and commented that the Department's estimate ''that 2.8 million fewer workers will be impacted under its proposal than under the 2016 rule . . . is a vast underestimate.'' The alleged underestimate of affected workers resulted in part from EPI comparing the estimated impacts of the 2016 final rule in 2020 (*i.e.,* Year 4 of the 2016 rule) with the 2020 impacts of this rule (*i.e.,* Year 1 of this final rule).[232] Thus, EPI used the earnings levels associated with the first automatic update (which it calculated to be $51,053 for the standard salary level) for the 2016 rule. The Department has adjusted the calculation to use the 2016 final rule's predicted salary levels for 2020 when calculating Year 1 impacts.[233]

EPI also contended that the Department underestimated the difference between the number of workers affected by the 2016 final rule and the number affected by the NPRM because the Department's analysis ''[left] out an entire group of workers who would be affected by the rule—those who will no longer get *strengthened* protections.'' The majority of the difference between EPI's estimate of the number of affected workers and the NPRM's estimate is due to EPI including workers whose overtime protections were strengthened in the estimate of affected workers. However, in both this rule and the 2016 final rule, workers with strengthened overtime protections—those who fail the standard duties test and earn at least $455 but below the new standard salary level—are included in the description of affected workers but not in the official calculation of affected workers. This is because workers with strengthened protections are not directly impacted by changes in the regulations; they only directly benefit from the rulemaking if they are currently misclassified as exempt. Even so, the Department notes that this final rule will strengthen overtime protections for 4.1 million workers who currently fail the standard duties test and now will also earn below the standard salary level.

VII. Final Regulatory Flexibility Analysis (FRFA)

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The agency is also required to respond to public comment on the NPRM.[234] The Chief Counsel for Advocacy of the Small Business Administration submitted public comments on the NPRM which are addressed below.

A. Objectives of, and Need for, the Final Rule

The FLSA requires covered employers to: (1) Pay employees who are covered and not exempt from the Act's requirements not less than the Federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment.

The FLSA provides a number of exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional (EAP) employees. The exemption applies to employees employed in a bona fide executive, administrative, or professional capacity and for outside sales employees, as those terms are ''defined and delimited'' by the Department. 29 U.S.C. 213(a)(1). The Department's regulations implementing these ''white collar'' exemptions are codified at 29 CFR part 541.

For an employer to exclude an employee from minimum wage and overtime protection pursuant to the EAP exemption, the employee generally must

[230] As previously discussed, one such improvement is the Department's application of conditional probabilities to estimate the number of HCE workers. *See supra* note 160.

[231] In this final rule, the Department has revised (from the 2016 rule) how it calculates avoided litigation costs so the number referenced here for the 2016 final rule is not directly comparable to the calculation of reduced litigation costs for this final rule.

[232] *See https://www.epi.org/files/pdf/165984.pdf,* at 7.

[233] The Department also notes there are a variety of reasons for the discrepancy between the Department's and EPI's calculations, including use of different data and methodological differences.

[234] *See* 5 U.S.C. 604.

meet three criteria: (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the ''salary basis test''); (2) the amount of salary paid must meet a minimum specified amount (the ''salary level test''); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the ''duties test''). The salary level requirement was created to identify the dividing line distinguishing workers who may be performing exempt duties from the nonexempt workers whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions.

The Department has periodically updated the regulations governing these tests since the FLSA's enactment in 1938. The Department is currently enforcing the 2004 final rule, which, among other revisions, created the standard duties test and paired it with a salary level test of $455 per week. The 2004 final rule also created a new ''highly compensated'' test for exemption. Under this test, employees who are paid total annual compensation of at least $100,000 (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA's overtime requirements if they customarily and regularly perform at least one of the duties or responsibilities of an exempt EAP employee identified in the standard tests for exemption.[235]

The Department's primary objective in this rulemaking is to ensure that the revised salary levels will continue to provide a useful and effective test for exemption. The premise behind the standard salary level is to be an appropriate dividing line between employees who are nonexempt and employees who may be performing exempt duties. The threshold essentially screens out obviously nonexempt employees whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions. If left unchanged, the effectiveness of the salary level test as a means to help determine exempt status diminishes as nonexempt employee wages increase over time.

Employees who meet the requirements of part 541 are excluded from the Act's minimum wage and overtime pay protections. As a result, employees may work any number of hours in the workweek and not be subject to the FLSA's overtime pay requirements. Some state laws have stricter exemption standards than those described above. The FLSA does not preempt any such stricter state standards. If a state law establishes a higher standard than the provisions of the FLSA, the higher standard applies as a matter of state law in that specific state.[236]

To restore the function of the standard salary level and the HCE total compensation requirements as appropriate bright-line tests between overtime-protected employees and those who may be bona fide EAP employees, the Department is increasing the minimum salary level necessary for exemption from the FLSA's minimum wage and overtime requirements as an EAP employee from $455 to $684 a week for the standard salary test, and from $100,000 to $107,432 per year for the HCE test.

B. The Agency's Response to Public Comments

Small business commenters expressed concerns with the Department's estimates of the proposed rule's costs and other impacts. These concerns are acknowledged and addressed in sections VI.d.iii and VI.d.iv, which we incorporate herein.

C. Comment by the Chief Counsel for Advocacy of the Small Business Administration

SBA's Office of Advocacy (SBA Advocacy) generally supported the Department's proposal. SBA Advocacy's comment was based largely on feedback received from small businesses, many of whom told SBA Advocacy that the higher threshold in the 2016 final rule ($47,476) would have been disruptive and costly to small businesses. In its roundtables on the 2019 rulemaking, in contrast, SBA Advocacy heard that most small businesses would only have a few affected employees, and could absorb the costs from this rulemaking. SBA Advocacy listed a few recommendations for the Department to consider. Several of these recommendations (and related issues raised by other commenters) are also addressed elsewhere in this final rule.

SBA Advocacy recommended an adjustment to the calculation of the standard salary level. It indicated that some small businesses recommended that the Department ''adopt a narrower Census definition for areas with the lowest wages in the south when calculating and adjusting the new minimum salary threshold.'' SBA Advocacy, along with other commenters, specifically recommended that the Department ''focus on [a] more narrow geographic area like the East-South Central Census [Division] (which includes Alabama, Kentucky, Mississippi, and Tennessee) when adjusting the national wages; or provide more flexibility for these areas.'' The Department evaluated an alternative that eliminates higher-wage areas (District of Columbia, Maryland, and Virginia) from the data set used to determine the salary level (see Sections VI.D.vii and IV.A.v.). As previously discussed, the Department ultimately decided not to adopt this alternative, because it believes that using the entire South Census Region and the retail industry nationwide results in an appropriate nationwide salary level that is based on a low-wage region but can still serve as a meaningful dividing line in higher-wage regions. Using the entire South is also consistent with the methodology used in the 2004 final rule.

SBA Advocacy and a few other commenters also asserted that the Department underestimated small business compliance costs. SBA Advocacy stated that small businesses disagreed with the Department's estimate that, on average, establishments (including small businesses) will have a one-hour burden for rule familiarization, a 1.25-hour burden per affected worker in adjustment costs, and a 5-minute burden per worker per week for scheduling and monitoring. SBA Advocacy stated that small businesses have told them ''that it may take . . . many hours and several weeks to understand and implement this rule,'' and that ''[m]any small businesses spend a disproportionately higher amount of time and money on outside compliance staff.'' As discussed in more detail above, however, the Department believes that its estimates of time for rule familiarization and adjustment costs are appropriate, particularly given that the final rule is limited in scope and that most small businesses are already likely familiar with their responsibilities under the part 541 regulations. Additionally, these estimates represent an average of all establishments, some of which will spend little time on these activities and some of whom will spend more time than the average. However, the Department acknowledges that the prior 5 minutes per newly nonexempt overtime worker may be low and has doubled this estimate to 10 minutes.

Regarding the proposed transfer calculations, SBA Advocacy took issue with the Department's estimates that affected small business establishments would have, on average, $422 to $3,187

[235] § 541.601.

[236] *See* 29 U.S.C. 218(a).

in additional payroll costs in the first year (based on the proposed rule). Rather, SBA Advocacy stated that ''[s]mall businesses have told Advocacy that their payroll costs will be in the thousands of dollars.'' This comment, however, does not explain what methodological approach the Department should use to estimate transfers, or how much, if at all, the Department's approach underestimated such transfers. Therefore, the Department concludes that this comment does not provide a sufficient basis for changing its transfer calculation methodology.

D. Description of the Number of Small Entities to Which the Final Rule Will Apply

i. Definition of Small Entity

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by SBA, in effect as of October 1, 2017, to classify entities as small.[237] SBA establishes separate standards for individual 6-digit NAICS industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets (small defined as less than $550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[238]

Parameters that are used in the small business cost analysis are provided in Table 28.

TABLE 28—OVERVIEW OF PARAMETERS USED FOR COSTS TO SMALL BUSINESSES

Small business costs	Cost
Direct and Payroll Costs	
Average total cost per affected entity [a]	$3,656.
Range of total costs per affected entity [a]	$1,678–$31,118.
Average percent of revenue per affected entity [a]	0.15%.
Average percent of payroll per affected entity [a]	0.81%.
Average percent of small business profit	0.05%.
Direct Costs	
Regulatory familiarization:	
Time (first year)	1 hour per establishment.
Hourly wage	$43.38.
Adjustment:	
Time (first year affected)	75 minutes per newly affected worker.
Hourly wage	$43.38.
Managerial:	
Time (weekly)	10 minutes per affected worker.
Hourly wage	$50.92.
Payroll Increases	
Average payroll increase per affected entity [a]	$2,393.
Range of payroll increases per affected entity [a]	$0–$26,943.

[a] Using the methodology where all employees at an affected small firm are affected. This assumption generates upper-end estimates. Lower-end cost estimates are significantly smaller.

ii. Data Sources and Methods

The Department obtained data from several sources to determine the number of small entities and employment in these entities for each industry. However, the Statistics of U.S. Businesses (SUSB) was used for most industries. Industries for which the Department used alternative sources include credit unions,[239] commercial banks and savings institutions,[240] agriculture,[241] and public administration.[242] Unless otherwise noted, the Department used the latest available data in each case, so data years differ between sources.

For each industry, the SUSB 2012 data tabulates total employment, establishment, and firm counts by both enterprise employment size (*e.g.,* 0–4 employees, 5–9 employees) and receipt size (*e.g.,* less than $100,000, $100,000–$499,999).[243] The Department combined these categories with the SBA size standards to estimate the proportion of establishments and employees in each industry that are considered small or employed by a small entity, respectively. The general

[237] *See https://www.sba.gov/sites/default/files/files/Size_Standards_Table_2017.pdf.*

[238] *See http://www.sba.gov/advocacy/regulatory-flexibility-act* for details.

[239] National Credit Union Association. (2012). 2012 Year End Statistics for Federally Insured Credit Unions. Available at: *https://www.cuna.org/uploadedFiles/Global/About_Credit_Unions/NationalProfile-M18-Bank.pdf.*

[240] Federal Depository Insurance Corporation. (2018). Statistics on Depository Institutions—Compare Banks. Available at: *https://www5.fdic.gov/SDI/index.asp.* Data are from 3/31/18 for employment and from 6/30/2017 for share of firms and establishments that are ''small.''

[241] United States Department of Agriculture. (2019). 2017 Census of Agriculture: United States Summary and State Data: Volume 1, Geographic Area Series, Part 51. Available at: *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

[242] Census of Governments. 2017. Available at: *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[243] The SUSB defines employment as of March 12th.

methodological approach was to classify all establishments or employees in categories below the SBA cutoff as in ''small entity'' employment.[244] If a cutoff fell in the middle of a defined category, a uniform distribution of employees across that bracket was assumed to determine what proportion should be classified as small. The Department assumed that the small entity share of credit card issuing and other depository credit intermediation institutions (which were not separately represented in FDIC asset data), is similar to that of commercial banking and savings institutions. The estimated share of employment in small entities was applied to the CPS data to estimate the number of affected workers in small entities. Similarly, the estimated share of establishments that are small was applied to the most recent SUSB data available (2016) to determine the number of small entities.

The Department also estimated the number of small establishments by employer type (nonprofit, for-profit, government). The calculation of the number of establishments by employer type is similar to the calculation of the number of establishments by industry. However, instead of using SUSB data by industry, the Department used SUSB data by Legal Form of Organization for nonprofit and for-profit establishments, and data from the 2012 Census of Governments for small governments. The 2012 Census of Governments report includes a breakdown of state and local governments by the population of their underlying jurisdiction, allowing us to estimate the number of governments that are small. The estimated share of establishments that are small was applied to the 2016 SUSB data available and the estimated share of governments that are small was applied to the 2017 Census of Governments.

iii. Number of Small Entities and Employees

Table 29 presents the estimated number of establishments and small establishments in the U.S. (hereafter, the terms ''establishment'' and ''entity'' are used interchangeably and are considered equivalent for the purposes of this FRFA).[245] Based on the methodology described above, the Department found that of the 7.8 million establishments relevant to this analysis, 81 percent (6.3 million) are small by SBA standards. These small establishments employ about 53.1 million workers, about 37 percent of workers employed by all establishments (excluding self-employed, unpaid workers, and members of the armed forces), and account for roughly 36 percent of total payroll ($2.9 trillion of $8.0 trillion).[246]

TABLE 29—NUMBER OF ESTABLISHMENTS AND EMPLOYEES BY SBA SIZE STANDARDS, BY INDUSTRY AND EMPLOYER TYPE

Industry/employer type	Establishments (1,000s)		Workers (1,000s) [a]		Annual payroll (billions)	
	Total	Small	Total	Small business employed	Total	Small
Total	7,847.9	6,345.4	143,184.6	53,058.6	$7,976.2	$2,868.0
Industry [b]						
Agriculture	9.3	8.6	(c)	(c)	(c)	(c)
Forest., log., fish., hunt., and trap	13.3	12.9	(c)	(c)	(c)	(c)
Mining	27.2	22.0	(c)	(c)	(c)	(c)
Construction	696.7	676.9	8,525.6	5,482.7	478.8	309.5
Nonmetallic mineral prod. manuf	15.0	11.5	(c)	(c)	(c)	(c)
Prim. metals and fab. metal prod	59.4	55.8	1,652.6	1,004.7	91.6	54.7
Machinery manufacturing	23.5	21.5	1,240.7	673.2	79.9	44.0
Computer and elect. prod. manuf	12.4	11.0	1,173.5	552.2	109.9	53.5
Electrical equip., appliance manuf	5.7	4.9	(c)	(c)	(c)	(c)
Transportation equip. manuf	11.7	10.1	2,616.6	728.6	183.3	47.0
Wood products	14.3	13.1	(c)	(c)	(c)	(c)
Furniture and fixtures manuf	15.0	14.6	(c)	(c)	(c)	(c)
Misc. and not spec. manuf	26.0	25.1	1,512.1	888.6	92.9	53.8
Food manufacturing	27.1	23.9	1,809.0	829.3	81.2	35.9
Beverage and tobacco products	8.5	7.6	(c)	(c)	(c)	(c)
Textile, app., and leather manuf	15.6	15.2	575.8	390.3	26.0	17.5
Paper and printing	29.6	27.6	871.7	464.6	49.5	25.3
Petroleum and coal prod. manuf	2.2	1.2	(c)	(c)	(c)	(c)
Chemical manufacturing	13.5	10.7	1,423.2	553.8	121.0	45.4
Plastics and rubber products	12.1	10.1	(c)	(c)	(c)	(c)
Wholesale trade	412.5	328.3	3,440.5	1,583.3	216.4	98.3
Retail trade	1,069.1	688.8	15,694.5	5,398.1	617.8	234.8
Transport. and warehousing	231.0	183.8	6,355.2	1,740.6	329.9	84.4
Utilities	18.2	7.8	1,391.6	264.2	110.6	20.3
Publishing ind. (ex. internet)	27.5	21.2	(c)	(c)	(c)	(c)
Motion picture and sound recording	25.5	22.3	(c)	(c)	(c)	(c)
Broadcasting (except internet)	8.3	4.6	554.0	129.4	39.2	8.6
Internet publishing and broadcasting	8.1	6.8	(c)	(c)	(c)	(c)
Telecommunications	59.2	13.3	(c)	(c)	(c)	(c)

[244] The Department's estimates of the numbers of affected small entities and affected workers who are employees of small entities are likely overestimates as the Department had no credible way to estimate which enterprises with annual revenues below $500,000 also did not engage in interstate commerce.

[245] SUSB reports data by ''enterprise'' size designations (a business organization consisting of one or more domestic establishments that were specified under common ownership or control). However, the number of enterprises is not reported for the size designations. Instead, SUSB reports the number of ''establishments'' (individual plants, regardless of ownership) and ''firms'' (a collection of establishments with a single owner within a given state and industry) associated with enterprises size categories. Therefore, numbers in this analysis are for the number of establishments associated with small enterprises, which may exceed the number of small enterprises. We based the analysis on the number of establishments rather than firms for a more conservative estimate (potential overestimate) of the number of small businesses.

[246] Since information is not available on employer size in the CPS MORG, respondents were randomly assigned as working in a small business based on the SUSB probability of employment in a small business by detailed Census industry. Annual payroll was estimated based on the CPS weekly earnings of workers by industry size.

TABLE 29—NUMBER OF ESTABLISHMENTS AND EMPLOYEES BY SBA SIZE STANDARDS, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry/employer type	Establishments (1,000s)		Workers (1,000s) [a]		Annual payroll (billions)	
	Total	Small	Total	Small business employed	Total	Small
Internet serv. providers and data	13.6	9.0	[c]	[c]	[c]	[c]
Other information services	4.2	3.6	[c]	[c]	[c]	[c]
Finance	295.5	129.8	4,506.3	847.0	374.8	70.7
Insurance	181.5	141.7	2,746.7	722.0	197.0	51.8
Real estate	336.8	286.4	2,091.1	1,274.7	126.5	77.5
Rental and leasing services	53.7	26.7	[c]	[c]	[c]	[c]
Professional and technical services	903.5	819.1	10,196.2	4,770.7	897.3	414.2
Management of companies and enterprises	55.4	34.1	[c]	[c]	[c]	[c]
Admin. and support services	384.9	328.8	5,080.7	2,309.8	210.7	87.7
Waste manag. and remed. Services	24.6	18.4	[c]	[c]	[c]	[c]
Educational services	103.4	90.6	14,196.6	3,089.0	793.8	162.1
Hospitals	7.1	1.7	[c]	[c]	[c]	[c]
Health care services, except hospitals	700.5	575.8	10,074.6	4,787.1	496.9	236.3
Social assistance	182.9	149.0	3,040.0	1,703.7	113.2	60.5
Arts, entertainment, and recreation	137.2	126.3	2,760.6	1,394.5	108.9	54.4
Accommodation	66.8	55.8	1,475.8	566.4	55.6	21.1
Food services and drinking places	636.7	500.7	8,946.1	2,422.7	240.4	65.4
Repair and maintenance	214.8	199.8	1,614.1	1,214.7	72.9	53.9
Personal and laundry services	230.3	201.6	1,763.1	1,300.1	57.1	41.6
Membership associations & organizations	309.2	298.3	2,104.1	1,545.8	112.2	80.9
Private households	[d]	[d]	[c]	[c]	[c]	[c]
Public administration [e]	90.1	72.8	7,527.9	685.8	499.4	40.1
Employer Type						
Nonprofit, private	584.0	504.6	10,190.1	4,170.3	586.5	216.4
For profit, private	7,173.8	5,753.9	111,050.8	46,579.0	6,080.5	2,525.3
Government (state and local)	90.1	72.9	18,078.8	2,309.4	1,020.2	126.3

Note: Establishment data are from the Survey of U.S. Businesses 2016; worker and payroll data from pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Excludes the self-employed and unpaid workers.

[b] Summation across industries may not add to the totals reported due to suppressed values and some establishments not reporting an industry.

[c] Data not displayed because sample size of affected workers in small establishments is less than 10 due to reliability concerns.

[d] SUSB does not provide information on private households.

[e] Establishment number represents the total number of governments, including state and local. Data from Census of Governments, 2017.

As discussed in section VI.B.iii, estimates of workers subject to the FLSA do not exclude workers employed by enterprises that do not meet the enterprise coverage requirements because there is no data set that would adequately inform an estimate of the size of this worker population. Although not excluding such workers only affects a small percentage of workers generally, it may have a larger effect (and result in a larger overestimate) for non-profits, because revenue from charitable activities is not included when determining enterprise coverage.

iv. Number of Affected Small Entities and Employees

To estimate the probability that an exempt EAP worker in the CPS data is employed by a small establishment, the Department assumed this probability is equal to the proportion of all workers employed by small establishments in the corresponding industry. That is, if 50 percent of workers in an industry are employed in small entities, then on average small entities are expected to employ 1 out of every 2 exempt EAP workers in this industry.[247] The Department applied these probabilities to the population of exempt EAP workers to find the number of workers (total exempt EAP workers and total affected by the rule) that small entities employ. No data are available to determine whether small businesses (or small businesses in specific industries) are more or less likely than non-small businesses to employ exempt EAP workers or affected EAP workers. Therefore, the best assumption available is to assign the same rates to all small and non-small businesses.[248] [249]

[247] The Department used CPS microdata to estimate the number of affected workers. This was done individually for each observation in the relevant sample by randomly assigning them a small business status based on the best available estimate of the probability of a worker to be employed in a small business in their respective industry (3-digit Census codes). While aggregation to the 262 3-digit Census codes is certainly possible, many of these industry codes contain too few observations to be reliable.

[248] There is a strand of literature that indicates that small establishments tend to pay lower wages than larger establishments. This may imply that workers in small businesses are more likely to be affected than workers in large businesses; however, the literature does not make clear what the appropriate alternative rate for small businesses should be.

[249] Workers are designated as employed in a small business based on their industry of employment. The share of workers considered small in nonprofit, for profit, and government entities is therefore the weighted average of the shares for the industries that compose these categories.

The Department estimated that small entities employ 480,900 of the 1.3 million affected workers (38.2 percent) (Table 30). This composes 0.9 percent of the 53.1 million workers that small entities employ. The sectors with the highest total number of affected workers employed by small establishments are: Professional and technical services (79,700); retail trade (47,500); and health care services, except hospitals (43,500). The sectors with the largest percent of small business workers who are affected include: broadcasting (except internet) (2.0 percent); arts, entertainment, and recreation (1.9 percent); and insurance (1.9 percent).

TABLE 30—NUMBER OF AFFECTED WORKERS EMPLOYED BY SMALL ESTABLISHMENTS, BY INDUSTRY AND EMPLOYER TYPE

Industry	Workers (1,000s)		Affected workers (1,000s) [a]	
	Total	Small business employed	Total	Small business employed
Total	143,184.6	53,058.6	1,257.3	480.9
Industry				
Agriculture	(c)	(c)	(c)	(c)
Forest., log., fish., hunt., and trap	(c)	(c)	(c)	(c)
Mining	(c)	(c)	(c)	(c)
Construction	8,525.6	5,482.7	51.6	34.7
Nonmetallic mineral prod. manuf	(c)	(c)	(c)	(c)
Prim. metals and fab. metal prod	1,652.6	1,004.7	7.8	3.9
Machinery manufacturing	1,240.7	673.2	7.1	4.1
Computer and elect. prod. manuf	1,173.5	552.2	8.4	3.9
Electrical equip., appliance manuf	(c)	(c)	(c)	(c)
Transportation equip. manuf	2,616.6	728.6	15.0	4.1
Wood products	(c)	(c)	(c)	(c)
Furniture and fixtures manuf	(c)	(c)	(c)	(c)
Misc. and not spec. manuf	1,512.1	888.6	7.9	4.4
Food manufacturing	1,809.0	829.3	5.5	3.1
Beverage and tobacco products	(c)	(c)	(c)	(c)
Textile, app., and leather manuf	575.8	390.3	4.6	2.6
Paper and printing	871.7	464.6	7.2	4.5
Petroleum and coal prod. manuf	(c)	(c)	(c)	(c)
Chemical manufacturing	1,423.2	553.8	10.6	3.7
Plastics and rubber products	(c)	(c)	(c)	(c)
Wholesale trade	3,440.5	1,583.3	35.8	17.7
Retail trade	15,694.5	5,398.1	129.9	47.5
Transport. and warehousing	6,355.2	1,740.6	25.7	5.5
Utilities	1,391.6	264.2	12.4	3.8
Publishing ind. (ex. internet)	(c)	(c)	(c)	(c)
Motion picture and sound recording	(c)	(c)	(c)	(c)
Broadcasting (except internet)	554.0	129.4	8.2	2.5
Internet publishing and broadcasting	(c)	(c)	(c)	(c)
Telecommunications	(c)	(c)	(c)	(c)
Internet serv. providers and data	(c)	(c)	(c)	(c)
Other information services	(c)	(c)	(c)	(c)
Finance	4,506.3	847.0	76.8	15.2
Insurance	2,746.7	722.0	60.2	13.7
Real estate	2,091.1	1,274.7	25.4	17.3
Rental and leasing services	(c)	(c)	(c)	(c)
Professional and technical services	10,196.2	4,770.7	173.1	79.7
Management of companies & enterprises	(c)	(c)	(c)	(c)
Admin. and support services	5,080.7	2,309.8	33.5	13.5
Waste manag. and remed. services	(c)	(c)	(c)	(c)
Educational services	14,196.6	3,089.0	74.5	12.3
Hospitals	(c)	(c)	(c)	(c)
Health care services, except hospitals	10,074.6	4,787.1	91.0	43.5
Social assistance	3,040.0	1,703.7	52.8	28.3
Arts, entertainment, and recreation	2,760.6	1,394.5	53.0	26.7
Accommodation	1,475.8	566.4	9.8	4.0
Food services and drinking places	8,946.1	2,422.7	27.1	8.1
Repair and maintenance	1,614.1	1,214.7	11.4	8.2
Personal and laundry services	1,763.1	1,300.1	6.8	5.8
Membership associations & organizations	2,104.1	1,545.8	35.3	25.3
Private households	(c)	(c)	(c)	(c)
Public administration [b]	7,527.9	685.8	50.9	5.2
Employer Type				
Nonprofit, private	10,190.1	4,170.3	125.0	58.4

TABLE 30—NUMBER OF AFFECTED WORKERS EMPLOYED BY SMALL ESTABLISHMENTS, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Workers (1,000s)		Affected workers (1,000s) [a]	
	Total	Small business employed	Total	Small business employed
For profit, private	111,050.8	46,579.0	1,000.5	410.5
Government (state and local)	18,078.8	2,309.4	131.9	11.9

Note: Worker data are from pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Estimation of affected workers employed by small establishments was done at the Census 4-digit occupational code and industry level. Therefore, at the more aggregated 51 industry level shown in this table, the ratio of small business employed to total employed does not equal the ratio of affected small business employed to total affected for each industry, nor does it equal the ratio for the national total because relative industry size, employment, and small business employment differs from industry to industry.
[b] Establishment number represents the total number of state and local governments. Data from Census of Governments, 2017.
[c] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.

