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29 CFR Part 10

Establishing a Minimum Wage for Contractors; Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 10

RIN 1235–AA10

Establishing a Minimum Wage for Contractors

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Labor issues final regulations to implement Executive Order 13658, Establishing a Minimum Wage for Contractors, which was signed by President Barack Obama on February 12, 2014. Executive Order 13658 states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. The Executive Order therefore seeks to raise the hourly minimum wage paid by those contractors to workers performing work on covered Federal contracts to: $10.10 per hour, beginning January 1, 2015; and beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor. The Executive Order directs the Secretary to issue regulations by October 1, 2014, to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act, to implement the Order's requirements. This final rule therefore establishes standards and procedures for implementing and enforcing the minimum wage protections of Executive Order 13658. As required by the Order, the final rule incorporates to the extent practicable existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, the Service Contract Act, and the Davis-Bacon Act.

DATES: *Effective date:* This final rule is effective on December 8, 2014.

Applicability date: For procurement contracts subject to the Federal Acquisition Regulation and Executive Order 13658, this final rule is applicable beginning on the effective date of regulations revising 48 CFR parts 22 and 52 issued by the Federal Acquisition Regulatory Council.

FOR FURTHER INFORMATION CONTACT: Timothy Helm, Chief, Branch of Government Contracts Enforcement, Office of Government Contracts, Wage and Hour Division, U.S. Department of Labor, Room S–3006, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–0064 (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 Wage and Hour Division (WHD) district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the WHD's Web site for a nationwide listing of WHD district and area offices at *http://www.dol.gov/whd/america2.htm*.

SUPPLEMENTARY INFORMATION:

I. Executive Order 13658 Requirements and Background

On February 12, 2014, President Barack Obama signed Executive Order 13658, Establishing a Minimum Wage for Contractors (the Executive Order or the Order). 79 FR 9851. The Executive Order states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. *Id.* The Order therefore ''seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government'' by raising the hourly minimum wage paid by those contractors to workers performing work on covered Federal contracts to (i) $10.10 per hour, beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor (Secretary) in accordance with the Executive Order. *Id.*

Section 1 of Executive Order 13658 sets forth a general position of the Federal Government that increasing the hourly minimum wage paid by Federal contractors to $10.10 will ''increase efficiency and cost savings'' for the Federal Government. 79 FR 9851. The Order states that raising the pay of low-wage workers increases their morale and productivity and the quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs. *Id.* The Order further states that these savings and quality improvements will lead to improved economy and efficiency in Government procurement. *Id.*

Section 2 of Executive Order 13658 therefore establishes a minimum wage for Federal contractors and subcontractors. 79 FR 9851. The Order provides that executive departments and agencies (agencies) shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations (collectively referred to as ''contracts''), as described in section 7 of the Order, include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c),[1] in the performance of the contract or any subcontract thereunder, shall be at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary in accordance with the Executive Order. 79 FR 9851. As required by the Order, the minimum wage amount determined by the Secretary pursuant to this section shall be published by the Secretary at least 90 days before such new minimum wage is to take effect and shall be: (A) Not less than the amount in effect on the date of such determination; (B) increased from such amount by the annual percentage increase, if any, in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted) (CPI–W), or its successor publication, as determined by the Bureau of Labor Statistics; and (C) rounded to the nearest multiple of $0.05. *Id.*

Section 2 of the Executive Order further explains that, in calculating the annual percentage increase in the CPI for purposes of this section, the Secretary shall compare such CPI for the most recent month, quarter, or year available (as selected by the Secretary prior to the first year for which a minimum wage determined by the Secretary is in effect pursuant to this section) with the CPI for the same month in the preceding year, the same quarter in the preceding year, or the preceding year, respectively. 79 FR 9851. Pursuant to this section, nothing in the Order excuses noncompliance with any applicable Federal or State prevailing wage law or any applicable

[1] 29 U.S.C. 214(c) authorizes employers, after receiving a certificate from the WHD, to pay subminimum wages to workers whose earning or productive capacity is impaired by a physical or mental disability for the work to be performed.