Because no information is available on how affected workers are distributed among small establishments that employ affected workers, the Department estimated a range for effects. At one end of this range, the Department assumed that each small establishment employs no more than one affected worker, meaning that at most 480,900 of the 6.3 million small establishments will employ an affected worker. Thus, these assumptions provide an upper bound estimate of the number of affected small establishments (although it provides a lower bound estimate of the effect per small establishment because costs are spread over a larger number of establishments). The impacts experienced by an establishment would increase as the share of its workers that are affected increases. Establishments that employ only affected workers are most likely to experience the most severe effects. Therefore, to estimate a lower-end estimate for the number of affected establishments (which generates an upper-end estimate for impacts per establishment) the Department assumed that all workers employed by an affected establishment are affected.

For the purposes of estimating this lower-range number of affected small establishments, the Department used the average size of a small establishment as the typical size of an affected small establishment.[250] The average number of employees in a small establishment is the number of workers that small establishments employ divided by the total number of small establishments in that industry (SUSB 2012). Thus, the number of affected small establishments in an industry, if all employees of an affected establishment are affected, equals the number of affected small establishment employees divided by the average number of employees per small establishment.

Table 31 summarizes the estimated number of affected workers that small establishments employ and the expected range for the number of affected small establishments by industry. The Department estimated that the rule will affect 480,900 workers who are employed by somewhere between 63,400 and 480,900 small establishments; this composes from 1.0 percent to 7.6 percent of all small establishments. It also means that from 5.9 million to 6.3 million small establishments incur no more than minimal regulatory familiarization costs (*i.e.,* 6.3 million minus 480,900 equals 5.9 million; 6.3 million minus 63,400 equals 6.3 million, using rounded values). The table also presents the average number of affected employees per establishment using the method in which all employees at the establishment are affected. For the other method, by definition, there is always one affected employee per establishment. Also displayed is the average payroll per small establishment by industry (based on both affected and non-affected small establishments), calculated by dividing total payroll of small businesses by the number of small businesses (Table 29) (applicable to both methods).

TABLE 31—NUMBER OF SMALL AFFECTED ESTABLISHMENTS AND EMPLOYEES BY INDUSTRY AND EMPLOYER TYPE

Industry	Affected workers in small entities (1,000s)	Number of small affected establishments (1,000s) [a]		Per establishment	
		One affected employee per estab. [b]	All employees at estab. affected [c]	Affected employees [a]	Average annual payroll ($1,000s)
Total	480.9	480.9	63.4	7.6	$452.0
Industry					
Agriculture	[d]	[d]	[d]	[d]	[d]

[250] This is not the true lower bound estimate of the number of affected establishments. Strictly speaking, a true lower bound estimate of the number of affected small establishments would be calculated by assuming all employees in the largest small establishments are affected. For example, if the SBA standard is that establishments with 500 employees are ''small,'' and 1,350 affected workers are employed by small establishments in that industry, then the smallest number of establishments that could be affected in that industry (the true lower bound) would be three. However, because such an outcome appears implausible, the Department determined a more reasonable lower estimate would be based on average establishment size.

TABLE 31—NUMBER OF SMALL AFFECTED ESTABLISHMENTS AND EMPLOYEES BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Affected workers in small entities (1,000s)	Number of small affected establishments (1,000s) [a]		Per establishment	
		One affected employee per estab. [b]	All employees at estab. affected [c]	Affected employees [a]	Average annual payroll ($1,000s)
Forest., log., fish., hunt., and trap	[d]	[d]	[d]	[d]	[d]
Mining	[d]	[d]	[d]	[d]	[d]
Construction	34.7	34.7	4.3	8.1	457.2
Nonmetallic mineral prod. manuf	[d]	[d]	[d]	[d]	[d]
Prim. metals and fab. metal prod	3.9	3.9	0.2	18.0	980.4
Machinery manufacturing	4.1	4.1	0.1	31.4	2,048.1
Computer and elect. prod. manuf	3.9	3.9	0.1	50.1	4,856.7
Electrical equip., appliance manuf	[d]	[d]	[d]	[d]	[d]
Transportation equip. manuf	4.1	4.1	0.1	72.5	4,677.3
Wood products	[d]	[d]	[d]	[d]	[d]
Furniture and fixtures manuf	[d]	[d]	[d]	[d]	[d]
Misc. and not spec. manuf	4.4	4.4	0.1	35.5	2,146.1
Food manufacturing	3.1	3.1	0.1	34.7	1,504.7
Beverage and tobacco products	[d]	[d]	[d]	[d]	[d]
Textile, app., and leather manuf.	2.6	2.6	0.1	25.6	1,151.1
Paper and printing	4.5	4.5	0.3	16.9	918.3
Petroleum and coal prod. manuf.	[d]	[d]	[d]	[d]	[d]
Chemical manufacturing	3.7	3.7	0.1	51.8	4,246.9
Plastics and rubber products	[d]	[d]	[d]	[d]	[d]
Wholesale trade	17.7	17.7	3.7	4.8	299.5
Retail trade	47.5	47.5	6.1	7.8	340.9
Transport. and warehousing	5.5	5.5	0.6	9.5	459.4
Utilities	3.8	3.8	0.1	34.0	2,612.6
Publishing ind. (ex. internet)	[d]	[d]	[d]	[d]	[d]
Motion picture and sound recording	[d]	[d]	[d]	[d]	[d]
Broadcasting (except internet)	2.5	2.5	0.1	28.0	1,851.5
Internet publishing and broadcasting	[d]	[d]	[d]	[d]	[d]
Telecommunications	[d]	[d]	[d]	[d]	[d]
Internet serv. providers and data	[d]	[d]	[d]	[d]	[d]
Other information services	[d]	[d]	[d]	[d]	[d]
Finance	15.2	15.2	2.3	6.5	545.0
Insurance	13.7	13.7	2.7	5.1	365.7
Real estate	17.3	17.3	3.9	4.5	270.4
Rental and leasing services	[d]	[d]	[d]	[d]	[d]
Professional and technical services	79.7	79.7	13.7	5.8	505.6
Management of companies and enterprises	[d]	[d]	[d]	[d]	[d]
Admin. and support services	13.5	13.5	1.9	7.0	266.8
Waste manag. and remed. services	[d]	[d]	[d]	[d]	[d]
Educational services	12.3	12.3	0.4	34.1	1,790.4
Hospitals	[d]	[d]	[d]	[d]	[d]
Health care services, except hospitals	43.5	43.5	5.2	8.3	410.4
Social assistance	28.3	28.3	2.5	11.4	405.9
Arts, entertainment, and recreation	26.7	26.7	2.4	11.0	430.7
Accommodation	4.0	4.0	0.4	10.1	378.3
Food services and drinking places	8.1	8.1	1.7	4.8	130.7
Repair and maintenance	8.2	8.2	1.4	6.1	269.9
Personal and laundry services	5.8	5.8	0.9	6.4	206.4
Membership associations & organizations	25.3	25.3	4.9	5.2	271.4
Private households	[d]	[d]	[d]	[d]	[d]
Public administration [f]	5.2	5.2	0.6	9.4	550.3
Employer Type					
Nonprofit, private	58.4	58.4	7.1	8.3	428.8
For profit, private	410.5	410.5	50.7	8.1	438.9
Government (state and local)	11.9	11.9	0.4	31.7	1,734.0

Note: Establishment data are from the Survey of U.S. Businesses 2016; worker and payroll data from pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Estimation of both affected small establishment employees and affected small establishments was done at the most detailed industry level available. Therefore, the ratio of affected small establishment employees to total small establishment employees for each industry may not match the ratio of small affected establishments to total small establishments at the more aggregated industry level presented in the table, nor will it equal the ratio at the national level because relative industry size, employment, and small business employment differs from industry to industry.

[b] This method may overestimate the number of affected establishments and therefore the ratio of affected workers to affected establishments may be greater than 1-to-1. However, we addressed this issue by also calculating effects based on the assumption that 100 percent of workers at an establishment are affected.

[c] For example, on average, a small establishment in the construction industry employs 8.1 workers (5.5 million employees divided by 676,900 small establishments). This method assumes if an establishment is affected then all 8.1 workers are affected. Therefore, in the construction industry this method estimates there are 4,300 small affected establishments (34,700 affected small workers divided by 8.1).
[d] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.
[e] Number of establishments is smaller than number of affected employees; thus, total number of establishments reported.
[f] Establishment number represents the total number of state and local governments.

v. Projected Impacts to Affected Small Entities

For small entities, the Department projected various types of effects, including regulatory familiarization costs, adjustment costs, managerial costs, and payroll increases to employees. The Department estimated a range for the number of small affected establishments and the impacts they incur. However, few establishments are likely to incur the effects at the upper end of this range because it seems unlikely that the final rule would affect all employees at a small firm. While the upper and lower bounds are likely over- and under-estimates, respectively, of effects per small establishment, the Department believes that this range of costs and payroll increases provides the most accurate characterization of the effects of the rule on small employers.[251] Furthermore, the smaller estimate of the number of affected establishments (*i.e.,* where all employees are assumed to be affected) will result in the largest costs and payroll increases per entity as a percent of establishment payroll and revenue, and the Department expects that many, if not most, entities will incur smaller costs, payroll increases, and effects relative to establishment size.

The Department expects total direct employer costs will range from $80.1 million to $97.1 million for affected small establishments (Table 32) in the first year. Small establishments that do not employ affected workers will incur an additional $254.4 million to $272.5 million in regulatory familiarization costs. The three industries with the highest costs (professional and technical services; retail trade; and health care services, except hospitals) account for about 36 percent of the costs. The transportation equipment manufacturing industry is expected to incur the largest cost per establishment ($11,700 using the method where all employees are affected), although the costs are not expected to exceed 0.25 percent of payroll. The food services and drinking places industry is expected to experience the largest effect as a share of payroll (estimated direct costs compose 0.63 percent of average entity payroll).

TABLE 32—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE

Industry	Cost to small entities in year 1 [a]					
	One affected employee			All employees affected		
	Total (millions) [b]	Cost per affected entity	Percent of annual payroll	Total (millions) [b]	Cost per affected entity	Percent of annual payroll
Total	$97.1	$202	0.04%	$80.1	$1,263	0.28
Industry						
Agriculture	(c)	(c)	(c)	(c)	(c)	(c)
Forest., log., fish., hunt., and trap	(c)	(c)	(c)	(c)	(c)	(c)
Mining	(c)	(c)	(c)	(c)	(c)	(c)
Construction	7.1	204	0.04	5.8	1,348	0.29
Nonmetallic mineral prod. manuf	(c)	(c)	(c)	(c)	(c)	(c)
Prim. metals and fab. metal prod	0.8	204	0.02	0.6	2,943	0.30
Machinery manufacturing	0.8	204	0.01	0.7	5,094	0.249
Computer and elect. prod. manuf	0.8	204	0.00	0.6	8,116	0.17
Electrical equip., appliance manuf	(c)	(c)	(c)	(c)	(c)	(c)
Transportation equip. manuf	0.8	204	0.00	0.7	11,720	0.25
Wood products	(c)	(c)	(c)	(c)	(c)	(c)
Furniture and fixtures manuf	(c)	(c)	(c)	(c)	(c)	(c)
Misc. and not spec. manuf	0.9	204	0.01	0.7	5,758	0.27
Food manufacturing	0.6	204	0.01	0.5	5,639	0.37
Beverage and tobacco products	(c)	(c)	(c)	(c)	(c)	(c)
Textile, app., and leather manuf	0.5	204	0.02	0.4	4,175	0.36
Paper and printing	0.9	204	0.02	0.7	2,759	0.30
Petroleum and coal prod. manuf	(c)	(c)	(c)	(c)	(c)	(c)
Chemical manufacturing	0.8	204	0.00	0.6	8,382	0.20
Plastics and rubber products	(c)	(c)	(c)	(c)	(c)	(c)
Wholesale trade	3.6	204	0.07	3.0	820	0.27
Retail trade	9.7	204	0.06	7.9	1,306	0.38
Transport. and warehousing	1.1	204	0.04	0.9	1,569	0.34
Utilities	0.8	204	0.01	0.6	5,527	0.21
Publishing ind. (ex. internet)	(c)	(c)	(c)	(c)	(c)	(c)
Motion picture and sound recording	(c)	(c)	(c)	(c)	(c)	(c)
Broadcasting (except internet)	0.5	204	0.01	0.4	4,556	0.25
Internet publishing and broadcasting	(c)	(c)	(c)	(c)	(c)	(c)
Telecommunications	(c)	(c)	(c)	(c)	(c)	(c)
Internet serv. providers and data	(c)	(c)	(c)	(c)	(c)	(c)
Other information services	(c)	(c)	(c)	(c)	(c)	(c)
Finance	3.1	204	0.04	2.5	1,095	0.20
Insurance	2.8	204	0.06	2.3	864	0.24
Real estate	3.5	204	0.08	3.0	760	0.28

[251] As noted previously, these are not the true lower and upper bounds. The values presented are the highest and lowest estimates the Department believes are plausible.

TABLE 32—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Cost to small entities in year 1 [a]					
	One affected employee			All employees affected		
	Total (millions) [b]	Cost per affected entity	Percent of annual payroll	Total (millions) [b]	Cost per affected entity	Percent of annual payroll
Rental and leasing services	(c)	(c)	(c)	(c)	(c)	(c)
Professional and technical services	16.3	204	0.04	13.4	982	0.19
Management of companies and enterprises	(c)	(c)	(c)	(c)	(c)	(c)
Admin. and support services	2.8	204	0.08	2.3	1,175	0.44
Waste manag. and remed. services	(c)	(c)	(c)	(c)	(c)	(c)
Educational services	2.5	204	0.01	2.0	5,539	0.31
Hospitals	(c)	(c)	(c)	(c)	(c)	(c)
Health care services, except hospitals	8.9	204	0.05	7.2	1,383	0.34
Social assistance	5.8	204	0.05	4.7	1,885	0.46
Arts, entertainment, and recreation	5.4	204	0.05	4.4	1,822	0.42
Accommodation	0.8	204	0.05	0.7	1,678	0.44
Food services and drinking places	1.7	204	0.16	1.4	823	0.63
Repair and maintenance	1.7	204	0.08	1.4	1,023	0.38
Personal and laundry services	1.2	204	0.10	1.0	1,082	0.52
Membership associations & organizations	5.2	204	0.08	4.3	878	0.32
Private households	(c)	(c)	(c)	(c)	(c)	(c)
Public administration	1.1	204	0.04	0.9	1,561	0.28
Employer Type						
Nonprofit, private	11.6	199	0.05	9.4	1,330	0.31
For profit, private	86.6	211	0.05	71.0	1,400	0.32
Government (state and local)	2.4	201	0.01	1.9	5,055	0.29

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Direct costs include regulatory familiarization, adjustment, and managerial costs.
[b] The range of costs per establishment depends on the number of affected establishments. The minimum assumes that each affected establishment has one affected worker (therefore, the number of affected establishments is equal to the number of affected workers). The maximum assumes the share of workers in small entities who are affected is also the share of small entity establishments that are affected.
[c] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.

It is possible that the costs of the final rule may be disproportionately large for small entities, especially because small entities often have limited or no human resources personnel on staff. However, the Department expects that small entities will rely upon compliance assistance materials provided by the Department or industry associations to become familiar with the final rule. Additionally, the Department notes that the final rule is quite limited in scope as it primarily makes changes to the salary component of the part 541 regulations. Finally, the Department believes that most entities have at least some nonexempt employees and, therefore, already have policies and systems in place for monitoring and recording their hours. The Department believes that applying those same policies and systems to the workers whose exemption status changes will not be an unreasonable burden on small businesses. Average weekly earnings for affected EAP workers in small establishments are expected to increase by about $6.07 per week per affected worker, using the incomplete fixed-job model [252] described in section VI.D.iv.3.[253] This will lead to $151.8 million in additional annual wage payments to employees in small entities (less than 0.6 percent of aggregate affected establishment payroll; Table 33). The largest payroll increases per establishment are expected in the sectors of textile, apparel, and leather manufacturing (up to $27,000 per entity); transportation equipment manufacturing (up to $14,600 per entity); and food manufacturing (up to $14,500 per entity). However, average payroll increases per establishment exceed 2 percent of average annual payroll in only two sectors: Food services and drinking places (3.0 percent) and textile, apparel, and leather manufacturing (2.3 percent).

[252] As explained in section VI.D.iv.3, the incomplete fixed-job model reflects the Department's determination that an appropriate estimate of the impact on the implicit hourly rate of pay for regular overtime workers should be determined using the average of Barkume's and Trejo's two estimates of the incomplete fixed-job model adjustments: A wage change that is 40 percent of the adjustment toward the amount predicted by the fixed-job model, assuming an initial zero overtime pay premium, and a wage change that is 80 percent of the adjustment assuming an initial 28 percent overtime pay premium.

[253] This is an average increase for all affected workers (both EAP and HCE), and reconciles to the weighted average of individual salary changes discussed in the Transfers section.

TABLE 33—YEAR 1 SMALL ESTABLISHMENT PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE

Industry	Increased payroll for small entities in year 1 [a]				
	Total (millions)	One affected employee		All employees affected	
		Per estab.	Percent of annual payroll	Per estab.	Percent of annual payroll
Total	$151.8	$316	0.07	$2,393	0.53
Industry					
Agriculture	[b]	[b]	[b]	[b]	[b]
Forest., log., fish., hunt., and trap.	[b]	[b]	[b]	[b]	[b]
Mining	[b]	[b]	[b]	[b]	[b]
Construction	9.2	265	0.06	2,147	0.47
Nonmetallic mineral prod. manuf.	[b]	[b]	[b]	[b]	[b]
Prim. metals and fab. metal prod.	1.0	257	0.03	4,622	0.47
Machinery manufacturing	1.7	405	0.02	12,710	0.62
Computer and elect. prod. manuf.	0.3	80	0.00	4,004	0.08
Electrical equip., appliance manuf.	[b]	[b]	[b]	[b]	[b]
Transportation equip. manuf.	0.8	200	0.00	14,528	0.31
Wood products	[b]	[b]	[b]	[b]	[b]
Furniture and fixtures manuf.	[b]	[b]	[b]	[b]	[b]
Misc. and not spec. manuf.	1.7	389	0.02	13,794	0.64
Food manufacturing	1.3	417	0.03	14,476	0.96
Beverage and tobacco products	[b]	[b]	[b]	[b]	[b]
Textile, app., and leather manuf.	2.7	1,051	0.09	26,943	2.34
Paper and printing	1.1	233	0.03	3,931	0.43
Petroleum and coal prod. manuf.	[b]	[b]	[b]	[b]	[b]
Chemical manufacturing	0.9	236	0.01	12,236	0.29
Plastics and rubber products	[b]	[b]	[b]	[b]	[b]
Wholesale trade	4.7	263	0.09	1,270	0.42
Retail trade	17.1	360	0.11	2,818	0.83
Transport. and warehousing	1.8	321	0.07	3,039	0.66
Utilities	.....	0	.....	0	.....
Publishing ind. (ex. internet)	[b]	[b]	[b]	[b]	[b]
Motion picture and sound recording	[b]	[b]	[b]	[b]	[b]
Broadcasting (except internet)	1.1	451	0.02	12,620	0.68
Internet publishing and broadcasting	[b]	[b]	[b]	[b]	[b]
Telecommunications	[b]	[b]	[b]	[b]	[b]
Internet serv. providers and data	[b]	[b]	[b]	[b]	[b]
Other information services	[b]	[b]	[b]	[b]	[b]
Finance	3.6	239	0.04	1,557	0.29
Insurance	2.3	169	0.05	862	0.24
Real estate	8.5	489	0.18	2,175	0.80
Rental and leasing services	[b]	[b]	[b]	[b]	[b]
Professional and technical services	32.2	404	0.08	2,351	0.47
Management of companies and enterprises	[b]	[b]	[b]	[b]	[b]
Admin. and support services	3.6	265	0.10	1,859	0.70
Waste manag. and remed. services	[b]	[b]	[b]	[b]	[b]
Educational services	4.6	373	0.02	12,716	0.71
Hospitals	[b]	[b]	[b]	[b]	[b]
Health care services, except hospitals	5.8	134	0.03	1,114	0.27
Social assistance	4.2	148	0.04	1,690	0.42
Arts, entertainment, and recreation	15.1	567	0.13	6,260	1.45
Accommodation	.....	0	.....	0	.....
Food services and drinking places	6.6	818	0.63	3,960	3.03
Repair and maintenance	3.8	466	0.17	2,832	1.05
Personal and laundry services	0.6	110	0.05	709	0.34
Membership associations & organizations	4.1	160	0.06	831	0.31
Private households	[b]	[b]	[b]	[b]	[b]
Public administration	0.9	165	0.03	1,553	0.28
Employer Type					
Nonprofit, private	26.2	448	0.10	3,702	0.86
For profit, private	124.4	303	0.07	2,452	0.56
Government (state and local)	1.3	108	0.01	3,422	0.20

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.

[a] Aggregate change in total annual payroll experienced by small entities under the updated salary levels after labor market adjustments. This amount represents the total amount of (wage) transfers from employers to employees.

[b] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.

Table 34 presents estimated first year direct costs and payroll increases combined per establishment and the costs and payroll increases as a percent of average establishment payroll. The Department presents only the results for the upper bound scenario where all workers employed by the establishment are affected. Combined costs and payroll increases per establishment range from $1,700 in the accommodations industry to $31,100 in textile, apparel, and leather manufacturing. Combined costs and payroll increases compose more than 2 percent of average annual establishment payroll in two sectors: Food services and drinking places (3.7 percent) and textile, apparel, and leather manufacturing (2.7 percent). In all other sectors, they range from 0.2 percent to 1.9 percent of payroll.

However, comparing costs and payroll increases to payrolls overstates the effects on establishments because payroll represents only a fraction of the financial resources available to an establishment. The Department approximated revenue per small affected establishment by calculating the ratio of small business revenues to payroll by industry from the 2012 SUSB data then multiplying that ratio by average small entity payroll.[254] Using this approximation of annual revenues as a benchmark, only one sector has costs and payroll increases amounting to more than one percent of revenues, food services and drinking places (1.1 percent).

TABLE 34—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD

Industry	Costs and payroll increases for small affected establishments, all employees affected			
	Total (millions)	Per estab. [a]	Percent of annual payroll	Percent of estimated revenues [b]
Total	$231.9	$3,656	0.81	0.15
Industry				
Agriculture	(c)	(c)	(c)	(c)
Forest., log., fish., hunt., and trap	(c)	(c)	(c)	(c)
Mining	(c)	(c)	(c)	(c)
Construction	15.0	3,495	0.76	0.17
Nonmetallic mineral prod. manuf	(c)	(c)	(c)	(c)
Prim. metals and fab. metal prod	1.6	7,565	0.77	0.15
Machinery manufacturing	2.3	17,804	0.87	0.18
Computer and elect. prod. manuf	0.9	12,119	0.25	0.05
Electrical equip., appliance manuf	(c)	(c)	(c)	(c)
Transportation equip. manuf	1.5	26,248	0.56	0.08
Wood products	(c)	(c)	(c)	(c)
Furniture and fixtures manuf	(c)	(c)	(c)	(c)
Misc. and not spec. manuf	2.4	19,552	0.91	0.21
Food manufacturing	1.8	20,115	1.34	0.12
Beverage and tobacco products	(c)	(c)	(c)	(c)
Textile, app., and leather manuf	3.2	31,118	2.70	0.50
Paper and printing	1.8	6,690	0.73	0.15
Petroleum and coal prod. manuf	(c)	(c)	(c)	(c)
Chemical manufacturing	1.5	20,618	0.49	0.04
Plastics and rubber products	(c)	(c)	(c)	(c)
Wholesale trade	7.7	2,090	0.70	0.04
Retail trade	25.0	4,123	1.21	0.12
Transport. and warehousing	2.7	4,608	1.00	0.23
Utilities	0.6	5,527	0.21	0.02
Publishing ind. (ex. internet)	(c)	(c)	(c)	(c)
Motion picture and sound recording	(c)	(c)	(c)	(c)
Broadcasting (except internet)	1.6	17,176	0.93	0.33
Internet publishing and broadcasting	(c)	(c)	(c)	(c)
Telecommunications	(c)	(c)	(c)	(c)
Internet serv. providers and data	(c)	(c)	(c)	(c)
Other information services	(c)	(c)	(c)	(c)
Finance	6.2	2,652	0.49	0.17
Insurance	4.6	1,727	0.47	0.11
Real estate	11.4	2,936	1.09	0.24
Rental and leasing services	(c)	(c)	(c)	(c)
Professional and technical services	45.6	3,333	0.66	0.26
Management of companies and enterprises	(c)	(c)	(c)	(c)
Admin. and support services	5.8	3,034	1.14	0.51
Waste manag. and remed. services	(c)	(c)	(c)	(c)
Educational services	6.6	18,255	1.02	0.39
Hospitals	(c)	(c)	(c)	(c)
Health care services, except hospitals	13.1	2,497	0.61	0.26
Social assistance	8.8	3,575	0.88	0.41

[254] The ratio of revenues to payroll for small businesses ranged from 2.15 (social assistance) to 43.40 (petroleum and coal products manufacturing), with an average over all sectors of 5.35. The Department used this estimate of revenue, instead of small business revenue reported directly from the 2012 SUSB so revenue aligned with payrolls in 2018.

TABLE 34—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD—Continued

Industry	Costs and payroll increases for small affected establishments, all employees affected			
	Total (millions)	Per estab. [a]	Percent of annual payroll	Percent of estimated revenues [b]
Arts, entertainment, and recreation	19.5	8,082	1.88	0.62
Accommodation	0.7	1,678	0.44	0.11
Food services and drinking places	8.0	4,783	3.66	1.09
Repair and maintenance	5.2	3,855	1.43	0.40
Personal and laundry services	1.6	1,791	0.87	0.30
Membership associations & organizations	8.4	1,710	0.63	0.16
Private households	[c]	[c]	[c]	[c]
Public administration	1.7	3,114	0.57	0.15
Employer Type				
Nonprofit, private	94.40	3,570	1.00	0.30
For profit, private	585.30	3,532	1.00	0.20
Government (state and local)	12.20	9,264	0.60	0.20

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Total direct costs and transfers for small establishments in which all employees are affected. Impacts to small establishments in which one employee is affected will be a fraction of the impacts presented in this table.
[b] Revenues estimated by calculating the ratio of estimated small business revenues to payroll from the 2012 SUSB, and multiplying by payroll per small entity. For the public administration sector, the ratio was calculated using revenues and payroll from the 2017 Census of Governments.
[c] Data not displayed due to reliability concerns; sample size of affected workers in small establishments is less than 10.

vi. Projected Effects to Affected Small Entities in Year 2 Through Year 10

To determine how small businesses will be affected in future years, the Department projected costs to small businesses for nine years after Year 1 of the rule. Projected employment and earnings were calculated using the same methodology described in section VI.B.iii. Affected employees in small firms follow a similar pattern to affected workers in all establishments: the number decreases gradually in projected years. There are 480,900 affected workers in small establishments in Year 1 and 337,700 in Year 10. Table 35 reports affected workers in selected years only.

TABLE 35—PROJECTED NUMBER OF AFFECTED WORKERS IN SMALL ESTABLISHMENTS, BY INDUSTRY

Industry	Affected workers in small establishments (1,000s)	
	Year 1	Year 10
Total	480.9	337.7
Agriculture	[a]	[a]
Forest., log., fish., hunt., and trap	[a]	[a]
Mining	[a]	[a]
Construction	34.7	20.7
Nonmetallic mineral prod. manuf	[a]	[a]
Prim. metals and fab. metal prod	3.9	[a]
Machinery manufacturing	4.1	4.4
Computer and elect. prod. manuf	3.9	[a]
Electrical equip., appliance manuf	[a]	[a]
Transportation equip. manuf	4.1	[a]
Wood products	[a]	[a]
Furniture and fixtures manuf	[a]	[a]
Misc. and not spec. manuf	4.4	3.8
Food manufacturing	3.1	[a]
Beverage and tobacco products	[a]	[a]
Textile, app., and leather manuf	2.6	[a]
Paper and printing	4.5	[a]
Petroleum and coal prod. manuf	[a]	[a]
Chemical manufacturing	3.7	[a]
Plastics and rubber products	[a]	[a]
Wholesale trade	17.7	12.7
Retail trade	47.5	26.9
Transport. and warehousing	5.5	3.8
Utilities	3.8	[a]
Publishing ind. (ex. internet)	[a]	[a]
Motion picture and sound recording	[a]	[a]
Broadcasting (except internet)	2.5	[a]

TABLE 35—PROJECTED NUMBER OF AFFECTED WORKERS IN SMALL ESTABLISHMENTS, BY INDUSTRY—Continued

Industry	Affected workers in small establishments (1,000s)	
	Year 1	Year 10
Internet publishing and broadcasting	[a]	[a]
Telecommunications	[a]	[a]
Internet serv. providers and data	[a]	[a]
Other information services	[a]	[a]
Finance	15.2	12.1
Insurance	13.7	13.0
Real estate	17.3	12.1
Rental and leasing services	[a]	[a]
Professional and technical services	79.7	55.7
Management of companies and enterprises	[a]	[a]
Admin. and support services	13.5	9.3
Waste manag. and remed. services	[a]	[a]
Educational services	12.3	11.1
Hospitals	[a]	[a]
Health care services, except hospitals	43.5	35.3
Social assistance	28.3	25.7
Arts, entertainment, and recreation	26.7	17.6
Accommodation	4.0	[a]
Food services and drinking places	8.1	6.2
Repair and maintenance	8.2	7.6
Personal and laundry services	5.8	3.9
Membership associations & organizations	25.3	18.2
Private households	[a]	[a]
Public administration	5.2	2.7

Note: Worker data are from pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Data not displayed because sample size of affected workers in small establishments is less than 10.

Costs to small establishments vary by year but generally decrease from Year 1 mostly because regulatory familiarization costs are zero in all projected years, and adjustment costs are relatively small. By Year 10, additional costs and payroll for small businesses have decreased from $231.9 million in Year 1 to $118.5 million (Table 36). The Department notes that, due to relatively small sample sizes, the estimates by detailed industry are not precise. This can cause some numbers in the data to vary across years by a greater amount than they will in the future.

TABLE 36—PROJECTED DIRECT COSTS AND PAYROLL INCREASES FOR AFFECTED SMALL ESTABLISHMENTS, BY INDUSTRY, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD

Industry	Costs and payroll increases for small affected establishments, all employees affected (millions 2019)	
	Year 1	Year 10
Total	$231.9	$118.5
Agriculture	[a]	[a]
Forest., log., fish., hunt., and trap	[a]	[a]
Mining	[a]	[a]
Construction	15.0	6.1
Nonmetallic mineral prod. manuf	[a]	[a]
Prim. metals and fab. metal prod	1.6	[a]
Machinery manufacturing	2.3	2.6
Computer and elect. prod. manuf	0.9	[a]
Electrical equip., appliance manuf	[a]	[a]
Transportation equip. manuf	1.5	[a]
Wood products	[a]	[a]
Furniture and fixtures manuf	[a]	[a]
Misc. and not spec. manuf	2.4	1.1
Food manufacturing	1.8	[a]
Beverage and tobacco products	[a]	[a]
Textile, app., and leather manuf	3.2	[a]
Paper and printing	1.8	[a]
Petroleum and coal prod. manuf	[a]	[a]
Chemical manufacturing	1.5	[a]
Plastics and rubber products	[a]	[a]
Wholesale trade	7.7	7.0

TABLE 36—PROJECTED DIRECT COSTS AND PAYROLL INCREASES FOR AFFECTED SMALL ESTABLISHMENTS, BY INDUSTRY, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD—Continued

Industry	Costs and payroll increases for small affected establishments, all employees affected (millions 2019)	
	Year 1	Year 10
Retail trade	25.0	14.7
Transport. and warehousing	2.7	0.5
Utilities	0.6	[a]
Publishing ind. (ex. internet)	[a]	[a]
Motion picture and sound recording	[a]	[a]
Broadcasting (except internet)	1.6	[a]
Internet publishing and broadcasting	[a]	[a]
Telecommunications	[a]	[a]
Internet serv. providers and data	[a]	[a]
Other information services	[a]	[a]
Finance	6.2	2.1
Insurance	4.6	2.6
Real estate	11.4	4.7
Rental and leasing services	[a]	[a]
Professional and technical services	45.6	21.8
Management of companies and enterprises	[a]	[a]
Admin. and support services	5.8	2.3
Waste manag. and remed. services	[a]	[a]
Educational services	6.6	3.9
Hospitals	[a]	[a]
Health care services, except hospitals	13.1	6.4
Social assistance	8.8	4.9
Arts, entertainment, and recreation	19.5	6.0
Accommodation	0.7	[a]
Food services and drinking places	8.0	3.7
Repair and maintenance	5.2	3.2
Personal and laundry services	1.6	0.8
Membership associations & organizations	8.4	5.9
Private households	[a]	[a]
Public administration	1.7	0.3

Note: Pooled CPS data for 7/2016–6/2019 adjusted to reflect 2018/2019.
[a] Data not displayed because sample size of affected workers in small establishments is less than 10.

E. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

The FLSA sets minimum wage, overtime pay, and recordkeeping requirements for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked.

Every covered employer must keep certain records for each nonexempt worker. The regulations at part 516 require employers to maintain records for employees subject to the minimum wage and overtime pay provisions of the FLSA. The recordkeeping requirements are not new requirements; however, employers will need to keep some additional records for affected employees who become nonexempt. As indicated in this analysis, this final rule expands minimum wage and overtime pay coverage to 1.2 million affected EAP workers. This will result in an increase in employer burden and was estimated in the PRA portion (section V) of this final rule. Note that the burdens reported for the PRA section of this rule include the entire information collection and not merely the additional burden estimated as a result of this final rule.

F. Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

This section discusses the description of the steps the agency has taken to minimize the economic impact on small entities, consistent with the stated objectives of the FLSA. It includes a statement of the factual, policy, and legal reasons for the selected standard and HCE levels adopted in the final rule and why alternatives were rejected.

In this final rule, the Department sets the standard salary level equal to the 20th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) and/or the retail industry. Based on 2018/19 data, this results in a salary level of 684 per week, or 35,568 annually for a full-year worker. The Department believes that a standard salary level set at the 20th percentile of earnings of full-time salaried workers in the lowest-wage Census Region and/or retail industry will accomplish the goal of setting a salary threshold that adequately distinguishes between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating the reintroduction of a limit on nonexempt work as existed under the long duties test. The Department sets the HCE total annual compensation level equal to the 80th percentile of earnings of full-time salaried workers nationally (107,432 annually based on 2018/19 data).[255] The Department believes that this level avoids unduly burdensome costs associated with evaluating, under the

[255] The Department estimated this value using CPS data for earnings of full-time (defined as at least 35 hours per week) nonhourly paid employees. For the purpose of this rulemaking, the Department considers data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers.

standard duties test, the exemption statuses of large numbers of highly-paid white collar employees, many of whom would have remained exempt even under that test, while providing a meaningful and appropriate complement to the more lenient HCE duties test. The Department further believes that nearly all of the highly-paid white collar workers earning above this threshold ''would satisfy any duties test.'' [256]

The Department is also revising the regulations to permit employers to count nondiscretionary bonuses, incentives, and commissions toward up to 10 percent of the required salary level for the standard exemption, so long as employers pay those amounts on an annually or more frequent basis.

i. Differing Compliance and Reporting Requirements for Small Entities

This final rule provides no differing compliance requirements and reporting requirements for small entities. The Department has strived to minimize respondent recordkeeping burden by requiring no specific form or order of records under the FLSA and its corresponding regulations. Moreover, employers would normally maintain the records under usual or customary business practices.

ii. Least Burdensome Option or Explanation Required

The Department believes it has chosen the most effective option that updates and clarifies the rule and which results in the least burden. Among the options considered by the Department, the least restrictive option was taking no regulatory action. Taking no regulatory action does not address the Department's concerns discussed above under Objectives of, and Need for, the Final Rule. Pursuant to section 603(c) of the RFA, the following alternatives are to be addressed:

Differing compliance or reporting requirements that take into account the resources available to small entities. The FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees. To establish differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA and appears unnecessary given the small annualized cost of the rule. The Year 1 cost of the proposed rule for the average employer that qualifies as small was estimated to range from a minimum of 1,700 (accommodation industry) to a maximum of 31,100 (textile, apparel, and leather manufacturing), using the upper-bound estimates. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department has not proposed differing compliance or reporting requirements for small businesses.

The clarification, consolidation, or simplification of compliance and reporting requirements for small entities. This final rule imposes no new reporting requirements. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

The use of performance rather than design standards. Under this final rule, employers may achieve compliance through a variety of means. Employers may elect to continue to claim the EAP exemption for affected employees by adjusting salary levels, hire additional workers or spread overtime hours to other employees, or compensate employees for overtime hours worked. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

An exemption from coverage of the rule, or any part thereof, for such small entities. Creating an exemption from coverage of this rule for businesses with as many as 500 employees, those defined as small businesses under SBA's size standards, is inconsistent with the FLSA, which applies to all employers that satisfy the enterprise coverage threshold or employ individually covered employees, regardless of employer size.[257]

G. Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Final Rule

The Department is not aware of any federal rules that duplicate, overlap, or conflict with this final rule.

VIII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA),[258] requires agencies to prepare a written statement for rules for which a final rulemaking was published and that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $165 million ($100 million in 1995 dollars adjusted for inflation to 2018) or more in at least one year. This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

A. Authorizing Legislation

This final rule is issued pursuant to section 13(a)(1) of the Fair Labor Standards Act (FLSA or Act), 29 U.S.C. 213(a)(1). The section exempts from the FLSA's minimum wage and overtime pay requirements ''any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the Administrative Procedure Act] . . .).'' [259] The requirements of the exemption are contained in part 541 of the Department's regulations. Section 3(e) of the FLSA [260] defines ''employee'' to include most individuals employed by a state, political subdivision of a state, or interstate governmental agency. Section 3(x) of the FLSA [261] also defines public agencies to include the government of a state or political subdivision thereof, or any interstate governmental agency.

B. Assessment of Costs and Benefits

For purposes of the UMRA, this rule includes a federal mandate that is expected to result in increased expenditures by the private sector of more than $165 million in at least one year, but the rule will not result in increased expenditures by state, local and tribal governments, in the aggregate, of $165 million or more in any one year.

Costs to state and local governments: Based on the economic impact analysis of this final rule, the Department determined that the final rule will result in Year 1 costs for state and local governments totaling $52.1 million, of which $21.7 million are direct employer costs and $30.4 million are payroll increases (Table 37). In subsequent years, the Department estimated that state and local governments may experience payroll increases of as much as $49.0 million per year.

[256] 84 FR 10914 (internal citation omitted).

[257] *See* 29 U.S.C. 203(s).

[258] 2 U.S.C. 1501 *et seq.*

[259] 29 U.S.C. 213(a)(1).

[260] 29 U.S.C. 203(e).

[261] 29 U.S.C. 203(x).

Costs to the private sector: The Department determined that the final rule will result in Year 1 costs to the private sector of approximately $887.0 million, of which $521.0 million are direct employer costs and $366.0 million are payroll increases. In subsequent years, the Department estimated that the private sector may experience a payroll increase of as much as $284.2 million per year.

TABLE 37—SUMMARY OF YEAR 1 AFFECTED EAP WORKERS, REGULATORY COSTS, AND TRANSFERS BY TYPE OF EMPLOYER

	Total	Private	Government [a]
Affected EAP Workers (1,000s)			
Number	1,257	1,125	128
Direct Employer Costs (Millions)			
Regulatory familiarization	$340.4	$336.5	$3.9
Adjustment	68.2	61.0	7.0
Managerial	134.4	123.5	10.9
Total direct costs	543.0	521.0	21.7
Payroll Increases (Millions)			
From employers to workers	$396.4	$366.0	$30.4
Direct Employer Costs & Transfers (Millions)			
From employers	$939.4	$887.0	$52.1

[a] Includes only state, local, and tribal governments.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material.[262] However, OMB guidance on this requirement notes that such macro-economic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of $51.2 billion to $102.5 billion (using 2018 GDP). A regulation with a smaller aggregate effect is not likely to have a measurable effect in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this final rule.

The Department's RIA estimates that the total first-year costs (direct employer costs and payroll increases from employers to workers) of the final rule will be approximately $887.0 million for private employers and $52.1 million for state and local governments. Given OMB's guidance, the Department has determined that a full macro-economic analysis is not likely to show any measurable effect on the economy. Therefore, these costs are compared to payroll costs and revenue to demonstrate the feasibility of adapting to these new rules.

Total first-year private sector costs compose 0.013 percent of private sector payrolls nationwide.[263] Total private sector first-year costs compose 0.002 percent of national private sector revenues (revenues in 2018 are projected to be $40.9 trillion).[264] The Department concludes that effects of this magnitude are affordable and will not result in significant disruptions to typical firms in any of the major industry categories.

Total first-year state and local government costs compose less than 0.01 percent of state and local government payrolls.[265] First-year state and local government costs compose 0.001 percent of state and local government revenues (projected 2018 revenues were estimated to be $3.7 trillion).[266] Effects of this magnitude will not result in significant disruptions to typical state and local governments. The $52.1 million in state and local government costs constitutes an average of approximately $578 for each of the approximately 90,126 state and local entities. The Department considers effects of this magnitude to be quite small both in absolute terms and in relation to payrolls and revenue.

C. Response to Comments

i. Consultation Prior to Issuance of the NPRM

On July 26, 2017, the Department published an RFI to gather information to aid in formulating a proposal to revise the part 541 regulations. Later, between September 7 and October 17, 2018, the Department held listening sessions in all five Wage and Hour regions throughout the country, and in Washington, DC, to supplement feedback received as part of the RFI. A wide variety of state and local government entities filed comments in response to the 2017 RFI and/or participated in the 2018 listening sessions, and the Department took their views into consideration in drafting the NPRM published earlier this year. Although several tribal governments submitted comments in response to the Department's 2015 NPRM, *see* 81 FR 32547–48, no tribal governments participated in response to the 2017 RFI or 2018 listening sessions.

[262] 2 U.S.C. 1532(a)(4).

[263] Private sector payroll costs nationwide are projected to be $6.8 trillion in 2018. This projection is based on private sector payroll costs in 2012, which were $5.3 trillion using the 2012 Economic Census of the United States. This was inflated to 2018 dollars using the GDP deflator.

[264] Private sector revenues in 2012 were $32.3 trillion using the 2012 Economic Census of the United States. This was inflated to 2018 dollars using the GDP deflator.

[265] State and local payrolls in 2016 were reported as $927.9 billion. This was inflated to 2018 payroll costs of $1,016.5 billion using the CPI–U. State and Local Government Finances Summary: FY2016. Available at *https://www.census.gov/govs/local/*.

[266] State and local revenues in 2016 were reported as $3.4 trillion. This was inflated to 2018 dollars using the CPI–U. State and Local Government Finances Summary: FY2016. Available at *https://www.census.gov/govs/local/*.

ii. Comments Received in Response to the NPRM

The Department received comments from a variety of commenters representing state and local governments, including from some elected officials.[267] These comments presented a range of views on the proposed rule, particularly the proposed increase to the standard salary level threshold. Some commenters, like the Public Housing Authorities Directors Association (PHADA), supported the proposed rule, agreeing that an update to the standard salary level is ''long overdue'' and finding the proposed increase preferable to the higher threshold adopted in the 2016 final rule. *See also* Joint Comment of the International Public Management Association for Human Resources (IPMA–HR), the International City/County Management Association (ICMA), and the Government Finance Officers Association (GFOA). Other commenters, like the Idaho Division of Human Resources (IDHR), the National Association of Counties (NACo), and the South Butler Community Library, expressed concern about the impact of any increase to the standard salary level, including from the proposed increase. While IDHR and NACo agreed that the proposed rule would be preferable to the 2016 final rule, each criticized the Department's preference for a uniform standard salary level that, they stated, would disproportionately impact employers operating in lower-income states and counties. Others representing certain state governments, however, opposed the proposed rule on the grounds that they would prefer a significantly higher standard salary level, such as the one adopted under the 2016 final rule. *See* House and Senate Democratic Caucuses of the Michigan Legislature; Michigan Governor Gretchen Whitmer; Pennsylvania Department of Labor & Industry; State AGs; Washington Governor Jay Inslee; Wisconsin Department of Workforce Development. These comments echoed many of the same criticisms of the proposed salary level levied by employee advocates discussed earlier in section IV.A.v, but the State AGs made an additional point (relevant for UMRA purposes) that a low federal threshold burdens state governments with expensive law enforcement responsibilities to protect workers in their states from unlawful misclassification. The State AGs asserted that state governments are reluctant to set their own higher exemption thresholds for fear of ''creating uneven standards for employment and [risking] competition with neighboring states.''

As explained earlier in section IV.A, the Department agrees with the overwhelming majority of commenters that an increase to the $455 per week standard salary level currently being enforced is both necessary and overdue. While the adoption of any nationwide earning threshold has a disproportionate impact on employers operating in lower-income regions and industries, the Department believes that adopting multiple salary levels that vary by region would introduce confusion and compliance costs for employers (or employees) operating across different jurisdictions. By contrast, the Department concludes that reapplying the 2004 final rule's methodology to set the standard salary level appropriately accommodates employers operating in low-wage regions.[268]

Some state and local government commenters opined on other aspects of the proposed rule. For example, NACo endorsed the Department's proposal to permit nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level test; this proposal has been finalized as proposed. The joint comment submitted by IPMA–HR, ICMA, and the GFOA objected to the NPRM's proposed increase to the total annual compensation threshold for highly compensated employees, asserting that the proposed threshold of $147,414 per year ''would render the highly compensated employee exemption almost meaningless, especially for smaller governmental organizations in certain parts of the country.'' As explained in section IV.D, the Department has finalized a lower increase to the HCE threshold, to $107,432 per year, which addresses such concerns.

State and local government commenters disagreed over how the Department should update the earnings thresholds going forward. Some commenters urged the Department to adopt a mechanism to automatically update the standard salary level and HCE total compensation levels, which they viewed as critical for ensuring that the effectiveness of the earnings thresholds does not erode over time. *See* House and Senate Democratic Caucuses of the Michigan Legislature; Michigan Governor Gretchen Whitmer; State AGs; Washington Governor Jay Insee; Wisconsin Department of Workforce Development. By contrast, NACo, PHADA, and the joint comment submitted by IPMA–HR, ICMA, and the GFOA supported the Department's proposed commitment to update the earnings thresholds using notice-and-comment rulemaking every four years. As explained in section IV.E, in this final rule the Department reaffirms its intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice-and-comment rulemaking.

Finally, IDHR requested a delayed effective date of at least 18 months, asserting that ''[p]ublic entities, like the State [of Idaho], require sufficient time in the [budgeting] and legislative processes to address appropriations or to make statutory changes to existing state law affected by a federal law amendment.'' As explained in section II.E, the Department has set an effective date of January 1, 2020, for the final rule. The time between this rule's publication and effective date exceeds the 30-day minimum required under the Administrative Procedure Act (APA), 5 U.S.C. 553(d), and the 60 days mandated for a ''major rule'' under the Congressional Review Act, 5 U.S.C. 801(a)(3)(A). Given that the Department is currently enforcing the 2004 standard salary level, which an overwhelming majority of commenters agreed needs to be updated, the Department concludes that a lengthier delayed effective date would be imprudent.

D. Least Burdensome Option or Explanation Required

This final rule has described the Department's consideration of various options throughout the preamble and economic impact analysis (*see* section VI.C). The Department believes that it has chosen the least burdensome but still cost-effective methodology to update the salary level consistent with the Department's statutory obligation. Although some alternative options considered would have set the standard salary level at a rate lower than the updated salary level, that outcome would not necessarily be the most cost-effective or least-burdensome alternative for employers. A lower or outdated salary level would result in a less effective bright-line test for separating workers who may be exempt from those nonexempt workers intended to be

[267] As in response to the RFI, the Department did not receive any comments from tribal governments or affiliated stakeholders in response to the NPRM.

[268] IDHR and the joint comment submitted by IPMA–HR, ICMA, and the GFOA requested that the Department permit employers to prorate the salary level for part-time employees. As explained earlier, *see supra* n.72, the Department declines this request, emphasizing that the standard salary level is not an annual earnings threshold and that ''[e]xempt employees need not be paid for any workweek in which they perform no work.'' 29 CFR 541.602(a)(1).

within the Act's protection. A low salary level would also increase the burden on the employer to apply the duties test to more employees in determining whether an employee is exempt, which would inherently increase the likelihood of misclassification and, in turn, increase the risk that employees who should receive overtime and minimum wage protections under the FLSA are denied those protections.

Selecting a standard salary level inevitably affects both the risk and cost of misclassification of overtime-eligible employees earning above the salary level, as well as the risk and cost of providing overtime protection to employees performing bona fide EAP duties who are paid below the salary level. An unduly low level risks increasing employer liability from unintentionally misclassifying workers as exempt; but an unduly high standard salary level increases labor costs to employers precluded from claiming the exemption for employees performing bona fide EAP duties. Thus, the ultimate cost of the regulation is increased if the standard salary level is set either too low or too high. The Department determined that setting the standard salary level equivalent to the earnings of the 20th percentile of full-time salaried workers in the South and/or in the retail industry balances the risks and costs of misclassification of exempt status.

IX. Executive Order 13132, Federalism

The Department has (1) reviewed this final rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications.

X. Executive Order 13175, Indian Tribal Governments

This final rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Signed at Washington, DC, this 16th day of September, 2019.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor amends title 29 of the Code of Federal Regulations part 541 as follows:

PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES

■ 1. The authority citation for part 541 continues to read as follows:

Authority: 29 U.S.C. 213; Pub. L. 101–583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR, 1945–53 Comp., p. 1004); Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 2. In § 541.100, revise paragraph (a)(1) to read as follows:

§ 541.100 General rule for executive employees.

(a) * * *

(1) Compensated on a salary basis pursuant to § 541.600 at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities;

* * * * *

■ 3. In § 541.200, revise paragraph (a)(1) to read as follows:

§ 541.200 General rule for administrative employees.

(a) * * *

(1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities;

* * * * *

■ 4. In § 541.204, revise paragraph (a)(1) to read as follows:

§ 541.204 Educational establishments.

(a) * * *

(1) Compensated on a salary or fee basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities; or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

* * * * *

■ 5. In § 541.300, revise paragraph (a)(1) to read as follows:

§ 541.300 General rule for professional employees.

(a) * * *

(1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities; and

* * * * *

■ 6. Amend § 541.400 by removing the first two sentences of paragraph (b) and adding one sentence in their place to read as follows:

§ 541.400 General rule for computer employees.

* * * * *

(b) The section 13(a)(1) exemption applies to any computer employee who is compensated on a salary or fee basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities. * * *

* * * * *

■ 7. Amend § 541.600 by:

■ a. Removing the first three sentences of paragraph (a) and adding one sentence in their place; and

■ b. Revising paragraph (b).

The revisions and additions read as follows:

§ 541.600 Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal Government, or $380 per week if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities. * * *

(b) The required amount of compensation per week may be translated into equivalent amounts for periods longer than one week. For example, the $684-per-week requirement will be met if the employee is compensated biweekly on a salary basis of not less than $1,368, semimonthly on a salary basis of not less than $1,482, or monthly on a salary basis of not less than $2,964. However, the shortest period of payment that will meet this compensation requirement is one week.

* * * * *

■ 8. Amend § 541.601 by revising paragraphs (a) and (b) to read as follows:

§ 541.601 Highly compensated employees.

(a)(1) Beginning on January 1, 2020, an employee with total annual compensation of at least $107,432 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee as identified in subparts B, C or D of this part.

(2) Where the annual period covers periods both prior to and after January 1, 2020, the amount of total annual compensation due will be determined on a proportional basis.

(b)(1) ''Total annual compensation'' must include at least $684 per week paid on a salary or fee basis as set forth in §§ 541.602 and 541.605, except that § 541.602(a)(3) shall not apply to highly compensated employees. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee's total annual compensation does not total at least the amount specified in the applicable subsection of paragraph (a) by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, for a 52-week period beginning January 1, 2020, an employee may earn $90,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $17,432 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $12,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $5,432 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C, or D of this part.

* * * * *

■ 9. In § 541.602, revise paragraph (a)(3) to read as follows:

§ 541.602 Salary basis.

(a) * * *

(3) Up to ten percent of the salary amount required by § 541.600(a) may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently. The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. This provision does not apply to highly compensated employees under § 541.601.

(i) If by the last pay period of the 52-week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received is less than 52 times the weekly salary amount required by § 541.600(a), the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any such final payment made after the end of the 52-week period may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid.

(ii) An employee who does not work a full 52-week period for the employer, either because the employee is newly hired after the beginning of this period or ends the employment before the end of this period, may qualify for exemption if the employee receives a *pro rata* portion of the minimum amount established in paragraph (a)(3) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (a)(3)(i) of this section within one pay period after the end of employment.

* * * * *

■ 10. Revise § 541.604 to read as follows:

§ 541.604 Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $684 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $684 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $684 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (*e.g.,* flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $725 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $210 per shift without violating the $684-per-week salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much

as, or even more than, the guaranteed salary.

■ 11. In § 541.605, revise paragraph (b) to read as follows:

§ 541.605 Fee basis.

* * * * *

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least the minimum salary per week, as required by §§ 541.600(a) and 541.602(a), if the employee worked 40 hours. Thus, an artist paid $350 for a picture that took 20 hours to complete meets the $684 minimum salary requirement for exemption since earnings at this rate would yield the artist $700 if 40 hours were worked.

■ 12. Amend § 541.709 by revising the first sentence to read as follows:

§ 541.709 Motion picture producing industry.

The requirement that the employee be paid ''on a salary basis'' does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $1,043 per week (exclusive of board, lodging, or other facilities). * * *

* * * * *

[FR Doc. 2019–20353 Filed 9–26–19; 8:45 am]

BILLING CODE 4510–27–P

impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule is not creating any new requirements for contractors or changing any existing policies and practices. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114–92), which repeals and replaces section 845 of the NDAA for FY 1994 (Pub. L. 103–160; 10 U.S.C. 2371 note) with 10 U.S.C. 2371b.