law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order. *Id.*

Section 3 of Executive Order 13658 explains the application of the Order to tipped workers. 79 FR 9851–52. It provides that for workers covered by section 2 of the Order who are tipped employees pursuant to 29 U.S.C. 203(t), the hourly cash wage that must be paid by an employer to such employees shall be at least: (i) $4.90 an hour, beginning on January 1, 2015; (ii) for each succeeding 1-year period until the hourly cash wage under this section equals 70 percent of the wage in effect under section 2 of the Order for such period, an hourly cash wage equal to the amount determined under section 3 of the Order for the preceding year, increased by the lesser of: (A) $0.95; or (B) the amount necessary for the hourly cash wage under section 3 to equal 70 percent of the wage under section 2 of the Order; and (iii) for each subsequent year, 70 percent of the wage in effect under section 2 for such year rounded to the nearest multiple of $0.05. 79 FR 9851–52. Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their wages are equal to the minimum wage under section 2 of the Order, section 3 requires that the cash wage paid by the employer be increased such that their wages equal the minimum wage under section 2 of the Order. 79 FR 9852. Consistent with applicable law, if the wage required to be paid under the Service Contract Act (SCA), 41 U.S.C. 6701 *et seq.,* or any other applicable law or regulation is higher than the wage required by section 2 of the Order, the employer must pay additional cash wages sufficient to meet the highest wage required to be paid. *Id.*

Section 4 of Executive Order 13658 provides that the Secretary shall issue regulations by October 1, 2014, to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act, to implement the requirements of the Order, including providing exclusions from the requirements set forth in the Order where appropriate. 79 FR 9852. It also requires that, to the extent permitted by law, within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council (FARC) shall issue regulations in the Federal Acquisition Regulation (FAR) to provide for inclusion of the contract clause in Federal procurement solicitations and contracts subject to the Executive Order. *Id.* Additionally, this section states that within 60 days of the Secretary issuing regulations pursuant to the Order, agencies must take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts for concessions and contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, entered into after January 1, 2015, consistent with the effective date of such agency action, comply with the requirements set forth in sections 2 and 3 of the Order. *Id.* The Order further specifies that any regulations issued pursuant to this section should, to the extent practicable and consistent with section 8 of the Order, incorporate existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.;* the SCA; and the Davis-Bacon Act (DBA), 40 U.S.C. 3141 *et seq.* 79 FR 9852.

Section 5 of Executive Order 13658 grants authority to the Secretary to investigate potential violations of and obtain compliance with the Order. 79 FR 9852. It also explains that Executive Order 13658 does not create any rights under the Contract Disputes Act and that disputes regarding whether a contractor has paid the wages prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to the Order. *Id.*

Section 6 of Executive Order 13658 establishes that if any provision of the Order or the application of such provision to any person or circumstance is held to be invalid, the remainder of the Order and the application shall not be affected. 79 FR 9852.

Section 7 of the Executive Order provides that nothing in the Order shall be construed to impair or otherwise affect the authority granted by law to an agency or the head thereof; or the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals. 79 FR 9852–53. It also states that the Order is to be implemented consistent with applicable law and subject to the availability of appropriations. 79 FR 9853. The Order explains that it 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. *Id.*

Section 7 of Executive Order 13658 further establishes that the Order shall apply only to a new contract, as defined by the Secretary in the regulations issued pursuant to section 4 of the Order, if: (i)(A) It is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by Department of Labor (the Department) regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Section 7 of the Order also states that, for contracts covered by the SCA or the DBA, the Order shall apply only to contracts at the thresholds specified in those statutes.[2] *Id.* Additionally, for procurement contracts where workers' wages are governed by the FLSA, the Order specifies that it shall apply only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a),[3] unless expressly made subject to the Order pursuant to regulations or actions taken under section 4 of the Order. 79 FR 9853. The Executive Order specifies that it shall not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended; or any contracts expressly excluded by the regulations issued pursuant to section 4(a) of the Order. 79 FR 9853. The Order also strongly encourages independent agencies to comply with its requirements. *Id.*