The objective of this proposed rule is to clarify for contracting officers the criteria that must be met to award, without competition, a follow-on production contract associated with a prototype project transaction agreement.

DoD does not collect data on the number of follow-on production contracts that are awarded annually and associated with a prototype project transaction agreement made under the authority of 10 U.S.C. 2371b; therefore, DoD is unable to estimate the number of small entities that will be impacted by this rule. However, DoD does not expect small business entities to be significantly impacted by this rule, because the rule does not change any existing processes or impose any additional burdens. Instead, the rule simply clarifies instructions to contracting officers on the criteria that must be met in order to award an associated follow-on production contract without using competitive procedures.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives available to meet the objectives of the statutes.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2019–D031) in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 206

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 206 is proposed to be amended as follows:

PART 206—COMPETITION REQUIREMENTS

■ 1. The authority citation for 48 CFR part 206 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 C chapter 1.

■ 2. Amend section 206.001 by revising paragraph (S–70) to read as follows:

206.001 Applicability.

* * * * *

(S–70) Also excepted from the competition requirements of FAR part 6 are follow-on production contracts for products developed pursuant to the ''other transactions'' authority of 10 U.S.C. 2371b for prototype projects when—

(1) The other transaction agreement includes provisions for a follow-on production contract;

(2) The follow-on contract will be awarded to the participants in the other transaction for the prototype project;

(3) Competitive procedures are used for the selection of parties for participation in the transaction;

(4) The participants in the transaction successfully completes the prototype or sub-prototype project provided for in the transaction; and

(5)(i) There is a written determination that—

(A) The requirements of 10 U.S.C. 2371b(d) are met; and

(B) The use of the authority of 10 U.S.C. 2371b is essential to promoting the success of the prototype project; and

(ii)(A) For actions in excess of $100 million, but not in excess of $500 million including all options, the determination is executed by the senior procurement executive; and

(B) For actions in excess of $500 million including all options, the determination is—

(*1*) Executed by the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment; and

(*2*) Provided to the congressional defense committees at least 30 days prior to contract award.

[FR Doc. 2019–20555 Filed 9–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 210, 212, 215, and 234

[Docket DARS–2019–0050]

RIN 0750–AK65

Defense Federal Acquisition Regulation Supplement: Market Research and Value Analysis for the Determination of Price Reasonableness (DFARS Case 2019–D027)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement several sections of the National Defense Authorization Act for Fiscal Year 2017 to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis and allow an offeror to submit information relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before November 25, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019–D027, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''DFARS Case 2019–D027'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2019–D027.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please ''DFARS Case 2019–D027'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D027 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To

confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement sections 871 and 872 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). Section 871 modifies 10 U.S.C. 2377, Preference for acquisition of commercial items, to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis for the acquisition of commercial items. Section 872 modifies 10 U.S.C. 2379, Requirement for determination by Secretary of Defense and notification to Congress before procurement of major weapon systems as commercial items, to allow an offeror to submit information or analysis relating to the value of a commercial item.

II. Discussion and Analysis

This proposed rule implements the requirements of section 871 at DFARS 212.209(a), which addresses the determination of price reasonableness when acquiring commercial items. The focus of this requirement is that agencies shall conduct market research to support the determination of price reasonableness for commercial items. The rule proposes to add the reference to 10 U.S.C. 2377 and directs contracting officers to use: The information submitted under DFARS 234.7002(d) when acquiring major weapon systems as commercial items in accordance with 10 U.S.C. 2379; or, in the case of other items, other relevant information as described in DFARS 212.209.

This proposed rule implements the requirements of section 872 in DFARS subpart 234.70, which addresses the acquisition of major weapon systems as commercial items. DFARS 234.7002(d) addresses the relevant information necessary to make a determination of price reasonableness. To implement section 872, this rule proposes a new paragraph (d)(5) at DFARS 234.7002, which does not impose a requirement, but allows an offeror to submit information or analysis relating to the value of a commercial item, to aid in the determination of the reasonableness of the price of such item. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to other paragraphs in DFARS 234.7002(d). To assist in understanding value analysis, a definition of ''value analysis'' is added at DFARS 234.7001. A cross-reference is also added at DFARS 210.001.

This rule does not impose additional requirements on offerors. The information required is consistent with the existing requirement at DFARS 215.404–1(b)(iii)(D), which requires an offeror to submit other relevant information that can serve as the basis for determining the reasonableness of price. The DFARS provision 252.215–7010, Requirements for Certified Cost or Pricing Data and Data other Than Certified Cost or Pricing Data, is the existing mechanism for obtaining the minimum information necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements of DFARS 215.404–1(b).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to add or modify any provisions or clauses or the prescriptions for any provisions or clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule is issued in order to implement sections 871 and 872 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328).

The objective of this rule is to address the use of market research and value analysis to support the determination of price reasonableness when acquiring commercial items. The legal basis of the rule is sections 871 and 872 of the NDAA for FY 2017.

Based on data from the Federal Procurement Data System, DoD awarded 38,000 new commercial contracts to 16,429 small entities in FY 2018. There are an additional unknown number of small entities that submitted offers and did not receive awards (estimated at several thousand).

This rule does not impose any new reporting, recordkeeping, or other compliance requirements on small entities. DFARS 252.215–7010, Requirements for Certified Cost or Pricing Data, and Data Other Than Certified Cost or Pricing Data, already requires offerors to provide information necessary to determine that the price is fair and reasonable. Offerors are allowed, but not required, to submit information or analysis relating to the value of a commercial item for consideration by the contracting officer in determining price reasonableness.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact, because there is no significant impact on small entities.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2019–D027), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35) or impact any existing information collection requirements.

List of Subjects in 48 CFR Parts 210, 212, 215 and 234

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 210, 212, 215, and 234 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 210, 212, and 234 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 210—MARKET RESEARCH

■ 2. Amend section 210.001 by adding paragraph (a)(iii) to read as follows:

210.001 Policy.

(a) * * *

(iii) Use market research, where appropriate, to inform price reasonableness determinations (see 212.209 and 234.7002).

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 212.209 by—

■ a. Revising paragraph (a); and

■ b. In paragraph (b), removing ''market research pursuant to paragraph (a) of this section,'' and adding ''market research'' in its place.

The revision reads as follows:

212.209 Determination of price reasonableness.

(a) In accordance with 10 U.S.C. 2377(d), agencies shall conduct or obtain market research to support the determination of the reasonableness of price for commercial items contained in any bid or offer submitted in response to an agency solicitation. To the extent necessary to support such market research, the contracting officer for the solicitation—

(1) In the case of major weapon systems items acquired under 10 U.S.C. 2379, shall use information submitted under 234.7002(d); and

(2) In the case of other items, may require the offeror to submit other relevant information as described in this section.

* * * * *

PART 215—CONTRACTING BY NEGOTIATION

■ 4. Amend section 215.403–3 by adding paragraph (c) to read as follows:

215.403–3 Requiring data other than certified cost or pricing data.

* * * * *

(c) *Commercial items.* For determination of price reasonableness of major weapon systems acquired as commercial items, see 234.7002(d).

PART 234—MAJOR SYSTEMS ACQUISITION

■ 5. Revise section 234.7001 to read as follows:

234.7001 Definitions.

As used in this subpart—

Major weapon system means a weapon system acquired pursuant to a major defense acquisition program.

Value analysis means a systematic and objective evaluation of the function of a product and its related costs, whose purpose is to ensure optimum value.

■ 6. Amend section 234.7002 by—

■ a. Revising the paragraph (d) introductory text; and

■ b. Adding a new paragraph (d)(5).

The revision and addition read as follows:

234.7002 Policy.

* * * * *

(d) *Relevant information.* This section implements 10 U.S.C. 2379. See also DFARS 212.209(a).

* * * * *

(5) An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. Value analysis is used to understand what features or characteristics of a given product or service, or offered terms and conditions warrant consideration as having legitimate value to the Government. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (d)(1) and (d)(2) of this section. For additional guidance on use of value analysis see PGI 234.7002(d)(5).

[FR Doc. 2019–20558 Filed 9–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 622 and 635

RIN 0648–BI61

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Atlantic Highly Migratory Species; Coral and Coral Reefs of the Gulf of Mexico; Amendment 9

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of availability (NOA); request for comments.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) has submitted Amendment 9 to the Fishery Management Plan (FMP) for the Coral and Coral Reefs of the Gulf of Mexico (Amendment 9) to the FMP for review, approval, and implementation by NMFS. Amendment 9, if approved by the Secretary of Commerce, and an associated framework action to the FMP would establish new habitat areas of particular concern (HAPCs), some of which include a prohibition of the deployment of bottom-tending gear, and modify current fishing regulations in the Gulf of Mexico (Gulf). The purpose of Amendment 9 and the framework action is to protect coral essential fish habitat in the Gulf.

DATES: Written comments on Amendment 9 must be received by November 25, 2019.

ADDRESSES: You may submit comments on Amendment 9 identified by ''NOAA–NMFS–2017–0146'' by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0146,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Lauren Waters, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of Amendment 9 and the framework action may be obtained from *www.regulations.gov* or the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/amendment-9-coral-habitat-areas-considered-management-gulf-mexico.* Amendment 9 includes an

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 206

[Docket DARS–2019–0051]

RIN 0750–AK67

Defense Federal Acquisition Regulation Supplement: Exception to Competition for Certain Follow-On Production Contracts (DFARS Case 2019–D031)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that modifies the criteria required to exempt from competition certain follow-on productions contracts.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before November 25, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019–D031, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''DFARS Case 2019–D031'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2019–D031.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please ''DFARS Case 2019–D031'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D031 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114–92). Section 815 repeals and replaces section 845 of the NDAA for FY 1994 (Pub. L. 103–160; 10 U.S.C. 2371 note) with 10 U.S.C. 2371b, which modifies the authority of DoD to carry out certain prototype project transactions, as well as the criteria required to award an associated follow-on production contract to a participant in the transaction without the use of competitive procedures.

Currently, DFARS 206.001(S–70) states that the award of a follow-on production contract for products developed under the authority of 10 U.S.C. 2371 is excepted from the use of competitive procedures, if: (1) The prototype project transaction agreement includes a provision for a follow-on production contract; (2) specific criteria in 10 U.S.C. 2371 note are met; and (3) the quantities and prices for the follow-on contract do not exceed the quantities and target prices established in the transaction agreement. Section 815 no longer limits a follow-on production contract to quantities and target prices that were established in the transaction agreement. As a result, this rule removes the limitation from the requisite criteria to exempt a follow-on contract from competitive procedures in subpart 206.

II. Discussion and Analysis

This rule updates the DFARS 206.001(S–70) references to 10 U.S.C. 2371 to the equivalent parts of 10 U.S.C. 2371b; and, adds to the list of criteria necessary to award a follow-on production contract without competition, the requirement that—

- A written determination was executed by certain acquisition officials for transactions in excess of specified dollar values;
- The follow-on contract be awarded to participants in the transaction for the prototype project;
- Competitive procedures were used to selected the parties in the transaction; and
- The participants in the transaction successfully completed the prototype project provided for in the transaction.

The additions to the criteria do not implement new requirements. The statutes and regulations that implement DoD's other transaction authority permit DoD to provide, in the agreement, for the award of a follow-on production contract to a participant in the prototype project. Agreements made under DoD's other transaction authority are not subject to the Federal Acquisition Regulation or DFARS; however, the award of a follow-on production contract resulting from such a transaction agreement is subject to these acquisition regulations. As such, this addition serves as notice to contracting officers that: When the transaction agreement included a provision for the award of a follow-on production contract, and the award of the contract will be made without competition, certain criteria must be met for the follow-on contract award and certain criteria must have been met during the other transaction authority process. This addition will help ensure contracting officers are aware of and in compliance with DoD's other transactional authority when awarding a resultant follow-on production contract.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule only impacts the internal operating procedures of the agency. The rule does not impose any new requirements on contracts at or below the simplified acquisition threshold and for commercial items, including commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic

impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule is not creating any new requirements for contractors or changing any existing policies and practices. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114–92), which repeals and replaces section 845 of the NDAA for FY 1994 (Pub. L. 103–160; 10 U.S.C. 2371 note) with 10 U.S.C. 2371b.

The objective of this proposed rule is to clarify for contracting officers the criteria that must be met to award, without competition, a follow-on production contract associated with a prototype project transaction agreement.

DoD does not collect data on the number of follow-on production contracts that are awarded annually and associated with a prototype project transaction agreement made under the authority of 10 U.S.C. 2371b; therefore, DoD is unable to estimate the number of small entities that will be impacted by this rule. However, DoD does not expect small business entities to be significantly impacted by this rule, because the rule does not change any existing processes or impose any additional burdens. Instead, the rule simply clarifies instructions to contracting officers on the criteria that must be met in order to award an associated follow-on production contract without using competitive procedures.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives available to meet the objectives of the statutes.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2019–D031) in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 206

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 206 is proposed to be amended as follows:

PART 206—COMPETITION REQUIREMENTS

■ 1. The authority citation for 48 CFR part 206 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 C chapter 1.

■ 2. Amend section 206.001 by revising paragraph (S–70) to read as follows:

206.001 Applicability.

* * * * *

(S–70) Also excepted from the competition requirements of FAR part 6 are follow-on production contracts for products developed pursuant to the ''other transactions'' authority of 10 U.S.C. 2371b for prototype projects when—

(1) The other transaction agreement includes provisions for a follow-on production contract;

(2) The follow-on contract will be awarded to the participants in the other transaction for the prototype project;

(3) Competitive procedures are used for the selection of parties for participation in the transaction;

(4) The participants in the transaction successfully completes the prototype or sub-prototype project provided for in the transaction; and

(5)(i) There is a written determination that—

(A) The requirements of 10 U.S.C. 2371b(d) are met; and

(B) The use of the authority of 10 U.S.C. 2371b is essential to promoting the success of the prototype project; and

(ii)(A) For actions in excess of $100 million, but not in excess of $500 million including all options, the determination is executed by the senior procurement executive; and

(B) For actions in excess of $500 million including all options, the determination is—

(*1*) Executed by the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment; and

(*2*) Provided to the congressional defense committees at least 30 days prior to contract award.

[FR Doc. 2019–20555 Filed 9–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 210, 212, 215, and 234

[Docket DARS–2019–0050]

RIN 0750–AK65

Defense Federal Acquisition Regulation Supplement: Market Research and Value Analysis for the Determination of Price Reasonableness (DFARS Case 2019–D027)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement several sections of the National Defense Authorization Act for Fiscal Year 2017 to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis and allow an offeror to submit information relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before November 25, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019–D027, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''DFARS Case 2019–D027'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2019–D027.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please ''DFARS Case 2019–D027'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D027 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To

Entities, and Significant Alternatives Considered. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

155. The Commission believes that the steps described below to facilitate participation in 833 Auction will result in both operational and administrative cost savings for small entities and other auction participants. For example, assigning toll free numbers through competitive bidding will benefit smaller entities rather than the prior first-come first-served basis which favored larger, more sophisticated entities that had invested in obtaining enhanced connectivity to the Toll Free Database. Moreover, the Commission also elected to allow potential subscribers, many of which are smaller entities, the choice between participating directly in the auction or indirectly through a RespOrg. In addition, the Commission created an alternative payment mechanism that will be available for both upfront and final payments, in which applicants can submit payments via ACH instead of wire transfer if the payments are below a $300 threshold. The Commission believes such measures will benefit small entities, who may be interested in only acquiring one or perhaps a few toll free numbers.

156. The procedures adopted in the *833 Auction Procedures Public Notice* to facilitate participation in the 833 Auction will result in both operational and administrative cost savings for small entities and other auction participants. In light of the numerous resources that will be available from the Commission and Somos at no cost, the processes and procedures adopted in the *833 Auction Procedures Public Notice* should result in minimal economic impact on small entities. For example, prior to the auction, small entities and other auction participants may seek clarification of or guidance on complying with application procedures, reporting requirements, and the bidding system. Small entities as well as other auction participants will be able to avail themselves of (1) a web-based, interactive online tutorial to familiarize themselves with auction procedures, filing requirements, bidding procedures, and other matters related to the 833 Auction and (2) a telephone hotline to assist with issues such as access to or navigation within the auction application system. The Commission and Somos also make copies of Commission decisions available to the public without charge, providing a low-cost mechanism for small businesses to conduct research prior to and throughout the auction. In addition, Somos will post public notices on its website, making this information easily accessible and without charge to benefit all 833 Auction applicants, including small businesses. These steps are made available to facilitate participation in the 833 Auction by all eligible bidders and may result in significant cost savings for small business entities who utilize these alternatives. Moreover, the adoption of bidding procedures in advance of the auctions is designed to ensure that the 833 Auction will be administered predictably and fairly for all participants, including small businesses.

157. The Commission will send a copy of the *833 Auction Procedures Public Notice,* including the Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *833 Auction Procedures Public Notice* (or summary thereof) will also be published in the **Federal Register**.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–20526 Filed 9–25–19; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 208, 212, 213, 215, 216, 217, 234, and 237

[Docket DARS–2018–0055]

RIN 0750–AJ74

Defense Federal Acquisition Regulation Supplement: Restrictions on Use of Lowest Price Technically Acceptable Source Selection Process (DFARS Case 2018–D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2017 and 2018 that establish limitations and prohibitions on the use of the lowest price technically acceptable source selection process.

DATES: Effective October 1, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 83 FR 62550 on December 4, 2018, to implement the limitations and prohibitions on use of the lowest price technically acceptable (LPTA) source selection process provided in sections 813, 814, and 892 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) and sections 822, 832, 882, and 1002 of the NDAA for FY 2018 (Pub. L. 115–91). Sixteen respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Significant Changes as a Result of Public Comments

No changes from the proposed rule are made in the final rule as a result of the public comments received.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Several respondents express support for the rule.

Response: DoD acknowledges support for the rule.

2. General Comments

Comment: A respondent expresses concern that the rule will be interpreted as a complete prohibition on the use of the LPTA source selection process. The respondent recommends revising the rule to clarify that use of the process is acceptable and expand on the circumstances in which it is or is not appropriate for use in acquisitions.

Response: It is not the intent of the rule to prohibit the use of the LPTA source selection process. The LPTA source selection process is a valuable part of the best value continuum and an acceptable and appropriate source selection approach for many acquisitions. Instead, the intent of the

rule is to implement the statutory language, which aims to identify meaningful circumstances that must exist for an acquisition to use the LPTA source selection process and certain types of requirements that will regularly benefit from the use of tradeoff source selection procedures. If a requirement satisfies the limitations for use of the LPTA source selection process, then the process may be used as a source selection approach. Supplemental information to contracting officers on when and from whom to seek additional guidance on whether a requirement satisfies the limitations at 215.101–2–70(a)(1) will be published in the DFARS Procedures, Guidance, and Information (PGI) in conjunction with this final rule.

Comment: One respondent expresses concern about how the agencies using fully automated systems to award contracts are going to implement this rule.

Response: Each Department or agency is required to implement the requirements of this final rule in its acquisition business processes and procedures.

Comment: One respondent expresses support for additional training and guidance that will assist acquisition personnel in making best value decisions.

Response: Training is readily available to DoD personnel on a variety of acquisition topics, including best value decisions. Upon publication of the final rule, the DFARS PGI will be updated to provide contracting officers with information on when and from whom to seek additional guidance when acquiring supplies and services that are impacted by this rule.

3. Expansion of the Applicability of the Rule

Comment: Some respondents recommend applying greater restrictions on the types of acquisitions that can use the LPTA source selection process. For example, a respondent suggests revising this rule to only authorize the use of the LPTA source selection process when acquiring goods that are predominantly expendable in nature, non-technical, or have a short shelf life or life expectancy. Another respondent suggests limiting the use of the LPTA source selection process to only commercial and commercial-off-the-shelf items valued at or below the simplified acquisition threshold, while expressly prohibiting its use for all other requirements.

Response: To ensure that DoD is not denied the benefit of cost and technical tradeoffs in the source selection process, the rule identifies meaningful circumstances that must exist for an individual requirement to use the LPTA source selection process. Each requirement has a unique set of circumstances that should be considered when developing a source selection approach. The LPTA source selection process is a valuable part of the best value continuum and can be used to facilitate an effective and competitive acquisition approach, depending on the circumstances of the acquisition. Limiting the use of the LPTA source selection process to only goods, commercial items under a specific dollar threshold, or other broadly defined groupings does not fully consider the circumstances of an individual requirement and could result in additional and unnecessary time and cost burdens for both Government and industry.

4. Limitation Criteria at 215.101–2–70(a)(1)

a. Application of Criteria

Comment: Some respondents recommend revising the rule to clarify whether each limitation listed at 215.101–2–70(a)(1) applies to supplies, services, or both supplies and services. In particular, a respondent suggests that the rule text be clarified to ensure that the limitations at 215.101–2–70(a)(i) through (iv) are applied to both supplies and services. The respondent also suggests restructuring the rule text by dividing the limitations into two paragraphs: One paragraph that identifies the limitations that apply to the acquisition of supplies, and one that identifies the limitations that apply to the acquisition of services. In contrast, another respondent expresses support for retaining the existing structure of the rule.

Response: The statutory language being implemented by the rule does not categorize the limitations into those that apply to supplies or services. As a result, the list of limitations at 215.101–2–70(a)(1)(i) through (viii) is written to apply to any acquisition that utilizes the LPTA source selection process. In consideration of these limitations, the contracting officer must document the contract file with a description of the circumstances that justify the use of the LPTA source selection process.

One exception is the limitation at 215.101–2–70(a)(1)(vi), which implements paragraph (a)(3) of section 822 of the NDAA for FY 2018 that states the limitation is ''with respect to a contract for the procurement of goods;'' as such, this rule specifically identifies that goods must meet this limitation.

b. Additional Criteria

Comment: Some respondents suggest that additional criteria be added to the list of limitations in order to satisfy Congressional intent. Specifically, one respondent suggests that ''non-complex'' be added to the additional criteria for goods at 215.101–2–70(a)(1)(vi). The respondent also suggests adding another factor to the list that expressly limits the use of LPTA source selection procedures to procurements where the risk of unsuccessful performance is minimal.

Response: The intent of this rule is to implement the statutory language, which does not include ''non-complex'' as a criteria to meet when purchasing goods, or a limitation on acceptable performance risk, when using the LPTA source selection process. Comprehensively, the consideration of each limitation at 215.101–2–70(a)(1) provides an effective evaluation of a requirement's suitability to use of the LPTA source selection process and reflects the intent of the statutory language; therefore, no additional limitation criteria are included in this final rule.

c. Clarification of Terms

Comment: Some respondents indicate that the terms used in the rule are unclear. Specifically, one respondent suggests modifying paragraph 215.101–2–70(a)(1)(ii) to expressly state that ''value'' includes both qualitative and quantitative value to be realized by DoD. Another respondent advises that it is unclear what ''full life-cycle costs'' means when acquiring services.

Response: Supplemental guidance will be published in DFARS PGI in conjunction with this final rule to assist contracting officers in documenting the contract file with a determination that the lowest price reflects full life-cycle costs. The term ''value'' includes monetary and non-monetary benefits, as applicable to the requirement. The term also considers whether DoD is willing to pay more than a minimum price in return for non-monetary benefits (*e.g.,* greater functionality, higher performance, or lower performance risk). The rule does not place any limitations on the meaning of the term.

d. Documentation of Justification

Comment: A respondent expresses concern that this rule requires a written justification when using the LPTA source selection process. As acquisition planning already requires the contracting officer to document the acquisition process and the rationale behind the decision to use one process

or method over another, the respondent views the documentation required by this rule to be unnecessary. In contrast, another respondent suggests that this rule expand the documentation requirement to include a description and analysis of the all the requirements at 215.101–2–70(a)(1) in order to justify the use of the LPTA source selection process and require the justification to be posted with the solicitation.

Response: This rule implements statutory language that requires a contracting officer document the contract file with the circumstances justifying the use of the LPTA source selection process. The rule does not specify a format or method to be used to meet this statutory requirement. The appropriate format of the justification and the method of incorporation into the contract file is left to the discretion of each Department or agency. When developing a source selection approach, acquisition personnel consider the unique circumstances of a requirement and determine the method that will result in the best value to DoD. Publicizing the justification with the solicitation is not required by statute and could result in increased cost and time burden to both Government and industry.

5. List of Services and Supplies at 215.101–2–70(a)(2)

Comment: A respondent suggests that the rule specify how a contracting officer determines that a procurement is predominately for a specific category of service.

Response: For solicitation and reporting purposes, contracting officers assign each acquisition a product or service code that best represents the predominant dollar amount of supplies or services being procured on an award. This code will determine whether the acquisition is subject to the limitations at 215.101–2–70(a)(2).

Comment: A respondent recommends that the list include services directly related to national security, in order to implement the intent of Congress.

Response: The intent of this rule is to implement the requisite statutory language, which does not include ''services directly related to national security'' in the list of service categories that must avoid using the LPTA source selection process, to the maximum extent practicable; as such, the rule text does not include such services in 215.101–2–70(a)(2)(i).

Comment: A respondent suggests that the list of services at 215.101–2–70(a)(2)(i) expressly include advisory and assistance services, as the term ''knowledge-based professional services'' may be misinterpreted to not include advisory and assistance services.

Response: The intent of this rule is to implement the requisite statutory language, which does not explicitly include advisory and assistance services; therefore, the rule text does not identify advisory and assistance services in 215.101–2–70(a)(2)(1).

Comment: Section 880(c) of the NDAA for FY 2019 restricts civilian agencies from using the LPTA source selection process for procurements that are predominately for the same services listed at 215.101–2–70(a)(2)(i), and also includes ''health care services and records'' and ''telecommunication devices and services'' to the list. To harmonize the requirements between the FAR and the DFARS or comply with statute, a couple of respondents suggest the rule incorporate the two additional categories from section 880(c) into the restrictions at 215–101–2–70(a)(2).

Response: The intent of this rule is to implement the statutes at sections 813, 814, and 892 of the NDAA for FY 2017, and sections 822, 832, 882, and 1002 of the NDAA for FY 2018. Section 880 of the NDAA for FY 2019 is being implemented via FAR case 2018–016, Lowest Price Technically Acceptable Source Selection Process, and does not apply to DoD.

6. Suggestion for Technical Edit

Comment: One respondent suggests that the two sentences regarding audit services at 215.101–2–70(b)(3) be reversed to state the prohibition upfront and follow with how award decisions shall be made for such services.

Response: The primary intent of the text, as arranged, is to address the action a contracting officer shall take when awarding an auditing contract; therefore, no change is made to the final rule.

C. Other Changes

An editorial change was made to the rule to update the reference at 213.106–1(a)(2)(ii) from 215.101–70 to 215.101–2–70.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not create any new DFARS clauses or amend any existing DFARS clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

This rule primarily affects the internal Government procedures, including requirements determination and acquisition strategy decisions, and contract file documentation requirements. However, a final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) and the NDAA for FY 2018 (Pub. L. 115–91). These sections establish a preference for the use of the tradeoff source selection process for certain safety items and auditing services; prohibit the use of reverse auctions or the lowest price technically acceptable (LPTA) source selection process for specific supplies and services; and specify criteria for the use of the LPTA source selection process.

No public comments were received in response to the initial regulatory flexibility analysis.

DoD does not have information on the total number of solicitations issued on an annual basis that specified the use of the LPTA source selection process, or the number or description of small entities that are impacted by certain solicitations. However, the Federal Procurement Data System (FPDS) provides the following information for fiscal year 2016:

DoD competitive contracts using FAR part 15 procedures. DoD awarded 18,361 new contracts and orders using competitive negotiated procedures, of

which 47% were awarded to 5,221 unique small business entities. It is important to note that FPDS does not collect data on the source selection process used for a solicitation. Therefore, this data includes competitive solicitations using LPTA or tradeoff source selection processes, which will be subject to future considerations and restrictions provided by section 813 of the NDAA for FY 2017 and section 822 of the NDAA for FY 2018.

Personal protective equipment. DoD competitively awarded 9,130 new contracts and orders potentially for combat-related personal protective equipment items that could be impacted by restrictions in section 814 of the NDAA for FY 2017. Of those new contracts and orders, 89% were awarded to 668 unique small business entities.

Aviation critical safety items. As discussed during the rulemaking process for DFARS clause 252.209–7010 published in the **Federal Register** at 76 FR 14641 on March 17, 2011, the identification of aviation critical safety items occurs entirely outside of the procurement process and is not captured in FPDS. Therefore, it is not possible for DoD to assess the impact of section 814 of the NDAA for FY 2017, as amended by 822 of the NDAA for FY 2018 on small business entities.

Audit-related services. DoD competitively awarded 46 new contracts and orders for audit services that could be impacted by section 1002 of the NDAA for FY 2018. Of those new contracts and orders, 61% were awarded to 17 unique small business entities.

Major defense acquisition programs (MDAPs). The impact to small businesses resulting from implementation of sections 832 and 882 of the NDAA for FY 2018 cannot be assessed, since FPDS does not collect data for MDAPs or specific acquisition phases (*i.e.,* engineering and manufacturing development (EMD)). Subject matter experts within DoD know of no instances where the LPTA source selection process has been used for procurement of EMD of an MDAP.

This rule does not include any new reporting, recordkeeping, or other compliance requirements.

This rule implements the statutory requirements, as written. There are no known alternative approaches to the rule that would meet the stated objectives of the applicable statutes.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 208, 212, 213, 215, 216, 217, 234, and 237

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 208, 212, 213, 215, 216, 217, 234, and 237 are amended as follows:

■ 1. The authority citation for 48 CFR parts 208, 212, 213, 215, 216, 217, 234, and 237 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 208—REQUIRED SOURCES OF SUPPLIES OR SERVICES

■ 2. Amend section 208.405 by redesignating the text as paragraph (1) and adding paragraphs (2) and (3) to read as follows:

208.405 Ordering procedures for Federal Supply Schedules.

* * * * *

(2) See 215.101–2–70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to orders placed under Federal Supply Schedules.

(3) See 217.7801 for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Add section 212.203 to subpart 212.2 to read as follows:

212.203 Procedures for solicitation, evaluation, and award.

(1) See 215.101–2–70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to the acquisition of commercial items.

(2) See 217.7801 for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Revise section 213.106–1 to read as follows:

213.106–1 Soliciting competition.

(a) *Considerations.*

(2)(i) Include an evaluation factor regarding supply chain risk (see subpart 239.73) when acquiring information technology, whether as a service or as a supply, that is a covered system, is a part of a covered system, or is in support of a covered system, as defined in 239.7301.

(ii) See 215.101–2–70 for limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to simplified acquisitions.

(iii) See 217.7801 for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

PART 215—CONTRACTING BY NEGOTIATION

■ 5. Add section 215.101–2 heading to read as follows:

215.101–2 Lowest price technically acceptable source selection process.

■ 6. Add section 215.101–2–70 to read as follows:

215.101–2–70 Limitations and prohibitions.

The following limitations and prohibitions apply when considering the use of the lowest price technically acceptable source selection procedures.

(a) *Limitations.*

(1) In accordance with section 813 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328) as amended by section 822 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91) (see 10 U.S.C. 2305 note), the lowest price technically acceptable source selection process shall only be used when—

(i) Minimum requirements can be described clearly and comprehensively and expressed in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

(ii) No, or minimal, value will be realized from a proposal that exceeds the minimum technical or performance requirements;

(iii) The proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(iv) The source selection authority has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit;

(v) No, or minimal, additional innovation or future technological

advantage will be realized by using a different source selection process;

(vi) Goods to be procured are predominantly expendable in nature, are nontechnical, or have a short life expectancy or short shelf life (See PGI 215.101–2–70(a)(1)(vi) for assistance with evaluating whether a requirement satisfies this limitation);

(vii) The contract file contains a determination that the lowest price reflects full life-cycle costs (as defined at FAR 7.101) of the product(s) or service(s) being acquired (see PGI 215.101–2–70(a)(1)(vii) for information on obtaining this determination); and

(viii) The contracting officer documents the contract file describing the circumstances justifying the use of the lowest price technically acceptable source selection process.

(2) In accordance with section 813 of the National Defense Authorization Act for Fiscal Year 2017, as amended by section 822 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91) (see 10 U.S.C. 2305 note), contracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable source selection process in the case of a procurement that is predominately for the acquisition of—

(i) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, or other knowledge-based professional services;

(ii) Items designated by the requiring activity as personal protective equipment (except see paragraph (b)(1) of this section); or

(iii) Services designated by the requiring activity as knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

(b) *Prohibitions.*

(1) In accordance with section 814 of the National Defense Authorization Act for Fiscal Year 2017 as amended by section 882 of the National Defense Authorization Act for Fiscal Year 2018 (see 10 U.S.C. 2302 note), contracting officers shall not use the lowest price technically acceptable source selection process to procure items designated by the requiring activity as personal protective equipment or an aviation critical safety item, when the requiring activity advises the contracting officer that the level of quality or failure of the equipment or item could result in combat casualties. See 252.209–7010 for the definition and identification of critical safety items.

(2) In accordance with section 832 of the National Defense Authorization Act for Fiscal Year 2018 (see 10 U.S.C. 2442 note), contracting officers shall not use the lowest price technically acceptable source selection process to acquire engineering and manufacturing development for a major defense acquisition program for which budgetary authority is requested beginning in fiscal year 2019.

(3) Contracting officers shall make award decisions based on best value factors and criteria, as determined by the resource sponsor (in accordance with agency procedures), for an auditing contract. The use of the lowest price technically acceptable source selection process is prohibited (10 U.S.C. 254b).

PART 216—TYPES OF CONTRACTS

■ 7. Amend section 216.505 by—

■ a. Removing paragraphs (1) and (2);

■ b. Adding paragraph (a);

■ c. Adding a paragraph (b) heading: and

■ d. Adding paragraph (b)(1).

The additions read as follows:

216.505 Ordering.

(a) *General.*

(6) Orders placed under indefinite-delivery contracts may be issued on DD Form 1155, Order for Supplies or Services.

(S–70) Departments and agencies shall comply with the review, approval, and reporting requirements established in accordance with subpart 217.7 when placing orders under non-DoD contracts in amounts exceeding the simplified acquisition threshold.

(b) *Orders under multiple-award contracts.*

(1) *Fair opportunity.*

(A) See 215.101–2–70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to orders placed against multiple award indefinite delivery contracts.

(B) See 217.7801 for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

* * * * *

PART 217—SPECIAL CONTRACTING METHODS

■ 8. Add new subpart 217.78 to read as follows:

217.78—REVERSE AUCTIONS

Sec.
217.7801 Prohibition.

217.78—REVERSE AUCTIONS

217.7801 Prohibition.

In accordance with section 814 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328) as amended by section 882 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91) (see 10 U.S.C. 2302 note), contracting officers shall not use reverse auctions when procuring items designated by the requiring activity as personal protective equipment or an aviation critical safety item, when the requiring activity advises the contracting officer that the level of quality or failure of the equipment or item could result in combat casualties. See 252.209–7010 for the definition and identification of critical safety items.

PART 234—MAJOR SYSTEM ACQUISITION

■ 9. Add section 234.005–2 to read as follows:

234.005–2 Mission-oriented solicitation.

See 215.101–2–70(b)(2) for the prohibition on the use of the lowest price technically acceptable source selection process for engineering and manufacturing development of a major defense acquisition program for which budgetary authority is requested beginning in fiscal year 2019.

PART 237—SERVICE CONTRACTING

■ 10. Amend section 237.270 by–

■ a. Redesignating paragraph (a)(2) as paragraph (a)(3); and

■ b. Adding new paragraph (a)(2) to read as follows:

237.270 Acquisition of audit services.

(a) * * *

(2) See 215.101–2–70(b)(3) for the prohibition on the use of the lowest price technically acceptable source selection process when acquiring audit services.

* * * * *

[FR Doc. 2019–20557 Filed 9–25–19; 8:45 am]

BILLING CODE 5001–06–P

IV. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 20, 1993. This rule is not a major rule as defined at 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule is not creating any new requirements or changing any existing requirements and the rule only impacts foreign contractors. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to modify DFARS clause 252.229–7001, Tax Relief, to incorporate the information included in DFARS clause 252.229–7000, Invoices Exclusive of Taxes or Duties. Combining these clauses will result in DFARS clause 252.229–7000 being removed from the DFARS, pursuant to action taken by the Regulatory Reform Task Force.

The objective of this proposed rule is to streamline DoD contract terms and conditions and contractor responsibilities pertaining to foreign taxes and duties. The modification of these DFARS clauses supports a recommendation from the DoD Regulatory Reform Task Force under Executive Order 13771, ''Enforcing the Regulatory Reform Agenda.''

This rule is combining two existing clauses that address the same topic into a single comprehensive clause. These clauses apply to solicitations and contracts awarded to a foreign concern for contract performance in a foreign country. This rule is not expected to impact small business entities, because this rule only applies to foreign entities. The Small Business Administration (SBA) identifies a ''small business'' as ''a business entity organized for profit, with a place of business located in the United States, and which operated primarily within the United States or which makes a significant contribution to the U.S. economy through the payment of taxes or use of American products, materials, or labor'' (13 CFR 121.102(a)). This rule only applies to foreign contractors, which do not meet the SBA definition of ''small business'' entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018–D049) in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 229 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 229 and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 229 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 229—TAXES

229.402–1 [Removed]

■ 2. Remove section 229.402–1.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.229–7000 [Removed and Reserved]

■ 3. Remove and reserve section 252.229–7000.

■ 4. Amend section 252.229–7001 by—

■ a. Removing the clause date ''(SEP 2014)'' and adding ''(DATE)'' in its place;

■ b. Revising paragraph (b);

■ c. In Alternate I—

■ i. Removing the clause date of ''(SEP 2014)'' and adding ''(DATE)'' in its place; and

■ ii. Revising paragraph (b).

The revisions read as follows:

252.229–7001 Tax Relief

* * * * *

(b) Invoices submitted in accordance with the terms and conditions of this contract shall be exclusive of all taxes or duties for which relief is available. The Contractor's invoice shall list separately the gross price, amount of tax deducted, and net price charged.

* * * * *

Alternate I. * * *

* * * * *

(b) Invoices submitted in accordance with the terms and conditions of this contract shall be exclusive of all taxes or duties for which relief is available. The Contractor's invoice shall list separately the gross price, amount of tax deducted, and net price charged.

* * * * *

[FR Doc. 2019–19568 Filed 9–12–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227 and 252

[Docket DARS–2019–0048]

RIN 0750–AK71

Defense Federal Acquisition Regulation Supplement: Validation of Proprietary and Technical Data (DFARS Case 2018–D069)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the

National Defense Authorization Act for Fiscal Year 2019, which amended the statutory presumption of development exclusively at private expense for commercial items in the procedures governing the validation of asserted restrictions on technical data.

DATES: Interested parties should submit written comments to the address shown below on or before November 12, 2019, to be considered in the formation of any proposed rule.

DoD is also hosting public meetings to obtain the views of interested parties in accordance with the notice published in the **Federal Register** on August 16, 2019, at 84 FR 41953.

ADDRESSES: Submit written comments identified by DFARS Case 2018–D069, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2018–D069.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2018–D069'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2018–D069 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, OUSD(A–S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is seeking information from experts and interested parties in Government and the private sector that will assist in the development of a revision to the DFARS to implement section 865 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 865 repeals several years of congressional adjustments to the statutory presumption of development at private expense for commercial items in the validation procedures at paragraph (f) of 10 U.S.C. 2321.

The presumption of development funding for commercial items was established in 1994 by section 8106 of the Federal Acquisition Streamlining Act (FASA) (Pub. L. 103–355). This statutory presumption has been amended numerous times, including by section 802(b) of the NDAA for FY 2007 (Pub. L. 109–364), section 815(a)(2) of the NDAA for FY 2008 (Pub. L. 110–181), section 1071(a)(5) of the NDAA for FY 2015 (Pub. L. 113–291), section 813(a) of the NDAA for FY 2016 (Pub. L. 114–92), and most recently by section 865.

The DFARS implementation of this mandatory presumption has evolved accordingly to track the statutory changes, with the primary coverage found at paragraph (c) of DFARS section 227.7103–13, and paragraph (b) of the clause at DFARS 252.227–7037. There is no DFARS coverage applying such a presumption of development funding to commercial computer software because, as a matter of policy also dating back to the FASA time frame, the underlying procedures for challenging and validating asserted restrictions have not been applied to commercial computer software—only to noncommercial computer software (*e.g.,* DFARS section 227.7203–13 and the clause at DFARS 252.227–7019).

II. Discussion and Analysis

Section 865 repeals the amendments to 10 U.S.C. 2321(f) made by the NDAAs for FYs 2007 through 2016, which required that contractors take certain steps to demonstrate that they paid for the development of commercial items if their restrictions on technical data are challenged. Section 865 returns the presumption of development funding for commercial items to its original form, as established in 1994 by FASA. More specifically, FASA provided that when challenging asserted restrictions on technical data pertaining to a commercial item, DoD is required to presume that the contractor or subcontractor has justified the asserted restriction on the basis that the item was developed exclusively at private expense, regardless of whether the contractor or subcontractor submits a justification in response to the challenge notice. The challenge may be sustained only if DoD provides information demonstrating that the item was not developed exclusively at private expense. Section 865 restores this paradigm.

Therefore, DoD is considering changes that would return the DFARS coverage at 227.7103–13 and 252.227–7037 substantially back to its original FASA-implementing language with regard to the presumption. The changes would incorporate minor wording differences due to slight changes in style and nomenclature over the years, such as referring to ''the Contracting Officer'' in lieu of ''the Department.''

In addition to seeking public comment on the substance of the draft DFARS revisions, DoD is also seeking information regarding any corresponding change in the burden, including associated costs or savings, resulting from contractors and subcontractors complying with the draft revised DFARS implementation. More specifically, DoD is seeking information regarding any anticipated increase or decrease in such burden and costs relative to the burden and costs associated with complying with the current DFARS implementing language.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 227 and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 227 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 2. Amend section 227.7103–13 by revising paragraph (c)(2) to read as follows:

227.7103–13 Government right to review, verify, challenge, and validate asserted restrictions.

* * * * *

(c) * * *

(2) *Commercial items—presumption regarding development exclusively at private expense.* 10 U.S.C. 2320(b)(1) and 2321(f) establish a presumption and procedures regarding validation of asserted restrictions for technical data related to commercial items-on the basis of development exclusively at private expense. Contracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. When a challenge is warranted for a commercial item, a contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.227–7037 by—
■ a. In the clause heading, removing ''(SEP 2016)'' and adding ''(DATE)'' in its place;
■ b. Revising paragraph (b); and
■ c. In paragraph (c), removing ''paragraph (b)(1)'' and adding ''paragraph (b)'' in its place.

The revision reads as follows:

252.227–7037 Validation of Restrictive Markings on Technical Data.

* * * * *

(b) *Commercial items—presumption regarding development exclusively at private expense.* The Contracting Officer will presume that the Contractor's or a subcontractor's asserted use or release restrictions with respect to a commercial item is justified on the basis that the item was developed exclusively at private expense. The Contracting Officer will not challenge such assertions unless the Contracting Officer has information that demonstrates that the commercial item was not developed exclusively at private expense.

* * * * *

[FR Doc. 2019–19569 Filed 9–12–19; 8:45 am]

BILLING CODE 5001–06–P

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. The results of this evaluation are contained in the section of the preamble titled ''Environmental Justice Considerations.''

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Greenhouse gases, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 8, 2019.

Gregory Sopkin,

Regional Administrator, EPA Region 8.

[FR Doc. 2019–17405 Filed 8–14–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 282

[EPA–R08–UST–2019–0827; FRL–9997–45–Region 8]

Montana: Final Approval of State Underground Storage Tank Program Revisions, Codification, and Incorporation by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is proposing to approve revisions to the State of Montana's Underground Storage Tank (UST) program submitted by the State. The EPA has determined that these revisions satisfy all requirements needed for program approval. This action also proposes to codify the EPA's approval of Montana's State program and incorporates by reference those provisions of the State's statutes and regulations that we have determined meet the requirements for approval. The EPA continues to retain its inspection and enforcement authorities under sections 9005 and 9006 of RCRA Subtitle I and other applicable statutory and regulatory provisions in the State of Montana.

DATES: Send written comments by September 16, 2019.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments.
2. *Email: Martella.Theresa@epa.gov.*
3. *Mail:* Theresa Martella, Region 8, Environmental Scientist, RCRA Branch, (8LCR–RC), Land, Chemicals and Redevelopment Division, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
4. *Hand Delivery or Courier:* Deliver your comments to Theresa Martella, Region 8, Environmental Scientist, RCRA Branch, (8LCR–RC), Land, Chemicals and Redevelopment Division, 1595 Wynkoop Street, Denver, Colorado 80202–1129.

Instructions: Direct your comments to Docket ID No. EPA–R08–UST–2018–0827. The EPA's policy is that all comments received will be included in the public docket without change and may be available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov* or email. The federal *https://www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy the documents that form the basis for this action and associated publicly available materials from 8:30 a.m. to 4 p.m., Monday through Friday, at the following location: EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, phone number (303) 312–6329. Interested persons wanting to examine these documents should make an appointment with the office at least two days in advance.

FOR FURTHER INFORMATION CONTACT: Theresa Martella, Region 8, Environmental Scientist, RCRA Branch, (8LCR–RC), Land, Chemicals and Redevelopment Division, 1595 Wynkoop Street, Denver, Colorado 80202–1129, phone number (303) 312–6329, email address: *Martella.Theresa@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information, see the direct final rule published in the ''Rules and Regulations'' section of this issue of the **Federal Register**.

Authority: This rule is issued under the authority of sections 2002(a), 9004, and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

List of Subjects in 40 CFR Part 282

Environmental protection, Administrative practice and procedure, Hazardous substances, Incorporation by reference, State program approval, and Underground storage tanks.

Dated: August 7, 2019.

Gregory Sopkin,

Regional Administrator, EPA Region 8.

[FR Doc. 2019–17407 Filed 8–14–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

RIN 1250–AA09

Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP) is proposing regulations to clarify the scope and application of the religious exemption contained in section 204(c) of Executive Order 11246, as amended. The proposed clarifications to the religious exemption will help

organizations with Federal Government contracts and subcontracts and federally assisted construction contracts and subcontracts better understand their Executive Order 11246 obligations.

DATES: To be assured of consideration, comments must be received on or before September 16, 2019.

ADDRESSES: You may submit comments, identified by RIN 1250–AA09, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 693–1304 (for comments of six pages or less).
- *Mail:* Harvey D. Fort, Acting Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, Room C–3325, 200 Constitution Avenue NW, Washington, DC 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693–0104 (voice) or (202) 693–1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at Room C–3325, 200 Constitution Avenue NW, Washington, DC 20210, or via the internet at *http://www.regulations.gov.* Upon request, individuals who require assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this notice of proposed rulemaking (NPRM) will be made available in the following formats: Large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: Harvey D. Fort, Acting Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210. Telephone: (202) 693–0104 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

Executive Summary

On July 2, 1964, President Lyndon B. Johnson signed the landmark Civil Rights Act of 1964. *See* Public Law 88–352, 78 Stat. 241. This legislation prohibited discrimination on various grounds in many of the most important aspects of civic life. Its Title VII extended these protections to employment opportunity, prohibiting discrimination on the basis of race, color, religion, sex, or national origin. In Title VII, Congress also provided a critical accommodation for religious employers. Congress permitted religious employers to take religion into account for employees performing religious activities: ''This title shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities. . . .'' *See* sec. 702(a), Public Law 88–352, 78 Stat. 255 (codified as amended at 42 U.S.C. 2000e–1(a)). Congress provided a similar exemption for religious educational institutions. *See* sec. 703(e)(2), Public Law 88–352, 78 Stat. 256 (codified at 42 U.S.C. 2000e–2(e)(2)).

Title VII's protections for religious organizations were expanded by Congress in 1972. Congress added a broad definition of ''religion'': ''The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.'' Equal Employment Opportunity Act of 1972, sec. 2(7), Public Law 92–261, 86 Stat. 103 (codified at 42 U.S.C. 2000e(j)). Congress also expanded the religious exemption in section 702 of Title VII and added educational institutions to the list of those eligible for exemption. In addition, Congress broadened the scope of the section 702 exemption to cover not just religious activities, but all activities of a religious organization: ''This title [VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.'' Sec. 3, Public Law 92–261, 86 Stat. 104 (codified at 42 U.S.C. 2000e–1(a)). This expansion of the religious exemption to all activities of religious organizations was upheld against an Establishment Clause challenge unanimously [1] by the Supreme Court. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos,* 483 U.S. 327, 330 (1987).

One year after President Johnson signed the Civil Rights Act, he signed Executive Order 11246, requiring equal employment opportunity in federal government contracting. The order mandated that all government contracts include a provision stating that ''[t]he contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.'' Sec. 202(1), E.O. 11246, 30 FR 12319, 12320 (Sept. 28, 1965). Two years later, President Johnson expressly acknowledged Title VII of the Civil Rights Act when expanding Executive Order 11246 to prohibit, as does Title VII, discrimination on the bases of sex and religion. *See* sec. 3, E.O. 11375, 32 FR 14303 (Oct. 17, 1967). In 1978, the responsibilities for enforcing Executive Order 11246 were consolidated in DOL. *See* E.O. 12086, 43 FR 46501 (Oct. 5, 1978). In its implementing regulations, DOL imported Title VII's exemption for religious educational institutions. *See* 43 FR 49240, 49243 (Oct. 20, 1978) (now codified at 41 CFR 60–1.5(a)(6)); *cf.* 42 U.S.C. 2000e–2(e)(2). Finally, in 2002, President George W. Bush amended the executive order by expressly importing Title VII's exemption for religious organizations, which likewise has since been implemented by DOL's regulations. *See* sec. 4, E.O. 13279, 67 FR 77143 (Dec. 12, 2002); 68 FR 56392 (Sept. 30, 2003) (codified at 41 CFR 60–1.5(a)(5)); *cf.* 42 U.S.C. 2000e–1(a).

Because the exemption administered by OFCCP springs directly from the Title VII exemption, it should be given a parallel interpretation, consistent with the Supreme Court's repeated counsel that the decision to borrow statutory text in a new statute is a ''strong indication that the two statutes should be interpreted pari passu.'' *Northcross* v. *Bd. of Educ. of Memphis City Sch.,* 412 U.S. 427, 428 (1973) (per curiam). OFCCP generally interprets the nondiscrimination provisions of Executive Order 11246 consistent with the principles of Title VII. There has been some variation among federal circuit courts in interpreting the scope and application of the Title VII religious exemption. And many of the relevant court opinions predate the recent Supreme Court decisions and executive orders discussed below. In this proposed rule, OFCCP has sought to follow the principles articulated by these recent decisions and orders, and has interpreted the circuit-level case law in light of them. OFCCP draws on Title

[1] Justice White wrote the majority opinion for five justices. Justices O'Connor, Blackmun, and Brennan (with Justice Marshall joining) wrote opinions concurring in the judgment.

VII case law regarding religious employers because of its persuasiveness on issues in common with federal contractor issues arising under Executive Order 11246.

These recent Supreme Court decisions have addressed the freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the U.S. Constitution and federal law. *See, e.g., Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1731 (2018) (government violates the Free Exercise Clause of the First Amendment when its decisions are based on hostility to religion or a religious viewpoint); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2022 (2017) (government violates the Free Exercise Clause of the First Amendment when it conditions a generally available public benefit on an entity's giving up its religious character, unless that condition withstands the strictest scrutiny); *Burwell* v. *Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2775 (2014) (the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 565 U.S. 171, 196 (2012) (the ministerial exception, grounded in the Establishment and Free Exercise clauses of the First Amendment, bars an employment-discrimination suit brought on behalf of a teacher against the religious school for which she worked). Although these decisions are not specific to the federal government's regulation of contractors, they have reminded the federal government of its duty to protect religious exercise—and not to impede it. Recent executive orders have done the same. *See* E.O. 13831; E.O. 13798, 82 FR 21675 (May 9, 2017).

Some religious organizations have previously provided feedback to OFCCP that they were reluctant to participate as federal contractors because of uncertainty regarding the scope of the religious exemption contained in section 204(c) of Executive Order 11246 and codified in OFCCP's regulations. This proposal is intended to provide clarity regarding the scope and application of the religious exemption consistent with the legal developments discussed above by proposing definitions of key terms in 41 CFR 60–1.3 and a rule of construction in 41 CFR 60–1.5. Among other changes, this proposal is intended to make clear that the Executive Order 11246 religious exemption covers not just churches but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose. It is also intended to make clear that religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases. In addition, consistent with the administration policy to enforce federal law's robust protections for religious freedom, the proposed rule states that it should be construed to provide the broadest protection of religious exercise permitted by the Constitution and other laws. While only a subset of contractors and would-be contractors may wish to seek this exemption, the Supreme Court, Congress, and the President have each affirmed the importance of protecting religious liberty for those organizations who wish to exercise it.

Section-by-Section Discussion of Proposal

Section 60–1.3 Definitions

OFCCP proposes to add definitions of the following five terms, appearing in alphabetical order, to the list of definitions in 41 CFR 60–1.3: *Exercise of religion; Particular religion; Religion; Religious corporation, association, educational institution, or society;* and *Sincere.* These definitions are interrelated and are therefore discussed below in the order in which they build on one another.

OFCCP proposes defining *Religion* to provide that the term is not limited to religious belief but also includes all aspects of religious observance and practice. The proposed definition is identical to the primary definition of ''religion'' in Title VII: ''The term 'religion' includes all aspects of religious observance and practice, as well as belief. . . .'' 42 U.S.C. 2000e(j). The proposed definition omits the second portion of the Title VII definition, which refers to an employer's accommodation of an employee's religious observance or practice, because that is redundant with OFCCP's existing regulations. OFCCP's regulations at 41 CFR part 60–50, Guidelines on Discrimination Because of Religion or National Origin, contain robust religious protections for employees, including accommodation language substantially the same as that in the portion of the Title VII definition omitted here. *Compare* 42 U.S.C. 2000e(j) *with* 41 CFR 60–50.3. Those provisions continue to govern contractors' obligations to accommodate employees' and potential employees' religious observance and practice.