Section 8 of Executive Order 13658 provides that the Order is effective immediately and shall apply to covered contracts where the solicitation for such contract has been issued on or after: (i) January 1, 2015, consistent with the effective date for the action taken by the FARC pursuant to section 4(a) of the Order; or (ii) for contracts where an agency action is taken pursuant to section 4(b) of the Order, January 1, 2015, consistent with the effective date for such action. 79 FR 9853. It also

[2] The prevailing wage requirements of the SCA apply to covered prime contracts in excess of $2,500. *See* 41 U.S.C. 6702(a)(2) (recodifying 41 U.S.C. 351(a)). The DBA applies to covered prime contracts that exceed $2,000. *See* 40 U.S.C. 3142(a). There is no value threshold requirement for subcontracts awarded under such prime contracts.

[3] 41 U.S.C. 1902(a) defines the micro-purchase threshold as $3,000.

specifies that the Order shall not apply to contracts entered into pursuant to solicitations issued on or before the effective date for the relevant action taken pursuant to section 4 of the Order. *Id.* Finally, section 8 states that, for all new contracts negotiated between the date of the Order and the effective dates set forth in this section, agencies are strongly encouraged to take all steps that are reasonable and legally permissible to ensure that individuals working pursuant to those contracts are paid an hourly wage of at least $10.10 (as set forth under sections 2 and 3 of the Order) as of the effective dates set forth in this section. 79 FR 9854.

II. Discussion of Final Rule

A. Legal Authority

The President issued Executive Order 13658 pursuant to his authority under ''the Constitution and the laws of the United States,'' expressly including the Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101 *et seq.* 79 FR 9851. The Procurement Act authorizes the President to ''prescribe policies and directives that the President considers necessary to carry out'' the statutory purposes of ensuring ''economical and efficient'' government procurement and administration of government property. 40 U.S.C. 101, 121(a). Executive Order 13658 delegates to the Secretary the authority to issue regulations to ''implement the requirements of this order.'' 79 FR 9852. The Secretary has delegated his authority to promulgate these regulations to the Administrator of the WHD. Secretary's Order 05–2010 (Sept. 2, 2010), 75 FR 55352 (published Sept. 10, 2010).

B. Discussion of the Final Rule

On June 17, 2014, the Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register**, inviting public comments for a period of 30 days on a proposal to implement the provisions of Executive Order 13658. *See* 79 FR 34568 (June 17, 2014). On July 8, 2014, the Department extended the period for filing written comments until July 28, 2014. *See* 79 FR 38478. More than 6,500 individuals and entities commented on the Department's NPRM. Comments were received from a variety of interested stakeholders, such as labor organizations; contractors and contractor associations; worker advocates, including advocates for people with disabilities; contracting agencies; small businesses; and workers. Some organizations attached the views of some of their individual members. For example, 1,159 individuals joined in comments submitted by Interfaith Worker Justice and the National Women's Law Center submitted 5,127 individual comments.

The Department received many comments, such as those submitted by the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), North America's Building Trades Unions (Building Trades), the National Women's Law Center, Interfaith Worker Justice, Demos, the National Employment Law Project (NELP), and the National Disability Rights Network (NDRN), expressing strong support for the Executive Order and for raising the minimum wage. Many of these commenters, such as Demos, commended the Department's NPRM as a ''reasonable and appropriate'' implementation of Executive Order 13658. The Building Trades similarly applauded the Department's proposed rule as presenting ''a straightforward and comprehensive framework for implementing, policing and enforcing Executive Order 13658.'' Although the Professional Services Council (PSC) disagreed with some of the substantive interpretations set forth in the Department's NPRM, it also expressed its appreciation for ''the extensive explanatory material'' set forth in the preamble to the proposed rule and noted that such information provided ''valuable insight into the Department's approach and rationale.''

However, the Department also received submissions from several commenters, including the National Restaurant Association (Association) and the International Franchise Association (IFA), the U.S. Chamber of Commerce (Chamber) and the National Federation of Independent Business (NFIB), the HR Policy Association, and the Associated Builders and Contractors, Inc. (ABC), expressing strong opposition to the Executive Order and questioning its legality and stated purpose. Comments questioning the legal authority and rationale underlying the Executive Order are not within the purview of this rulemaking action.