The definition of *Religion* proposed here has been used by other agencies. It would be identical to the definition used by the Department of Justice in grant regulations implementing section 815(c) of the Justice System Improvement Act of 1979. *See* 28 CFR 42.202(m). The Small Business Administration has used the same definition as well in its grant regulations. *See* 13 CFR 113.2(c).

Building on the proposed definition of *Religion,* OFCCP proposes to define *Particular religion* to clarify that the religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor. This proposed definition flows directly from the broad definition of *Religion,* discussed above, to include all aspects of religious belief, observance, and practice as understood by the employer. It is also consistent with Title VII case law holding that ''the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.'' *Little* v. *Wuerl,* 929 F.2d 944, 951 (3d Cir. 1991); *see also, e.g., Kennedy* v. *St. Joseph's Ministries, Inc.,* 657 F.3d 189, 194 (4th Cir. 2011) (''Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.' '' (quoting *Little,* 929 F.2d at 951)); *Hall* v. *Baptist Mem'l Health Care Corp.,* 215 F.3d 618, 624 (6th Cir. 2000) (''The decision to employ individuals 'of a particular religion' under [42 U.S.C.] § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.'' (citing, inter alia, *Little,* 929 F.2d at 951)); *Killinger* v. *Samford Univ.,* 113 F.3d 196, 200 (11th Cir. 1997) (''[T]he exemption [in 42 U.S.C. 2000e–1(a)] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities.'').

This approach, which recognizes contractors' exercise of religion, is also consistent with Supreme Court decisions emphasizing that

''condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.'' *Trinity Lutheran,* 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel* v. *Paty,* 435 U.S. 618, 626 (1978) (plurality opinion)). These decisions naturally extend to include the right to compete on a level playing field for federal government contracts. *See id.* (government burdens religious exercise when it so conditions ''a benefit or privilege,'' ''eligibility for office,'' ''a gratuitous benefit,'' or the ability ''to compete with secular organizations for a grant'' (quoted sources omitted)). *Accord* sec. 1, E.O. 13831 (the executive branch's policy is to allow ''faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . contracts . . . and other Federal funding opportunities'').

OFCCP believes this clarification will assist contractors who have looked for guidance on the religious exemption in OFCCP's past statements. These past statements may have suggested that the exemption permits qualifying organizations only to prefer members of their own faith in their employment practices. *See, e.g.,* OFCCP, Compliance Webinar (Mar. 25, 2015), *https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf* (''This exemption allows religious organizations to hire only members of their own faith.''). OFCCP based such statements on guidance from the Equal Employment Opportunity Commission (EEOC), the agency primarily responsible for enforcing Title VII. *See, e.g.,* EEOC, EEOC Compliance Manual sec. 12–I.C.1 (July 22, 2008) (''Under Title VII, religious organizations are permitted to give employment preference to members of their own religion.''). However, with this rulemaking, OFCCP clarifies that it applies the principles discussed above, permitting qualifying employers to take religion—defined more broadly than simply preferring coreligionists—into account in their employment decisions. The case law makes clear that qualifying employers ''need not enforce an across-the-board policy of hiring only coreligionists.'' *LeBoon* v. *Lancaster Jewish Cmty. Ctr. Ass'n,* 503 F.3d 217, 230 (3d Cir. 2007); *Killinger,* 113 F.3d at 199–200 (''We are also aware of no requirement that a religious educational institution engage in a strict policy of religious discrimination—such as always preferring Baptists in employment decisions—to be entitled to the exemption.'').

As is made clear by the text of section 204(c) of Executive Order 11246 and the corresponding regulation at 41 CFR 60–1.5(a)(5), the religious exemption itself does not exempt or excuse a contractor from complying with other applicable requirements. Although Title VII does not contain a corresponding proviso, courts have generally interpreted the Title VII religious exemption to be similarly precise, so that religious employers are not exempted from Title VII's other provisions protecting employees. *See, e.g., Kennedy,* 657 F.3d at 192; *Rayburn* v. *Gen. Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1166 (4th Cir. 1985); *cf. Hobby Lobby,* 134 S. Ct. at 2783 (rejecting ''the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction''); *Bob Jones Univ.* v. *United States,* 461 U.S. 574, 604 (1983) (''the Government has a fundamental, overriding interest in eradicating racial discrimination in education''). Thus, an employer may not, under Title VII or Executive Order 11246, invoke religion to discriminate on other bases protected by law.

Thus, when evaluating allegations of discrimination on bases other than religion against employers that are entitled to the Title VII religious exemption, courts carefully evaluate whether the employment action was permissibly based on religion. The particulars vary. Some courts have invoked the burden-shifting rules of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), to determine whether a religious employer's invocation of religion (or a religiously motivated policy) in making an employment decision was genuine or, instead, was merely a pretext for discrimination prohibited under Title VII. *See Cline* v. *Catholic Diocese of Toledo,* 206 F.3d 651 (6th Cir. 2000); *Boyd* v. *Harding Academy of Memphis, Inc.,* 88 F.3d 410 (6th Cir. 1996); *cf. Geary* v. *Visitation of Blessed Virgin Mary Parish Sch.,* 7 F.3d 324 (3d Cir. 1993) (applying *McDonnell Douglas* in assessing religious-exemption defense to claim under the Age Discrimination in Employment Act). At least one other case has noted that ''[o]ne way'' to show discriminatory intent using circumstantial evidence ''is through the burden-shifting framework set out in *McDonnell Douglas,*'' but another way is to ''show enough non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination.'' *Hamilton* v. *Southland Christian Sch., Inc.,* 680 F.3d 1316, 1320 (11th Cir. 2012).

Other decisions have not used the *McDonnell Douglas* framework, particularly when an inquiry into purported pretext would risk entangling the court in the internal affairs of a religious organization or require a court or jury to assess religious doctrine or the relative weight of religious considerations. *See Geary,* 7 F.3d at 330–31 (discussing cases). Depending on the circumstances, such an inquiry by a court or an agency could impermissibly infringe on the First Amendment rights of the employer.

This arises most prominently in the context of the ministerial exception, a judicially recognized exemption grounded in the First Amendment from employment-discrimination laws for decisions regarding employees who ''minister to the faithful.'' *Hosanna Tabor,* 565 U.S. at 189. The exemption ''is not limited to the head of a religious congregation,'' nor subject to ''a rigid formula for deciding when an employee qualifies as a minister.'' *Id.* at 190. ''The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.'' *Id.* at 189. The ministerial exception thus bars ''an employment discrimination suit brought on behalf of a minister.'' *Id.* In such a situation, it is dispositive that the employee is a minister; there is no further inquiry into the employer's motive. *See id.* at 706 (''[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause . . . and the Establishment Clause''); *see, e.g., Rayburn,* 772 F.2d at 1169 (''In 'quintessentially religious' matters, the free exercise clause of the First Amendment protects the act of decision rather than a motivation behind it.'' (quoting *Serbian E. Orthodox Diocese for U.S.* of *Am. & Canada* v. *Milivojevich,* 426 U.S. 696, 720 (1976))).

Courts also apply a different framework when an employer makes an employment decision based on religious criteria, yet the employee disputes the religious criteria. In those situations, courts have stated that ''if a religious institution . . . presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination.'' *Little,* 929 F.2d at 948 (quoting *EEOC* v. *Miss. Coll.,* 626 F.2d 477, 485 (5th Cir. 1980)). Courts have noted the constitutional dangers of ''choos[ing] between parties' competing

religious visions'' and entangling themselves in deciding whether the employer or the employee has the better reading of doctrine, or which tenets an employee must follow or believe to remain in employment. *Geary,* 7 F.3d at 330; *see Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.,* 450 F.3d 130, 141 (3d Cir. 2006) (''While it is true that the plaintiff in *Little* styled her allegation as one of religious discrimination whereas [this plaintiff] alleges gender discrimination, we do not believe the difference is significant in terms of whether serious constitutional questions are raised by applying Title VII. Comparing [plaintiff] to other Ursuline employees who have committed 'offenses' against Catholic doctrine would require us to engage in just the type of analysis specifically foreclosed by *Little.*''); *Little,* 929 F.2d at 949 (''In this case, the inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts.''); *Maguire* v. *Marquette Univ.,* 627 F. Supp. 1499, 1507 (E.D. Wisc. 1986) (''Despite [plaintiff's] protests that she is a Catholic, 'of a particular religion,' the determination of who fits into that category is for religious authorities and not for the government to decide.''), *aff'd in part, vacated in part on other grounds,* 814 F.2d 1213 (7th Cir. 1987).

Finally, there may be other instances where an inquiry by a court or an agency into employment practices otherwise threatens First Amendment rights. *See DeMarco* v. *Holy Cross High Sch.,* 4 F.3d 166, 172 (2d Cir. 1993) (''There may be cases involving lay employees in which the relationship between employee and employer is so pervasively religious that it is impossible to engage in an age-discrimination inquiry without serious risk of offending the Establishment Clause.''). These turn on their individual facts, and OFCCP does not attempt to enumerate such situations here.

With the foundation of those proposed definitions, the next term in the present proposed regulation is *Religious corporation, association, educational institution, or society.* This term is used in Executive Order 11246 section 204(c) and 41 CFR 60–1.5(a)(5), and it is the same term used in the Title VII religious exemption at 42 U.S.C. 2000e–1(a). The proposed definition applies to a corporation, association, educational institution, society, school, college, university, or institution of learning. The words ''school, college, university, or institution of learning'' also appear in 41 CFR 60–1.5(a)(6), the exemption for religious educational organizations. They are included in the proposed definition to make clear that the definition's listing of ''educational institution'' includes schools, colleges, universities, and institutions of learning. Depending on the facts, an educational organization may qualify under the § 60–1.5(a)(5) exemption, the § 60–1.5(a)(6) exemption, both, or neither.

The proposed definition of *Religious corporation, association, educational institution, or society* seeks to clarify which organizations can qualify for the religious exemption. Federal circuit courts have applied a confusing variety of tests for doing so under Title VII. In 2007, the Third Circuit noted:

> Over the years, courts have looked at the following factors: (1) Whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

LeBoon, 503 F.3d at 226 (citing *Killinger,* 113 F.3d 196; *EEOC* v. *Kamehameha Sch./Bishop Estate,* 990 F.2d 458 (9th Cir. 1993); *EEOC* v. *Townley Eng'g & Mfg. Co.,* 859 F.2d 610 (9th Cir. 1988); *Miss. Coll.,* 626 F.2d 477). In contrast, the Ninth Circuit has more recently held that:

> an entity is eligible for the [Title VII] section 2000e–1 exemption, at least, if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.

Spencer v. *World Vision, Inc.,* 633 F.3d 723, 724 (9th Cir. 2011) (per curiam).

The *World Vision* court reasoned that an approach like that exemplified in *LeBoon,* in which the court assesses the religiosity of an organization's various characteristics, can lead the court into a ''constitutional minefield.'' *Id.* at 730 (O'Scannlain, J., concurring); *see also id.* at 741 (Kleinfeld, J., concurring) (concurring in this part of Judge O'Scannlain's opinion). When the parties dispute whether a particular practice, position, or purpose has religious meaning, ''[t]he very act of making that determination . . . runs counter to the 'core of the constitutional guarantee against religious establishment.' '' *Id.* at 731 (O'Scannlain, J., concurring) (quoting *New York* v. *Cathedral Acad.,* 434 U.S. 125, 133 (1977)). ''[I]nquiry into . . . religious views . . . is not only unnecessary but also offensive. It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs.'' *Id.* (alterations in original) (quoting *Mitchell* v. *Helms,* 530 U.S. 793, 828 (2000) (plurality opinion) (internal quotation marks omitted)).

The *World Vision* court had other reasons for doubting *LeBoon*'s inquiries into the depths of religious practice. It noted that courts are ''ill-equipped to determine whether an activity or service is religious or secular in nature.'' *Id.* at 732; *see also id.* at 732 n.8. Favoring institutions with denominational affiliations could lead a court or an agency to discriminate among religions, which could also violate the First Amendment's Establishment Clause. *See id.* at 732 & n.9; *see also id.* at 738 & n.19 (Judge O'Scannlain pointing out that requiring the restriction of membership or benefits to coreligionists as a condition of Title VII exemption could similarly cause inter-religion discrimination that violates the Establishment Clause). And finally, a ''multifactor test,'' like *LeBoon's,* ''does not work well because it is inherently too indeterminate and subjective.'' *Id.* at 741 (Kleinfeld, J., concurring).

Although the *World Vision* majority agreed on those principles, its two judges differed slightly on the test to be used. Judge O'Scannlain put forward a three-part test: That ''a nonprofit entity qualifies for the [Title VII religious] exemption if it establishes that it (1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), (2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and (3) holds itself out to the public as religious.'' *Id.* at 734 (O'Scannlain, J., concurring) (footnote omitted). His test drew upon similar formulations by the D.C. Circuit and by then-Judge Breyer on the First Circuit rejecting, due to Establishment Clause concerns, National Labor Relations Board assertions of jurisdiction over religious educational institutions. *See id.* (citing *Univ. of Great Falls* v. *NLRB,* 278 F.3d 1335,

1343 (D.C. Cir. 2002); *Universidad Cent. de Bayamon* v. *NLRB,* 793 F.2d 383, 399–400, 403 (1st Cir. 1985) (en banc) (Breyer, J.)). Judge Kleinfeld would not have restricted the exemption to nonprofit entities but would have included, as an additional factor, that the entity charge only nominal fees for its goods and services. *See id.* at 746–48 (Kleinfeld, J., concurring). *World Vision's* controlling per curiam opinion thus put forward a four-part test: That an entity, to qualify for the religious exemption, must be ''organized for a religious purpose, . . . [be] engaged primarily in carrying out that religious purpose, . . . hold[ ] itself out to the public as an entity for carrying out that religious purpose, and . . . not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.'' *Id.* at 724 (per curiam).

OFCCP agrees with the *World Vision* court's reasoning that it would be inappropriate and constitutionally suspect for OFCCP to contradict a claim, found to be sincere,[2] that a particular activity or purpose has religious meaning. *See World Vision,* 633 F.3d at 733 (O'Scannlain, J., concurring) (''[W]here there is no dispute that a particular activity or purpose is religious in nature, we may rely on the parties' characterization. In a case such as this, where the matter is hotly contested, however, we should stay our hand and rely on considerations that do not require us to engage in constitutionally precarious inquires.''). Earlier Title VII decisions illustrate the problems of doing so, drawing the government into a balancing of secular and religious characteristics, with no clear indicia of how heavily which characteristics should weigh or how much religiosity or secularity is needed to tip the balance toward one side or the other.

For example, the Third Circuit in *LeBoon* applied a balancing test to decide whether a Jewish community center qualified as a religious corporation, organization, or institution. *See* 503 F.3d at 221. The court noted the center's various religious and secular characteristics, including some that weighed on both sides: For example, the center '' 'espoused Jewish values' although 'the Jewish values it espoused are universal,' '' *id.* at 227 (quoting testimony from the center's corporate designee) (alterations omitted); rabbis from three local synagogues advised the center but were honorary, non-voting members; the center received financial support from a local Jewish federation, but most of its income came from programming services and rentals; several of its ''activities involved observance of the Jewish religious calendar, although these activities did not necessarily involve holy services,'' *id.* at 228; and the center ''kept a kosher kitchen, although non-kosher foods could be brought into the building,'' *id.*

A test that relies on the government—as opposed to the organization itself—identifying whether certain features of an organization, or its character as a whole, are religious or secular may require the comparison of things that may not be comparable, as demonstrated by the decisions above. It may, for example, invite inquiries that are aptly described as ''judging whether a particular line is longer than a particular rock is heavy.'' *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.,* 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Further, the Supreme Court has cautioned especially against judging the centrality of religious beliefs and, by extension, the centrality of religion in an organization:

> It is no more appropriate for judges to determine the ''centrality'' of religious beliefs before applying a ''compelling interest'' test in the free exercise field, than it would be for them to determine the ''importance'' of ideas before applying the ''compelling interest'' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is ''central'' to his personal faith?

Emp't Div., Dep't of Human Res. of Ore. v. *Smith,* 494 U.S. 872, 887 (1990), *superseded in other respects by* Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.* The Supreme Court continued: ''Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.'' *Id.* As the D.C. Circuit stated in *University of Great Falls,* a test that requires ascertaining an entity's ''substantial religious character'' or lack thereof ''boils down to 'is it *sufficiently* religious?' '' 278 F.3d at 1343. Such inquiries by government entities are highly suspect under the Establishment Clause. *See, e.g., Cathedral Acad.,* 434 U.S. at 133 (''The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment. . . .'').

The competing opinions in *World Vision* also underscore the problem of asking the government to identify the primary purpose of certain organizations as religious or secular. *See* 633 F.3d at 737 (O'Scannlain, J., concurring) (World Vision ''attempts to express its 'Christian witness . . . in holistic ways through . . . ministries of relief, development, advocacy and public awareness.' '') (alterations in original); *id.* at 747 (Kleinfeld, J., concurring) (''the idea [behind World Vision] is not merely foreign aid in poor countries, but what amounts to missionary work by making its service providers exemplars of Christian charity''). *But cf. id.* at 764 (Berzon, J., dissenting) (''World Vision's purpose and daily operations are defined by a wide range of humanitarian aid that is, on its face, secular.''). *Cf. also, e.g., St. Elizabeth Cmty. Hosp.* v. *NLRB,* 708 F.2d 1436, 1441 (9th Cir. 1983) (''St. Elizabeth does not have a substantial religious character. Its primary purpose, like that of any secular hospital, is rather humanitarian, devoted to medical care for the sick.'').

Consequently, in its definition of *Religious corporation, association, educational institution, or society,* OFCCP proposes to adopt the test set out in *World Vision,* with some modifications discussed below. Most important, as explained in *World Vision,* all the factors below are determined with reference to the contractor's own sincerely held view of its religious purposes and the religious meaning (or not) of its practices. *See World Vision,* 633 F.3d at 733 (O'Scannlain, J., concurring).

First, the contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor's only purpose. *Cf. Universidad Cent. de Bayamon,* 793 F.2d at 401 (no NLRB jurisdiction when, among other things, an educational institution's mission had ''admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education''). A religious purpose can be shown by articles of incorporation or other founding documents, but that is not the only type of evidence that can be used. *See World Vision,* 633 F.3d at 736 (O'Scannlain, J., concurring); *id.* at 745 (Kleinfeld, J., concurring) (noting that some religious entities have ''no corporate apparatus''). And finally, ''the decision whether an organization is 'religious' for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization.'' *Id.* at

[2] The issue of sincerity is discussed later in this preamble.

735–36 (O'Scannlain, J., concurring) (quoting *LeBoon,* 503 F.3d at 226–27) (internal quotation mark omitted).

Second, the contractor must hold itself out to the public as carrying out a religious purpose. Again here, ''religious purpose'' ''must be measured with reference to the particular religion identified by the contractor.'' *Id.* at 736. A contractor can satisfy this requirement in a variety of ways, including by evidence of a religious purpose on its website, publications, advertisements, letterhead, or other public-facing materials, or by affirming a religious purpose in response to inquiries from a member of the public or a government entity.

Third, the contractor must exercise religion consistent with, and in furtherance of, a religious purpose. Here too, ''religious purpose'' means religious as ''measured with reference to the particular religion identified by the contractor.'' *Id.* The test here is similar to that in Judge O'Scannlain's concurring opinion in *World Vision* rather than that in the per curiam opinion. *Cf. id.* at 734.

OFCCP proposes this approach because it offers simpler administration for OFCCP and clearer notice to contractors. While OFCCP generally follows Title VII case law, the agency is an enforcement body, not a court, and it has authority over federal contractors specifically, rather than employers generally. Those differences counsel in favor of OFCCP's proposed revision to this aspect of the *World Vision* test.

OFCCP's staff can easily and consistently apply the test as proposed. As discussed earlier, an inquiry into whether an entity is engaged ''primarily'' in religious activity invites the balancing of things that cannot be balanced in any consistent way. How much expressly religious instruction must a school require of its students to be primarily engaged in a religious purpose? *See Kamehameha,* 990 F.2d at 463–64. How much funding must an organization receive from an ecclesiastical organization to be primarily engaged in a religious purpose? *See Killinger,* 113 F.3d at 199. What percentage of an organization's controlling body or employees must be made up of a certain religion to be primarily engaged in a religious purpose? *See, e.g., Siegel* v. *Truett-McConnell Coll., Inc.,* 13 F. Supp. 2d 1335, 1341 (N.D. Ga. 1994).[3] These and similarly intractable questions have arisen repeatedly in cases involving the religious exemption. And those questions remain intractable despite courts' having the benefit of full adversarial presentation and development of the record, two conditions not present at the beginning of OFCCP reviews. Avoiding such difficult-to-draw lines would better promote consistency in OFCCP's administration and give field staff better guidance.

Likewise, the test as proposed would be clearer for contractors. OFCCP's power to regulate any private entity springs entirely from that entity's contracting with the federal government. *See* Sec. 201–202, E.O. 11246; 29 U.S.C. 793 (a)–(b); 38 U.S.C. 4212(a)(1)–(2); *see also* 48 CFR 52.222–26, –35, –36. Both contractors and the government have an interest in ensuring that the terms of their agreements are as clear as possible. As the discussion earlier makes apparent, a ''primarily engaged'' inquiry lacks the clarity that ought to prevail in contractual relations—organizations should understand the obligations they will take on before entering into a binding agreement with the government. *See generally Fed. Crop Ins. Co.* v. *Merill,* 332 U.S. 380 (1947) (contractors are bound to obligations imposed by law even when government agents, acting beyond their authority, say otherwise); *cf. Pennhurst State Sch. & Hosp.* v. *Halderman,* 451 U.S. 1, 17 (1981) (''There can, of course, be no knowing acceptance if a State is unaware of the conditions [on federal funds] or is unable to ascertain what is expected of it.''). This need for clear regulation is especially acute given that the contractual conditions enforced by OFCCP are animated in part by the government's economic interest in the efficient fulfillment of its contracts, for which clarity is critical. *See Contractors Ass'n of E. Pa.* v. *Sec'y of Labor,* 442 F.2d 159, 171 (3d Cir. 1971) (antidiscrimination requirements in federal procurement and federally assisted construction contracts go beyond ''merely . . . impos[ing] [the President's] notions of desirable social legislation''; they further the government's ''financial and completion interests''); *cf. UAW-Labor Emp't & Training Corp.* v. *Chao,* 325 F.3d 360, 366–67 (D.C. Cir. 2003); *AFL–CIO* v. *Kahn,* 618 F.2d 784, 792 (D.C. Cir. 1979).

For these same reasons of contractual clarity and efficiency of administration, OFCCP's proposed definition extends no further than the three components listed therein, which, if satisfied, entitle an organization to the religious exemption. They are intended to be stand-alone components and not factors guiding an ultimate inquiry into whether an organization is ''primarily religious'' or secular as a whole.

The regulatory text proposed here uses the phrase ''engages in exercise of religion'' rather than Judge O'Scannlain's phrase, ''engages in activity.'' *See World Vision,* 633 F.3d at 734 (O'Scannlain, J., concurring) (''engaged in activity consistent with, and in furtherance of, those religious purposes''). This change, along with accompanying definitions described next, has been made for clarity, since OFCCP is proposing regulatory text in the form of a definition rather than a judicial opinion-style narrative in which terms like ''activity'' can be explicated at length. No change in substantive meaning is intended. The phrasing proposed here, along with the other definitions, makes clear that the activities furthering a religious purpose must be themselves of the kind that the contractor itself views as religious. OFCCP believes this formulation gives due regard to religious contractors' sincere religious exercise by recognizing that such organizations ascribe deep religious significance to their humanitarian, healing, charitable, and educational work. With that said, OFCCP does not see a scenario in which an entity's single religiously motivated employment action, standing alone, would be sufficient to satisfy this element of the definition, if that were the only religiously motivated action the entity could identify.

OFCCP does not propose to adopt the fourth factor set out in *World Vision,* that the entity seeking exemption ''not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.'' *Id.* at 724 (per curiam). OFCCP believes that the adoption of this factor could yield unexpected results and that it is difficult to square with other case law. First, there are many religious entities that engage ''primarily or substantially in the exchange of goods or services for

[3] *See Siegel,* 13 F. Supp. 2d at 1341 (''The religious affiliation of full-time faculty on the main campus were listed as follows: Baptist 23, Episcopalian 4, Methodist 4, Catholic 2, Congregational 1, and Evangelical Free Church 1. Adjunct faculty on the main campus were listed as follows: Baptist 11, Christians 5, Lutheran 1, Methodist 4. Thus, 66% of full-time faculty and 52% of part-time faculty on the main campus, for the period 1988–1993, were Baptist; 100% were Christians. The faculty at the satellite campuses was identified as part-time and the religious breakdown was listed as follows: Baptist 179, Methodist 73, Episcopal 26, Presbyterian 52, Unitarian 6, Pentecostal 2, Catholic 27, Independent 1, Christian 7, United Church of Christ 2, Jehovah''s Witness 1, Church of the Nazarene 1, Church Member 1, Assembly of God 6, Seventh Day Adventist 3, Non-Denominational 3, Unity Christian 1, Evangelical Free Church 1, Protestant 4, Congregational 1, Church of God 1, Church of Christ 3, Anglican 1, Lutheran 4, and Mormon 1.'').

money beyond nominal amounts.'' For instance, religious entities may operate discount retail stores or otherwise engage in the marketplace.[4] Religiously oriented hospitals, senior-living facilities, and hospices may also engage in substantial and frequent financial exchanges.[5] A test that makes financial exchange a dispositive factor may sweep more broadly than Executive Order 11246 intended, especially when considering that Executive Order 11246—and its religious exemption—pertain to government contracting, an economic activity in which most participants are for-profit entities.[6]

Second, and perhaps for this reason, this factor has not been determinative for other courts. An entity's for-profit or nonprofit status, or the volume or amount of its financial transactions, may be a factor, but not necessarily a dispositive one, under the *LeBoon* test. *See* 503 F.3d at 227 (''[N]ot all factors will be relevant in all cases, and the weight given each factor may vary from case to case.''). Likewise, in an earlier Ninth Circuit decision involving a claim for religious exemption brought by a for-profit organization, the court did not hold that the organization's for-profit status alone disqualified it from exemption. *See Townley,* 859 F.2d at 619.[7]

Although the Supreme Court considered and upheld the Title VII religious exemption against Establishment Clause challenge as applied ''to the secular nonprofit activities of religious organizations,'' *Amos,* 483 U.S. at 330, the Supreme Court's more recent decision in *Hobby Lobby* counsels against a stark distinction between for-profit and nonprofit corporations in this context. The Supreme Court wrote, ''No conceivable definition of the term ['person'] includes natural persons and nonprofit corporations, but not for-profit corporations.'' *Hobby Lobby,* 134 S. Ct. at 2769. *Hobby Lobby* forcefully rejected the argument that only nonprofit corporations can exercise religion. *See id.* at 2769–75. In *Hobby Lobby,* the Supreme Court observed that furthering the religious freedom of corporations, whether for-profit or nonprofit, furthers individual religious freedom. *See id.* at 2769. The Supreme Court found no reason to distinguish between for-profit sole proprietorships—which had brought Free Exercise claims before the Supreme Court in earlier cases—and for-profit closely held corporations. *See id.* at 2769–70. And the Supreme Court noted that every U.S. jurisdiction permits corporations to be formed ''for any lawful purpose or business,'' *id.* at 2771 (quoted source omitted), including a religious one: ''For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. . . . If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.'' *Id.* An argument to the contrary ''flies in the face of modern corporate law.'' *Id.* at 2770. *Hobby Lobby* answered the question whether a for-profit closely held corporation can exercise religion, and its affirmative answer supports OFCCP's proposal not to disqualify organizations from the religious exemption on the basis of their for-profit or nonprofit status.[8] However, for the same reasons discussed by the Supreme Court in *Hobby Lobby* with respect to the application of RFRA to for-profit entities, OFCCP does not anticipate that large, publicly held corporations would seek exemption or fall within the proposed definition. *See id.* at 2774 (''the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable'').

With the definition of *Religious corporation, association, educational institution, or society* set forth in this proposal, OFCCP intends to clarify the scope of the exemption and to ''rely on considerations that do not require [it] to engage in constitutionally precarious inquiries.'' *World Vision,* 633 F.3d at 733 (O'Scannlain, J., concurring). Accordingly, the proposed definition also identifies a number of features that are not required for OFCCP to determine that a contractor is religious. With this proposed definition, OFCCP intends to identify contractors that qualify for the exemption without engaging in an analysis that is inherently subjective and indeterminate, outside its competence, susceptible to discrimination among religions, or prone to entanglement with religious activity. *See, e.g., Mitchell,* 530 U.S. at 828 (plurality opinion); *Colorado Christian Univ.,* 534 F.3d at 1261–62; *Univ. of Great Falls,* 278 F.3d at 1342–43.

OFCCP proposes to define *Exercise of religion*—which appears in the proposed definition of *Religious corporation, association, educational institution, or society* just discussed—as the term is defined for purposes of RFRA. RFRA, in 42 U.S.C. 2000bb–2(4), defines ''exercise of religion'' to mean ''religious exercise'' as defined in the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc–5(7). RLUIPA, in turn, defines ''religious exercise'' as including ''any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'' This definition is well-established and prevents the kinds of problematic inquiries into the ''centrality'' of a religious practice highlighted above.

The proposed definition of *Exercise of religion* also clarifies that the touchstone for religious exercise is sincerity, and therefore an exercise of religion must only be sincere. As the Supreme Court has repeatedly counseled, ''religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'' *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 531 (1993) (quoting *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 714 (1981)) (internal quotation marks omitted); *see also, e.g., United States* v. *Ballard,* 322 U.S. 78, 86 (1944) (''[People] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.''). To merit protection, religious beliefs must simply be ''sincerely held.'' *E.g., Frazee* v. *Ill. Dept. of Emp't Sec.,* 489 U.S. 829, 834 (1989); *United States* v.

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[4] *See* Brian J. Grim and Melissa E. Grim, ''The Socio-economic Contribution of Religion to American Society: An Empirical Analysis,'' Interdisciplinary Journal of Research on Religion, vol. 12 (2016), article 3, pp. 10, 24, *http://www.religjournal.com/pdf/ijrr12003.pdf.*

[5] *See id.* at 7.

[6] *See* General Services Administration, System for Award Management, Advanced Search—Entity (listing 356,265 active for-profit entities and 85,484 nonprofit and/or other-not-for-profit entities), sam.gov/SAM/pages/public/searchRecords/advancedEMRSearch.jsf (last accessed Apr. 17, 2019).

[7] Judge O'Scannlain's proposed test in *World Vision* included the entity's nonprofit status as an ''initial consideration'' because ''the fact that that an entity is structured as a nonprofit provides strong evidence that its purpose is purely nonpecuniary.'' 633 F.3d at 734–35 (O'Scannlain, J., concurring). However, Judge Kleinfeld believed that there was ''not much congruence between nonprofit status and the free exercise of religion, or any eleemosynary purpose.'' *Id.* at 745 (Kleinfeld, J. concurring). *World Vision* was issued before the Supreme Court's decision in *Hobby Lobby,* which is discussed next.

[8] The *Hobby Lobby* Court elsewhere noted the assertion of the Department of Health and Human Services (HHS) that ''statutes like Title VII . . . expressly exempt churches and other nonprofit religious institutions but not for-profit corporations.'' 134 S. Ct. at 2773. The Court did not address whether HHS's characterization (which itself relied in part on *World Vision*) was correct. The Court simply stated that ''[i]f Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.'' *Id.* at 2773–74.

Seeger, 380 U.S. 163, 185 (1965). Courts have appropriately relied on the ''sincerely held'' standard when evaluating religious discrimination claims in the Title VII context. *See, e.g., Davis* v. *Fort Bend Cnty.,* 765 F.3d 480, 485 (5th Cir. 2014), *on remand,* No. 4:12–CV–131, 2016 WL 4479527 (S.D. Tex. Aug. 24, 2016), *rev'd,* 893 F.3d 300 (5th Cir. 2018), *cert. granted,* No. 18–525 (U.S. Jan. 11, 2019); *Philbrook* v. *Ansonia Bd. of Educ.,* 757 F.2d 476, 481–82 (2d Cir. 1985), *aff'd on other grounds,* 479 U.S. 60 (1986); *Redmond* v. *GAF Corp.,* 574 F.2d 897, 901 n.12 (7th Cir. 1978). In such cases, a court must ''vigilantly separate the issue of sincerity from the factfinder's perception of the religious nature of the [employee's] beliefs.'' *EEOC* v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados,* 279 F.3d 49, 57 (1st Cir. 2002) (alteration in original) (quoting *Patrick* v. *LeFevre,* 745 F.2d 153, 157 (2d Cir. 1984)) (internal quotation mark omitted).

These principles are incorporated in the proposed definition of *Sincere.* In line with court precedent and OFCCP's principles, the critical inquiry for OFCCP is whether a particular employment decision was in fact a sincere exercise of religion. OFCCP, like courts, ''merely asks whether a sincerely held religious belief actually motivated the institution's actions.'' *Geary,* 7 F.3d at 330. The religious organization's burden ''to explain is considerably lighter than in a non-religious employer case,'' since the organization, ''at most, is called upon to explain the application of its own doctrines.'' *Id.* ''Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim.'' *Id.; see Seeger,* 380 U.S. at 185 (whether a belief is ''truly held'' is ''a question of fact''). The sincerity of religious exercise is often undisputed or stipulated. *See, e.g., Hobby Lobby,* 134 S. Ct. at 2774 (''The companies in the case before us are closely held corporations, each owned and controlled by a single family, and no one has disputed the sincerity of their religious beliefs.''); *Holt* v. *Hobbs,* 135 S. Ct. 853, 862 (2015) (''Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.'').

In assessing sincerity, OFCCP takes into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons, although absolute uniformity is not required. *See Kennedy,* 657 F.3d at 194 (noting that the Title VII religious exemption permits religious organizations to ''consider some attempt at compromise''); *LeBoon,* 503 F.3d at 229 (''religious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection''); *see also Killinger,* 113 F.3d at 199–200. OFCCP will also evaluate any factors that indicate an insincere sham, such as acting ''in a manner inconsistent with that belief'' or ''evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.'' *Philbrook,* 757 F.2d at 482 (quoting *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Barber,* 650 F.2d 430, 441 (2d Cir. 1981)) (internal quotation mark omitted); *cf., e.g., Hobby Lobby,* 134 S. Ct. at 2774 n.28 (''To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.''); *United States* v. *Quaintance,* 608 F.3d 717, 724 (10th Cir. 2010) (Gorsuch, J.) (''the record contains additional, overwhelming contrary evidence that the [defendants] were running a commercial marijuana business with a religious front'').

OFCCP likewise acknowledges the constitutional and prudential limitations on its inquiry that may come into play when religious matters are involved. OFCCP respects and will apply the ministerial exception. OFCCP will not compare religious doctrines or practices in evaluating sincerity. *See, e.g., Curay-Cramer,* 450 F.3d at 139 (comparing ''the relative severity of [religious] offenses . . . would violate the First Amendment''); *Hall,* 215 F.3d at 626 (''the First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices''). Nor will OFCCP require contractors to adhere to strict, uniform procedures to demonstrate sincerity. *See Kennedy,* 657 F.3d at 194; *LeBoon,* 503 F.3d at 229. And where ''it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision,'' then OFCCP will apply the Executive Order 11246 religious exemption. *Curay-Cramer,* 450 F.3d at 141.

Finally, OFCCP proposes to apply a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion.[9] Specifically, where a contractor that is entitled to the religious exemption claims that its challenged employment action was based on religion, OFCCP will find a violation of Executive Order 11246 only if it can prove by a preponderance of the evidence that a protected characteristic other than religion was a but-for cause of the adverse action. *See Univ. of Texas Sw. Med. Ctr.* v. *Nassar,* 570 U.S. 338, 362–63 (2013); *Gross* v. *FBL Fin. Servs., Inc.,* 557 U.S. 167, 180 (2009). OFCCP believes this approach is necessary in the context in which a religious organization, acting on a sincerely held belief, takes adverse action against an employee on the basis of the employee's religion.[10]

Section 60–1.5 Exemptions

This rule proposes to add paragraph (e) to 41 CFR 60–1.5 to establish a rule of construction for subpart A of 41 CFR part 60–1 that provides for the broadest protection of religious exercise permitted by the Constitution and laws including RFRA. This rule of construction is adapted from RLUIPA, 42 U.S.C. 2000cc–3(g). Significantly, RFRA applies to all government conduct, not just to legislation or regulation. 42 U.S.C. 2000bb–1. The proposed paragraph (e) is clarifying, since the Constitution and federal law, including RFRA, already bind OFCCP.

Regulatory Procedures

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

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

[9] OFCCP requests comment on whether this causation standard should be included in any final regulatory text.

[10] OFCCP recognizes that in prior notice-and-comment rulemaking implementing E.O. 13665 (which amended E.O. 11246 to include pay transparency nondiscrimination), OFCCP rejected comments stating that a but-for causation standard was required; OFCCP adopted the motivating factor framework as expressed in the Title VII post-1991 Civil Rights Act for analyzing causation. *See* 80 FR 54934, 54944–46 (Sept. 11, 2015). Where a religious organization takes adverse action on the basis of an employee's religion, however, OFCCP believes that application of the motivating factor framework could require OFCCP to enter the Constitutionally-suspect minefield of having to evaluate the nature of a sincerely held belief, which could result in the inappropriate encroachment upon the organization's religious integrity. *See, e.g., World Vision,* 633 F.3d at 733 (O'Scannlain, J., concurring).

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

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This proposed rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. The Office of Management and Budget has reviewed the proposed rule. The designation, under Executive Order 13771, of any finalization of this proposed rule will be informed by feedback received during the public comment period.

The Need for the Regulation

The proposed regulatory changes are needed to provide clarity regarding the scope and application of the Executive Order 11246 religious exemption consistent with recent legal developments. The proposed rule is designed to clarify the requirements of the religious exemption, thus giving contractors and potential contractors better information and more predictability for ordering their affairs.

Discussion of Impacts

In this section, the Department presents a summary of the costs associated with the new definitions proposed in § 60–1.3 and the new rule of construction proposed in § 60–1.5. The Department determined that there are approximately 420,000 entities registered in the General Services Administration's System for Award Management (SAM) database.[11] Entities registered in the SAM database consist of contractor firms, and other entities such as state and local governments and other organizations that are interested in federal contracting opportunities, and other forms of federal financial assistance. The total number of entities in the SAM database fluctuates and is posted on a monthly basis. The current database includes approximately 420,000 entities. Thus, the Department determines that 420,000 entities are a reasonable representation of the number of entities that may or may not be affected by the proposed rule.[12] This SAM number, however, likely results in an overestimation for two reasons: The system captures firms that do not meet the jurisdictional dollar thresholds for the three laws that OFCCP enforces, and it captures contractor firms for work performed outside the United States by individuals hired outside the United States, over which OFCCP does not have authority. On the other hand, there is at least one reason to believe that the data may result in an underestimation because SAM data does not include all subcontractors.[13]

The Department estimated the hourly compensation of the employees who would likely review the rule. The Department assumes that a Human Resource Manager (SOC 11–3121) would review the rule. The mean hourly wage of Human Resource Managers is $59.38.[14] The Department adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. The Department used a fringe benefits rate of 46 percent [15] and an overhead rate of 17 percent,[16] resulting in a fully loaded hourly compensation rate for Human Resources Managers of $96.79 ($59.38 + ($59.38 × 46%) + ($59.38 × 17%)).

Cost of Regulatory Familiarization

The Department acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for a new information-collection requirement the estimated time it will take for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish compliance assistance materials, such as fact sheets and answers to frequently asked questions. OFCCP will also host webinars for interested persons that describe the new regulations and conduct listening sessions to identify any specific challenges contractors believe they face, or may face, when complying with the new regulations. The Department notes that such informal compliance guidance is not binding.

The Department believes that human resource managers at each contractor firm would be the employees responsible for understanding the new regulations. Therefore, the Department estimates that it will take a minimum of one-half hour for a human resource professional at each contractor firm to read the rule, read the compliance assistance materials provided by OFCCP, or participate in an OFCCP webinar to learn the new requirements.[17] Consequently, the estimated burden for rule familiarization would be 210,000 hours (420,000 contractor firms × ½ hour). The Department calculates the total estimated cost of rule familiarization as $20,325,900 (210,000 hours × $96.79/hour) in the first year, which amounts to a 10-year annualized cost of $2,313,413 at a discount rate of 3 percent (which is $5.51 per contractor firm) or $2,704,627 at a discount rate of 7 percent (which is $6.44 per contractor firm). The Department seeks public comments regarding the estimated number of firms that would review this rule, the estimated time to review the

[11] U.S. General Services Administration, System for Award Management, data released in monthly files, available at *https://www.sam.gov.* The SAM database is an estimate with the most recent download of data occurring March 2019.

[12] While the proposed rule may result in more religious corporations, associations, educational institutions or societies entering into federal contracting or subcontracting, there is no way to estimate the volume of increase.

[13] However, this underestimation may be partially offset because of the overlap among contractors and subcontractors; a firm may have a subcontract on some activities but have a contract on others and thus in fact be included in the SAM data.

[14] BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2017, *https://www.bls.gov/oes/current/oes_nat.htm.*

[15] BLS, Employer Costs for Employee Compensation, *https://www.bls.gov/ncs/data.htm.* Wages and salaries averaged $24.26 per hour worked in 2017, while benefit costs averaged $11.26, which is a benefits rate of 46%.

[16] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program'' (June 10, 2002), *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[17] The Department believes that contractor firms that may be potentially affected by the rule may take more time to review the proposed rule, while contractor firms that may not be affected may take less time, so the one half hour reflects an estimated average for all contractor firms.

rule, and whether human resource managers would be the most likely staff member to review the rule.

TABLE 1—REGULATORY FAMILIARIZATION COSTS

Total number of contractors	420,000.
Time to review rule	30 minutes.
Human resources manager fully loaded hourly compensation	$96.79.
Regulatory familiarization cost	$20,325,900.
Annualized cost with 3% discounting	$2,313,413.
Annualized cost per contractor with 3% discounting	$5.51.
Annualized cost with 7% discounting	$2,704,627.
Annualized cost per contractor with 7% discounting	$6.44.

The proposed rule does not include any additional costs because it adds no new requirements. The proposed definitions in § 60–1.3 (*Exercise of religion; Particular religion; Religion; Religious corporation, association, educational institution, or society;* and *Sincere*) simply clarify the scope and application of Executive Order 11246's religious exemption. The proposed rule of construction in § 60–1.5(e) likewise clarifies the application of Executive Order 11246 and affirms legal requirements that already bind OFCCP.

The total first year cost of the regulation is estimated at $20,325,900. Below, in Table 2, is a summary of the total quantifiable costs.

TABLE 2—QUANTIFIABLE COSTS

[Regulatory familiarization costs]

First-Year Costs	$24,197,500	
	Disc Rate = 3%	Disc Rate = 7%
10-Year Annualized Costs	$2,313,413	$2,704,627

Cost Savings

The Department expects that contractors impacted by the rule will experience cost savings. Specifically, the clarity provided in the new definitions and the interpretation provided will reduce the risk of non-compliance to contractors and the potential costs of litigation such findings of non-compliance with OFCCP's requirements might impose.

Benefits

Executive Order 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are nevertheless important, and states that agencies may consider such benefits. Those benefits include equity, fairness, and religious freedom. This proposed rule improves equity, fairness, and religious freedom by giving contractors clear guidance on the scope and application of the religious exemption to Executive Order 11246.

If the proposed rule increases clarity for federal contractors, this impact most likely yields a benefit to taxpayers (if contractor fees decrease because they do not need to engage third-party representatives to interpret OFCCP's requirements). In addition, by increasing clarity for both contractors and for OFCCP enforcement, the proposed rule may reduce the number and costs of enforcement proceedings by making it clearer to both sides at the outset what is required by the regulation. This would also most likely represent a benefit to taxpayers (since fewer resources would be spent in OFCCP administrative litigation and appeals).

The Department expects that the number of new contractors may increase by religious entities' being more willing to contract with the government in reliance on this clarified religious exemption and seeks comment on the costs, benefits, and distributional impacts on contractors and their employees.

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' Public Law 96–354. The RFA requires agencies to consider the impact of a proposed regulation on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions.

Agencies must review whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule would, then the agency must prepare a regulatory flexibility analysis as described in the RFA. *See id.*

However, if the agency determines that the rule would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the agency may so certify and the RFA does not require a regulatory flexibility analysis. *See* 5 U.S.C. 605. The certification must provide the factual basis for this determination. The Department does not expect this rule to have a significant economic impact on a substantial number of small entities. The Department does not believe the proposed rule has any recurring costs. The regulatory familiarization cost discounted at a 7 percent rate of $45.23 per contractor or $6.44 annualized is a *de minimis* cost.

The Department must determine the compliance costs of this proposed rule on small contractor firms, and whether these costs will be significant for a substantial number of small contractor firms (*i.e.,* small firms that enter into contracts with the federal government). If the estimated compliance costs for affected small contractor firms are less

than 3 percent of small contractor firms' revenues, the Department considers it appropriate to conclude that this proposed rule will not have a significant economic impact on small contractor firms.

A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact. *See, e.g.,* 79 FR 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 81 FR 39108 (June 15, 2016, Discrimination on the Basis of Sex). This threshold is also consistent with that sometimes used by other agencies. *See, e.g.,* 79 FR 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than 3 percent annually are not economically significant). The Department believes that its use of a 3 percent of revenues significance criterion is appropriate.

A standard definition of ''substantial'' impact has not been established; however, the EPA provided a determination chart to decide whether a substantial impact exists. If the percentage of all small entities subject to the rule that are experiencing a given economic impact (in this case 3 percent of revenue or greater) is greater than or equal to 15 percent of all entities within that industry, then the economic impact should be considered substantial. The Department has used a threshold of 15 percent of small entities in prior rulemakings for the definition of substantial number of small entities. *See, e.g.,* 79 FR 60633 (October 7, 2014, Establishing a Minimum Wage for Contractors). According to the Small Business Administration's (SBA's) Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, the determination of what constitutes a substantial number of small entities is open to interpretation, and is primarily dependent on the size of the industry.[18] Analysts should determine both the total number and percentage of regulated small entities experiencing significant economic impacts when determining whether a substantial number of small entities may be significantly affected.[19]

To analyze the proposed rule's impact on small contractor firms, the Department used as data sources the SBA's Table of Small Business Size Standards [20] and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB).[21] Since federal contractors are not limited to specific industries, the Department assessed the impact of this proposed rule across 19 industrial classifications. Because data limitations do not allow the Department to determine which of the small firms within these industries are federal contractors, the Department assumes that these small firms are not significantly different from the small federal contractors that will be directly affected by the proposed rule.

The Department used the following steps to estimate the cost of the proposed rule per small contractor firm as measured by a percentage of total annual receipts. First, the Department used Census SUSB data that disaggregates industry information by firm size in order to perform a robust analysis of the impact on small contractor firms. The Department applied the SBA small-business size standards to the SUSB data to determine the number of small firms in the affected industries. Then the Department used receipts data from the SUSB to calculate the cost per firm as a percentage of total receipts by dividing the estimated first year cost and the annualized cost per firm discounted at a 7 percent rate by the average annual receipts per firm. The methodology and results of two industries (construction and management of companies and enterprises) are presented in Tables 3 and 4.

In sum, the increased first year cost and annualized cost of compliance resulting from the proposed rule are *de minimis* relative to the revenue at small contractor firms no matter their size. All of the industries had a first year cost and annualized cost per firm as a percentage of receipts of less than 3 percent. For instance, the first year cost for the construction industry is estimated to range from 0.00 percent of revenue for firms that have average annual receipts of approximately $36 million to 0.09 percent of revenue for firms that have average annual revenue receipts under $100,000. Likewise, the annualized cost for the construction industry is estimated to range from 0.00 percent of revenue for firms that have average annual receipts of approximately $36 million to 0.01 percent of revenue for firms that have average annual revenue receipts of under $100,000. Management of companies and enterprises is the industry with the highest relative first year costs, with a range of 0.00 percent for firms that have average annual receipts of approximately $2 million to 0.15 percent for firms that have average annual receipts of under $31,000. With respect to the annualized costs for the management of companies and enterprises industry, the impact as a percentage of revenue ranges from 0.00 percent for firms that have average annual receipts of approximately $2 million to 0.02 percent for firms that have average annual receipts of under $31,000. Therefore, the first year and annualized burdens as a percentage of the smallest employer's revenue would be far less than 1 percent. Accordingly, OFCCP certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

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[18] Small Business Administration, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act *(August 2017), https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

[19] *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act (November 2006),* section 2.7.2, *https://www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf.*

[20] *https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

[21] *https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html.*

Table 3. Cost per Small Firm in the Construction Industry

Small Business Size Standard: $15 million – $36.5 million

	Number of Firms	Total Number of Employees	Annual Receipts	Average Receipts per Firm[1]	First Year Cost per Firm with 7% Discounting	First Year Cost per Firm as Percent of Receipts[2]	Annuallized Cost per Firm with 7% Discounting	Annual Cost per Firm as Percent of Receipts[3]
Firms with sales/receipts/revenue below $100,000	119,538	N/A	$6,116,019,000	$51,164	$45.23	0.09%	$6.44	0.01%
Firms with sales/receipts/revenue of $100,000 to $499,999	262,870	569,763	$67,195,728,000	$255,623	$45.23	0.02%	$6.44	0.00%
Firms with sales/receipts/revenue of $500,000 to $999,999	100,006	466,370	$70,808,134,000	$708,039	$45.23	0.01%	$6.44	0.00%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	85,343	742,370	$133,337,229,000	$1,562,369	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	35,670	585,723	$123,598,328,000	$3,465,050	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	12,306	327,911	$74,430,329,000	$6,048,296	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $7,500,000 to $9,999,999	6,179	214,777	$52,933,597,000	$8,566,693	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	6,752	299,412	$80,939,071,000	$11,987,422	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	3,272	190,075	$55,527,769,000	$16,970,590	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	2,002	136,366	$43,498,052,000	$21,727,299	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	1,365	107,700	$36,048,227,000	$26,408,958	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	909	80,081	$28,368,318,000	$31,208,271	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	638	64,770	$22,506,667,000	$35,276,908	$45.23	0.00%	$6.44	0.00%

N/A = not available, not disclosed

[1] In the case of construction firms with receipts below $100,000, the average receipts per firm ($51,164) was derived by dividing the total annual receipts ($6,116,019,000) by the number of firms (119,538).

[2] In the case of construction firms with receipts below $100,000, the first year cost per firm as a percent of receipts (0.09 percent) was derived by dividing the first year cost per firm ($45.23) by the average receipts per firm ($51,164).

3 In the case of construction firms with receipts below $100,000, the annualized cost per firm as a percent of receipts (0.01 percent) was derived by dividing the annualized cost per firm ($6.44) by the average receipts per firm ($51,164).

Table 4. Cost per Small Firm in the Management of Companies and Enterprises Industry								
Small Business Size Standard: $20.5 million								
	Number of Firms	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm with 7% Discounting	First Year Cost per Firm as Percent of Receipts	Annualized Cost per Firm with 7% Discounting	Annualized Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	1,107	7,938	$33,849,000	$30,577	$45.23	0.15%	$6.44	0.02%
Firms with sales/receipts/revenue of $100,000 to $499,999	1,216	4,631	$251,252,000	$206,622	$45.23	0.02%	$6.44	0.00%
Firms with sales/receipts/revenue of $500,000 to $999,999	743	5,764	$285,686,000	$384,503	$45.23	0.01%	$6.44	0.00%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	1,668	17,384	$783,830,000	$469,922	$45.23	0.01%	$6.44	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	2,016	26,218	$1,395,007,000	$691,968	$45.23	0.01%	$6.44	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,602	26,210	$1,567,547,000	$978,494	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $7,500,000 to $9,999,999	1,229	22,064	$1,528,733,000	$1,243,884	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,969	42,504	$2,727,035,000	$1,384,985	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,454	36,455	$2,687,284,000	$1,848,201	$45.23	0.00%	$6.44	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,114	27,887	$2,617,195,000	$2,349,367	$45.23	0.00%	$6.44	0.00%

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Paperwork Reduction Act

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

OFCCP has determined that there is no new requirement for information collection associated with this proposed rule. The proposed rule provides definitions and a rule of construction to clarify the scope and application of current law. The information collection contained in the existing Executive Order 11246 regulations are currently approved under OMB Control Number 1250–0001 (Construction Recordkeeping and Reporting Requirements) and OMB Control Number 1250–0003 (Recordkeeping and Reporting Requirements—Supply and Service). Consequently, this proposed rule does not require review by the Office of Management and Budget under the authority of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this proposed rule does not include any federal mandate that may result in excess of $100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

Executive Order 13132 (Federalism)

OFCCP has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' This rule will not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

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

List of Subjects in 41 CFR Part 60–1

Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Labor, Reporting and recordkeeping requirements.

Craig E. Leen,

Director, OFCCP.

For the reasons set forth in the preamble, OFCCP proposes to revise 41 CFR part 60–1 as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

■ 1. The authority citation for part 60–1 continues to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

■ 2. Amend § 60–1.3 by adding in alphabetical order the definition of ''Exercise of religion,'' ''Particular religion,'' ''Religion,'' ''Religious corporation, association, educational institution, or society,'' and ''Sincere'' to read as follows:

§ 60–1.3 Definitions.

* * * * *

Exercise of religion means any exercise of religion, whether or not compelled by, or central to, a system of religious belief. An exercise of religion need only be sincere.

* * * * *

Particular religion means the religion of a particular individual, corporation,

association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.

* * * * *

Religion includes all aspects of religious observance and practice, as well as belief.

* * * * *

Religious corporation, association, educational institution, or society means a corporation, association, educational institution, society, school, college, university, or institution of learning that is organized for a religious purpose; holds itself out to the public as carrying out a religious purpose; and engages in exercise of religion consistent with, and in furtherance of, a religious purpose. To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: Have a mosque, church, synagogue, temple, or other house of worship; be nonprofit; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.

* * * * *

Sincere means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief.

■ 3. Amend § 60–1.5 by adding paragraph (e) to read as follows:

§ 60–1.5 Exemptions.

* * * * *

(e) *Broad interpretation.* This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the United States Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb *et seq.*

[FR Doc. 2019–17472 Filed 8–14–19; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[4500030115]

Endangered and Threatened Wildlife and Plants; 90-Day Findings for Three Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition findings and initiation of status reviews.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce 90-day findings on three petitions to add or reclassify species under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that two petitions present substantial scientific or commercial information indicating that the petitioned actions may be warranted. Therefore, with the publication of this document, we announce that we plan to initiate reviews of the statuses of those species to determine whether the petitioned actions are warranted. To ensure that the status reviews are comprehensive, we are requesting scientific and commercial data and other information regarding those species. Based on the status reviews, we will issue 12-month findings which will address whether or not the petitioned actions are warranted, in accordance with the Act. We also find that one petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted. Therefore, we are not initiating a status review of that species in response to the petition. We refer to this finding as a ''not substantial'' petition finding.

DATES: These findings were made on August 15, 2019. As we commence work on the status reviews, we seek any new information concerning the statuses of, or threats to, the species or their habitats. We will consider any relevant information that we receive during our work on the status reviews.

ADDRESSES:

Supporting documents: Summaries of the bases for the petition findings contained in this document are available on *http://www.regulations.gov* under the appropriate docket number (see Tables 1 and 2 under **SUPPLEMENTARY INFORMATION**). In addition, this supporting information is available for public inspection, by appointment, during normal business hours by contacting the appropriate person, as specified in **FOR FURTHER INFORMATION CONTACT**.

Status Reviews: If you have new scientific or commercial data or other information concerning the statuses of, or threats to, the species for which a status review is being initiated, please provide those data or information by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter the appropriate docket number (see the Table 1 under **SUPPLEMENTARY INFORMATION**). Then, click on the ''Search'' button. After finding the correct document, you may submit information by clicking on ''Comment Now!'' If your information will fit in the provided comment box, please use this feature of *http://www.regulations.gov,* as it is most compatible with our information review procedures. If you attach your information as a separate document, our preferred file format is Microsoft Word. If you attach multiple comments (such as form letters), our preferred format is a spreadsheet in Microsoft Excel.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: [Insert appropriate docket number; see the Table 1 under **SUPPLEMENTARY INFORMATION**], U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike; Falls Church, VA 22041–3803.

We request that you send information only by the methods described above. We will post all information we receive on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us.

Not-substantial petition finding: If you have new information concerning the status of, or threats to, this species, or its habitat, please submit that information to the appropriate person listed under **FOR FURTHER INFORMATION CONTACT**, below.

FOR FURTHER INFORMATION CONTACT:

Species common name	Contact person
Gila topminnow	Jeff Humphrey, 602–242–0210; jeff_humphrey@fws.gov.
lake sturgeon	Barb Hosler, 517–351–1443; barbara_hosler@fws.gov.
Siskiyou Mountains salamander	Jenny Ericson, 530–841–3115; jenny_ericson@fws.gov.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2019–0002, Sequence No. 4]

Federal Acquisition Regulation; Federal Acquisition Circular 2019–05; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of an interim rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2019–05. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the internet at *http://www.regulations.gov.*

DATES: For effective date see the separate document, which follows.

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite FAC 2019–05, FAR Case 2018–017.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR Case, refer to the specific subject set forth in the document following this item summary. FAC 2019–05 amends the FAR as follows:

RULE LISTED IN FAC 2019–05

Subject	FAR case	Analyst
Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment	2018–017	Francis.

Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2018–017)

This interim rule amends the FAR to implement section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Paragraph (a)(1)(A) of section 889 prohibits agencies from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunication equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system on or after August 13, 2019, unless an exception applies or a waiver has been granted. Further prohibitions at paragraph (a)(1)(B) of section 889 go into effect August 13, 2020, and will be addressed through separate rulemaking.

To implement paragraph (a)(1)(A) of section 889, this interim rule provides a new solicitation provision and contract clause. The provision at FAR 52.204–24 requires offerors to represent whether their offer includes covered telecommunications equipment or services and if so, to identify additional details about its use. Representations are also required for orders on indefinite delivery contracts. The clause at FAR 52.204–25 prohibits contractors from providing any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception applies or the covered telecommunications equipment or services are covered by a waiver described in FAR 4.2104. The contractor must also report any such equipment, systems, or services discovered during contract performance; this requirement flows down to subcontractors.

This rule applies to all acquisitions, including acquisitions at or below the simplified acquisition threshold and to acquisitions of commercial items, including commercially available off-the-shelf items. It may have a significant economic impact on a substantial number of small entities.

This interim rule is being implemented as a national security measure to protect Government information, and Government information and communication technology systems.

Contracting officers shall modify certain contracts to include the new FAR clause, as specified in the ''Dates'' section of the preamble of the interim rule. Contracting officers also shall include the new FAR provision in solicitations for an order, or notices of intent to place an order, under those contracts.

Janet M. Fry,

Director, Federal Acquisition Policy Division, Office of Government-Wide Policy.

Federal Acquisition Circular (FAC) 2019–05 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2019–05 is effective August 13, 2019 except for FAR Case 2018–017, which is effective August 13, 2019.

Kim Herrington,

Acting Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

William G. Roets, II,

Acting Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.

[FR Doc. 2019–17200 Filed 8–12–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 12, 13, 39, and 52

[FAC 2019–05; FAR Case 2018–017; Docket No. 2018–0017, Sequence No. 1]

RIN 9000–AN83

Federal Acquisition Regulation: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232).

DATES: *Effective Date:* August 13, 2019.

Applicability:

Contracting officers shall include the provision at FAR 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment and clause at FAR 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment as prescribed—

- In solicitations issued on or after August 13, 2019, and resultant contracts; and
- In solicitations issued before August 13, 2019, provided award of the resulting contract(s) occurs on or after August 13, 2019.

Contracting officers shall modify, in accordance with FAR 1.108(d), existing indefinite delivery contracts to include the FAR clause for future orders, prior to placing any future orders.

If modifying an existing contract or task or delivery order to extend the period of performance, including exercising an option, contracting officers shall include the clause in accordance with 1.108(d).

The contracting officer shall include the provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, in all solicitations for an order, or notices of intent to place an order, including those issued before August 13, 2019, where performance will occur on or after that date, under an existing indefinite delivery contract.

Comment date: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before October 15, 2019 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–017 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2018–017''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2018–017''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''FAR Case 2018–017'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite ''FAR Case 2018–017'' in all correspondence related to this case. All comments received will be posted without change to *http://;www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite FAR Case 2018–017.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises the FAR to implement section 889(a)(1)(A) of the NDAA for FY 2019 (Pub. L. 115–232). Section 889(a)(1)(A) prohibits agencies from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system, on or after August 13, 2019.

''Covered telecommunications equipment or services,'' as defined in the statute, means—

- Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);
- For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);
- Telecommunications or video surveillance services provided by such entities or using such equipment; or
- Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

The rule adopts the definition of critical technologies included in the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) (Section 1703 of Title XVII of the NDAA for FY 2019, Pub. L. 115–232, 50 U.S.C. 4565(a)(6)(A)).

''Covered foreign country,'' as defined in section 889, means the People's Republic of China.

Under certain circumstances, section 889 allows the head of an executive agency to grant a one-time waiver on a case-by-case basis for up to a two-year period; in other circumstances, waivers issued by the Director of National Intelligence are authorized.

This rule requires submission of a representation with each offer that will require offerors to identify as part of their offer any covered telecommunications equipment or services that will be provided to the Government. DoD, GSA, and NASA recognize that some agencies may need to tailor the approach to the information collected based on the unique mission and supply chain risks for their agency.

In order to reduce the information collection burden imposed on the public, DoD, GSA, and NASA are currently working on updates to the System for Award Management to allow offerors to represent annually whether they sell equipment, systems, or services that include covered telecommunications equipment or services. Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation in their offers for contracts and for task or delivery orders under indefinite delivery contracts.

The prohibition in section 889(a)(1)(B) is not effective until August 13, 2020, and will be implemented through separate rulemaking.

II. Discussion and Analysis

This rule amends FAR part 4, adding a new subpart 4.21, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, with a corresponding new provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, and contract clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. The rule adds text in subpart 12.3, Acquisition of Commercial Items, and subpart 13.2, Actions at or Below the Micro-Purchase Threshold, to address section 889(a)(1)(A) with regard to commercial item representations and micro-purchases.

The definition of ''critical technologies'' provided in FIRRMA has been adopted to address the prohibition in section 889(a)(1)(A) on providing

covered telecommunications equipment or services as ''critical technology as part of any system.'' As with section 889, FIRRMA is aimed at ensuring that the United States is protected from certain risks regarding foreign actors. In effectuating these protections, defining terms in a consistent manner, to facilitate consistent application, is crucial. While there are elements of this definition that may not raise concerns regarding covered telecommunications equipment or services (for example, the inclusions of select agents or toxins), the majority of identified categories in the FIRRMA definition of ''critical technologies'' include or could potentially include covered telecommunications equipment or services. Since the prohibition does not apply if no covered telecommunications equipment or services are present, a definition that includes categories that may be unlikely to include telecommunications equipment or services is overbroad in a way that incurs no additional cost, and ensures the benefits of consistency with other Government efforts.

To implement section 889(a)(1)(A), the clause at 52.204–25 prohibits contractors from providing any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception or a waiver applies. The contractor must also report any such equipment, systems, or services discovered during contract performance; this requirement flows down to subcontractors.

The provision at 52.204–24 is required in all solicitations, and includes a representation that will require offerors to identify as part of their offer any covered telecommunications equipment or services that will be provided to the Government. The additional information provided through this representation will assist the Government in appropriately assessing the presence of any covered telecommunications equipment or services that may be present in an offer, for example, to determine if the items in question will be used as a substantial or essential component, or to determine if a waiver request may be appropriate.

This rule also adds cross-references in FAR parts 39, Acquisition of Information Technology, and 13, Simplified Acquisition Procedures, to the coverage of the section 889 prohibition at FAR subpart 4.21. In addition, the rule adds OMB Control Number 9000–0199 to the list at FAR 1.106 of OMB approval under the Paperwork Reduction Act.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule adds a new provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, and a new contract clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, in order to implement section 889(a)(1)(A) of the NDAA for FY 2019, which prohibits the purchase of any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system on or after August 13, 2019, unless an exception applies or a waiver has been granted.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the simplified acquisition threshold (SAT). Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items.

Finally, 41 U.S.C. 1907 states that acquisitions of commercially available off-the-shelf (COTS) items will be exempt from a provision of law unless certain circumstances apply, including if the Administrator for Federal Procurement Policy makes a written determination and finding that would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law.

C. Determinations

The FAR Council has determined that it is in the best interest of the Government to apply the rule to contracts at or below the SAT and for the acquisition of commercial items. The Administrator for Federal Procurement Policy has determined that it is in the best interest of the Government to apply this rule to contracts for the acquisition of COTS items.

While the law does not specifically address acquisitions of commercial items, including COTS items, there is an unacceptable level of risk for the Government in buying equipment, systems, or services that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This level of risk is not alleviated by the fact that the equipment or service being acquired has been sold or offered for sale to the general public, either in the same form or a modified form as sold to the Government (*i.e.,* that it is a commercial item or COTS item), nor by the small size of the purchase (*i.e.,* at or below the SAT). As a result, agencies may face increased exposure for violating the law and unknowingly acquiring covered telecommunication equipment or services absent coverage of these types of acquisitions by this rule.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action'' under E.O. 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this rule. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to the requirements of E.O. 13771, because the rule is issued with respect to a national security function of the United States. As highlighted by sections III, VII, and VIII of this preamble, national security is a primary direct benefit of this rule. Also, though this rule is subject to the regulatory publication requirements of 41 U.S.C. 1707, application of the national security exemption under E.O. 13771 requires assessing the application of the ''good cause'' exception under 5 U.S.C. 553. This rule meets the ''good cause'' exception as the one-year deadline Congress established to implement section 889(a)(1)(A) would not provide sufficient time for notice and comment in light of the complex nature of the rule and sensitive interagency process.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA expect that this rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* An Initial Regulatory Flexibility Analysis (IRFA) has been performed, and is summarized as follows:

The reason for this interim rule is to implement section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232).

The objective of the rule is to prescribe appropriate policies and procedures to enable agencies to determine and ensure that they are not procuring or obtaining any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system on or after August 13, 2019. The legal basis for the rule is section 889(a)(1)(A) of the NDAA for FY 2019, which prohibits Government procurement of such equipment, systems, and services on or after that date, unless an exception applies or a waiver has been granted.

This collection includes a burden for reporting during contract performance and a representation. A data set was generated from the Federal Procurement Data System (FPDS) for fiscal years (FY) 2016, 2017, and 2018 for use in estimating the number of small entities affected by this rule.

The representation requirement in FAR provision 52.204–24 and the reporting requirement in the clause at FAR 52.204–25 will be incorporated in all solicitations and contracts, including contracts with small entities. The FPDS data indicates that the Government awarded contracts to an average of 95,223 unique entities, of which 69,865 (73 percent) were small entities. DoD, GSA, and NASA estimate that representations will be received from twice this number of entities, or 139,730 small entities. While representations will be submitted by all offerors, detailed additional information is only estimated to be required from approximately 10 percent of offerors, or 13,973 small entities. It is estimated that reports will be submitted by 5 percent of contractors, or 3,493 small entities.

The provision at FAR 52.204–24 requires each offeror to represent whether it will provide covered telecommunications equipment or services. If the offeror responds affirmatively, the offeror is required to further disclose substantial detail regarding the basis for the affirmative representation. Representations will be submitted by all offerors, or 139,730 small entities; it is estimated that detailed representations following an affirmative response will be submitted by 10 percent of contractors, or 13,973 small entities.

The clause at FAR 52.204–25 requires contractors and subcontractors to report to the contracting officer, or for DoD through *https://dibnet.dod.mil,* any discovery of covered telecommunications equipment or services during the course of contract performance.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

Because of the nature of the prohibition enacted by section 889(a)(1)(A), it is not possible to establish different compliance or reporting requirements or timetables that take into account the resources available to small entities or to exempt small entities from coverage of the rule, or any part thereof. However, in order to reduce the information collection burden imposed on the public, DoD, GSA, and NASA are currently working on updates to the System for Award Management to allow offerors to represent annually whether they sell equipment, systems, or services that include covered telecommunications equipment or services. Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation in their offers for contracts and for task or delivery orders under indefinite delivery contracts. DoD, GSA, and NASA were unable to identify any alternatives that would reduce the burden on small entities and still meet the objectives of section 889.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2018–017) in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA) provides that an agency generally cannot conduct or sponsor a collection of information, and no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, unless that collection has obtained OMB approval and displays a currently valid OMB Control Number.

DoD, GSA, and NASA requested, and OMB authorized, emergency processing of the collection of information involved in this rule, consistent with 5 CFR 1320.13. DoD, GSA, and NASA have determined the following conditions have been met:

a. The collection of information is needed prior to the expiration of time periods normally associated with a routine submission for review under the provisions of the PRA, because the prohibition in section 889(a)(1)(A) goes into effect on August 13, 2019.

b. The collection of information is essential to the mission of the agencies to ensure the Federal Government complies with section 889(a)(1)(A) on the statute's effective date in order to protect the Government supply chain from risks posed by covered telecommunications equipment or services.

c. Moreover, DoD, GSA, and NASA cannot comply with the normal clearance procedures because public harm is reasonably likely to result if current clearance procedures are followed. Authorizing collection of this information on the effective date will ensure that agencies do not procure or obtain, or extend or renew a contract to procure or obtain, equipment, systems, or services in violation of the prohibition in section 889(a)(1)(A). It will also avoid substantial additional costs that may be incurred from having to replace such equipment, systems, or services that are purchased in violation of section 889(a)(1)(A), as well as additional administrative costs for reprocurement.

DoD, GSA, and NASA intend to provide a separate 60-day notice in the **Federal Register** requesting public comment on the information collections contained within this rule under OMB Control Number 9000–0199.

Agency: DoD, GSA, and NASA.

Type of Information Collection: New Collection.

Title of Collection: Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

Affected Public: Private Sector—Business.

Total Estimated Number of Respondents: 190,446.

Average Responses per Respondents: 41.25.
Total Estimated Number of Responses: 7,855,881.
Average Time (for both positive and negative representations) per Response: 0.105 hour.
Total Annual Time Burden: 821,274.
Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 4,761.
Average Responses per Respondents: 5.
Total Estimated Number of Responses: 23,805.
Average Time per Response: 1.5 hour.
Total Annual Time Burden: 35,708.

The public reporting burden for this collection of information consists of a representation to identify whether an offeror will provide covered telecommunications equipment and services as required by 52.204–24 and reports of identified covered telecommunications equipment and services during contract performance as required by 52.204–25. Representations are estimated to average 0.105 hour (the average of the time for both positive and negative representations) per response to review the prohibitions, research the source of the product or service, and either provide a negative response in the majority of cases or to complete the additional detailed disclosure, if applicable. Reports are estimated to average 1.5 hours per response, including the time for reviewing definitions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the report.

The subsequent 60-day notice to be published by DoD, GSA, and NASA will invite public comments.

VIII. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. It is critical that the FAR is immediately revised to include the requirements of the law, which prohibits the Federal Government from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunication equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system on or after August 13, 2019, unless an exception applies or a waiver is granted.

Because section 889(a)(1)(A) takes effect on August 13, 2019, this rule must take effect immediately to ensure agencies and contractors are implementing the statutory prohibition.

Pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 4, 12, 13, 39, and 52

Government procurement.

Janet M. Fry,
Director, Federal Acquisition Policy Division, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 4, 12, 13, 39, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 12, 13, 39, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 1.106 amend the table by adding the entries ''4.21'', ''52.204–24'' and ''52.204–25'' in numerical order to read as follows:

FAR segment	OMB control No.
* * * * *	
4.21	9000–0199
* * * * *	
52.204–24	9000–0199
52.204–25	9000–0199
* * * * *	

■ 3. Revise the heading to Part 4 and add Subpart 4.21 to read as follows:

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

* * * * *

Subpart 4.21—Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

Sec.

4.2100 Scope of subpart.

This subpart implements paragraph (a)(1)(A) of section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232).

4.2101 Definitions.

As used in this subpart—

Covered foreign country means The People's Republic of China.

Covered telecommunications equipment or services means—

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, (or any subsidiary or affiliate of such entities);

(2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

(3) Telecommunications or video surveillance services provided by such entities or using such equipment; or

(4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

Critical technology means—

(1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations;

(2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled—

(i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or

(ii) For reasons relating to regional stability or surreptitious listening;

(3) Specially designed and prepared nuclear equipment, parts and

components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);

(4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);

(5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or

(6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

Substantial or essential component means any component necessary for the proper function or performance of a piece of equipment, system, or service.

4.2102 Prohibition.

(a) *Prohibited equipment, systems, or services.* On or after August 13, 2019, agencies are prohibited from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 4.2104.

(b) *Exceptions.* This subpart does not prohibit agencies from procuring or contractors from providing—

(1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(2) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(c) *Contracting Officers.* Contracting officers shall not procure or obtain, or extend or renew a contract (*e.g.,* exercise an option) to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 4.2104.

4.2103 Procedures.

(a) *Representations.* If an offeror provides an affirmative response to the representations or discloses information in accordance with paragraphs (c) and (d) of the provision at 52.204–24, follow agency procedures.

(b) *Reporting.* If a contractor provides a report pursuant to paragraph (d) of the clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, follow agency procedures.

4.2104 Waivers.

(a) *Executive agencies.* The head of an executive agency may, on a one-time basis, waive the prohibition at 4.2102(a) with respect to a Government entity (*e.g.,* requirements office, contracting office) that requests such a waiver.

(1) The waiver may be provided, for a period not to extend beyond August 13, 2021, if the Government entity seeking the waiver submits to the head of the executive agency—

(i) A compelling justification for the additional time to implement the requirements under 4.2102(a), as determined by the head of the executive agency; and

(ii) A full and complete laydown or description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain and a phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(2) The head of the executive agency shall, not later than 30 days after approval, submit to the appropriate congressional committees the full and complete laydown or description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain and the phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(b) *Director of National Intelligence.* The Director of National Intelligence may provide a waiver if the Director determines the waiver is in the national security interests of the United States.

4.2105 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment—

(1) In all solicitations for contracts; and

(2) Under indefinite delivery contracts, in all notices of intent to place an order, or solicitations for an order (*i.e.,* subpart 8.4 and 16.505).

(b) The contracting officer shall insert the clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, in all solicitations and contracts.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend section 12.301 by redesignating paragraphs (d)(6) through (d)(11) as (d)(7) through (d)(12), respectively, and adding a new paragraph (d)(6) to read as follows:

12.301 Solicitation provisions and contract clauses for acquisition of commercial items.

* * * * *

(d) * * *

(6) Insert the provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, as prescribed in 4.2105(a).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 5. Amend section 13.201 by revising the section heading and adding paragraphs (a) and (j) to read as follows:

13.201 General.

(a) Agency heads are encouraged to delegate micro-purchase authority (see 1.603–3).

* * * * *

(j) On or after August 13, 2019, do not procure or obtain, or extend or renew a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception applies or a waiver is granted. (See subpart 4.21.)

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 6. Amend section 39.101 by adding paragraph (f) to read as follows:

39.101 Policy.

* * * * *

(f) On or after August 13, 2019, contracting officers shall not procure or obtain, or extend or renew a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential

component of any system, or as critical technology as part of any system on or after August 13, 2019, unless an exception applies or a waiver is granted. (See subpart 4.21.)

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Add sections 52.204–24 and 52.204–25 to read as follows:

52.204–24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

As prescribed in 4.2105(a), insert the following provision:

Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2019)

(a) *Definitions.* As used in this provision—

Covered telecommunications equipment or services, Critical technology, and *Substantial or essential component* have the meanings provided in clause 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

(b) *Prohibition.* Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. Contractors are not prohibited from providing—

(1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(2) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(c) *Representation.* The Offeror represents that—

It [ ] will, [ ] will not provide covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation.

(d) *Disclosures.* If the Offeror has responded affirmatively to the representation in paragraph (c) of this provision, the Offeror shall provide the following information as part of the offer—

(1) All covered telecommunications equipment and services offered (include brand; model number, such as original equipment manufacturer (OEM) number, manufacturer part number, or wholesaler number; and item description, as applicable);

(2) Explanation of the proposed use of covered telecommunications equipment and services and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b) of this provision;

(3) For services, the entity providing the covered telecommunications services (include entity name, unique entity identifier, and Commercial and Government Entity (CAGE) code, if known); and

(4) For equipment, the entity that produced the covered telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the OEM or a distributor, if known).

(End of provision)

52.204–25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

As prescribed in 4.2105(b), insert the following clause:

Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2019)

(a) *Definitions.* As used in this clause—

Covered foreign country means The People's Republic of China.

Covered telecommunications equipment or services means—

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);

(2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

(3) Telecommunications or video surveillance services provided by such entities or using such equipment; or

(4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

Critical technology means—

(1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations;

(2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled—

(i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or

(ii) For reasons relating to regional stability or surreptitious listening;

(3) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);

(4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);

(5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or

(6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

Substantial or essential component means any component necessary for the proper function or performance of a piece of equipment, system, or service.

(b) *Prohibition.* Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The Contractor is prohibited from providing to the Government any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in Federal Acquisition Regulation 4.2104.

(c) *Exceptions.* This clause does not prohibit contractors from providing—

(1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(2) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(d) *Reporting requirement.* (1) In the event the Contractor identifies covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, or the Contractor is notified of such by a subcontractor at any tier or by any other source, the Contractor shall report the information in paragraph (d)(2) of this clause to the Contracting Officer, unless elsewhere in this contract are established procedures for reporting the information; in the case of the Department of Defense, the Contractor shall report to the website at *https://dibnet.dod.mil.* For indefinite delivery contracts, the Contractor shall report to the Contracting Officer for the indefinite delivery contract and the Contracting Officer(s) for any affected order or, in the case of the Department of Defense, identify both the indefinite delivery contract and any affected orders in the report provided at *https://dibnet.dod.mil.*

(2) The Contractor shall report the following information pursuant to paragraph (d)(1) of this clause:

(i) Within one business day from the date of such identification or notification: The contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.

(ii) Within 10 business days of submitting the information in paragraph (d)(2)(i) of this clause: Any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services.

(e) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items.

(End of clause)

■ 8. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (a)(3) through (a)(5) as paragraphs (a)(4) through (a)(6) and adding a new paragraph (a)(3);

■ c. Redesignating paragraphs (e)(1)(iv) through (e)(1)(xxii) as (e)(1)(v) through (e)(1)(xxiii), and adding a new paragraph (e)(1)(iv);

■ d. Revising the date of Alternate II; and

■ e. In Alternate II, redesignating paragraphs (e)(1)(ii)(D) through (e)(1)(ii)(T) as (e)(1)(ii)(E) through (e)(1)(ii)(U), and adding a new paragraph (e)(1)(ii)(D).

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (AUG 2019)

(a) * * *

(3) 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. (AUG 2019) (Section 889(a)(1)(A) of Pub. L. 115–232).

* * * * *

(e)(1) * * *

(iv) 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. (AUG 2019) (Section 889(a)(1)(A) of Pub. L. 115–232).

* * * * *

Alternate II (AUG 2019).

* * * * *

(e)(1) * * *

(ii) * * *

(D) 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. (AUG 2019) (Section 889(a)(1)(A) of Pub. L. 115–232).

* * * * *

■ 9. Amend section 52.213–4 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (a)(1)(iii) through (a)(1)(viii) as (a)(1)(iv) through (a)(1)(ix), and adding a new paragraph (a)(1)(iii); and

■ c. In paragraph (a)(2)(viii) removing ''(JAN 2019)'' and adding ''(AUG 2019)'' in its place.

The revision and addition read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (AUG 2019)

(a) * * *

(1) * * *

(iii) 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. (AUG 2019) (Section 889(a)(1)(A) of Pub. L. 115–232).

* * * * *

■ 10. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Redesignating paragraphs (c)(1)(vi) through (c)(1)(xix) as (c)(1)(vii) through (c)(1)(xx), and adding a new paragraph (c)(1)(vi).

The revision and addition reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

RULE LISTED IN FAC 2019–05

Subcontracts for Commercial Items (AUG 2019)

* * * * *

(c)(1) * * *

(vi) 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. (AUG 2019) (Section 889(a)(1)(A) of Pub. L. 115–232).

* * * * *

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2019–0002, Sequence No. 4]

Federal Acquisition Regulation; Federal Acquisition Circular 2019–05; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2019–05, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2019–05, which precedes this document. These documents are also available via the internet at *http://www.regulations.gov.*

DATES: August 13, 2019.

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite FAC 2019–05, FAR Case 2018–017.

Subject	FAR case	Analyst
*Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment	2018–017	Francis.