The Department also received a number of comments requesting that the President take other executive actions to protect workers on Federal Government contracts. While the Department appreciates such input, comments requesting further executive actions are beyond the scope of this rule and the Department's rulemaking authority.

Finally, the Center for Plain Language (CPL) submitted a comment regarding how the Federal Plain Language Guidelines could improve the general clarity of the final rule. The Department has carefully considered this comment and has endeavored to use plain language in the preamble and regulatory text of the final rule in instances where plain language is appropriate and does not change the substance of the rule. For example, the Department has avoided the use of ''prior to,'' ''pursuant to,'' ''shall,'' ''such,'' and ''thereunder,'' where appropriate. In addition, the Department has made an effort to use shorter sentences and paragraphs where possible or appropriate. Some of the suggested changes, however, are not suitable to this final rule. For example, the Department does not find the use of the pronoun ''you'' or headings in the form of questions to be appropriate here. Section 4(c) of Executive Order 13658 directs the Department to incorporate existing definitions and procedures from the DBA, the SCA, and the FLSA, to the extent practicable. Because the implementing regulations under those statutes do not use the pronoun ''you'' and do not use questions as headings, the Department has concluded that it would be inconsistent to do so in the final rule.

All other comments, including comments raising specific concerns regarding interpretations of the Executive Order set forth in the Department's NPRM, will be addressed in the following section-by-section analysis of the final rule. After considering all timely and relevant comments received in response to the June 17, 2014 NPRM, the Department is issuing this final rule to implement the provisions of Executive Order 13658.

The Department's final rule, which amends Title 29 of the Code of Federal Regulations (CFR) by adding part 10, establishes standards and procedures for implementing and enforcing Executive Order 13658. Subpart A of part 10 relates to general matters, including the purpose and scope of the rule, as well as the definitions, coverage, and exclusions that the rule provides pursuant to the Order. It also sets forth the general minimum wage requirement for contractors established by the Executive Order, an antiretaliation provision, and a prohibition against waiver of rights. Subpart B establishes the requirements that contracting agencies and the Department must follow to comply with the minimum wage provisions of the Executive Order. Subpart C establishes the requirements that contractors must follow to comply with the minimum wage provisions of the Executive Order. Subparts D and E specify standards and procedures related to complaint intake, investigations, remedies, and administrative enforcement

proceedings. Appendix A contains a contract clause to implement Executive Order 13658. 79 FR 9851. Appendix B sets forth a poster regarding the Executive Order minimum wage for contractors with FLSA-covered workers performing work on or in connection with a covered contract.

The following section-by-section discussion of this final rule summarizes the provisions proposed in the NPRM, addresses the comments received on each section, and sets forth the Department's response to such comments for each section.

Subpart A—General

Executive Order 13658 seeks to raise the hourly minimum wage paid by those contractors to workers performing work on covered Federal contracts to: $10.10 per hour, beginning January 1, 2015; and beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor in accordance with the Order.

Subpart A of part 10 pertains to general matters, including the purpose and scope of the rule, as well as the definitions, coverage, and exclusions that the rule provides pursuant to the Order. Subpart A also includes the Executive Order minimum wage requirement for contractors, an antiretaliation provision, and a prohibition against waiver of rights.

Section 10.1 Purpose and Scope

Proposed § 10.1(a) explained that the purpose of the proposed rule was to implement Executive Order 13658 and reiterated statements from the Order that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. The proposed rule further stated that there is evidence that boosting low wages can reduce turnover and absenteeism in the workplace, while also improving morale and incentives for workers, thereby leading to higher productivity overall. As stated in proposed § 10.1(a), it is for these reasons that the Executive Order concludes that raising, to $10.10 per hour, the minimum wage for work performed by parties who contract with the Federal Government will lead to improved economy and efficiency in Government procurement. The NPRM stated that the Department believes that, by increasing the quality and efficiency of services provided to the Federal Government, the Executive Order will improve the value that taxpayers receive from the Federal Government's investment.

The Department received a number of comments asserting that Executive Order 13658 does not promote economy and efficiency in Federal Government procurement and challenging the determinations set forth in the Executive Order that are reflected in proposed § 10.1(a). As stated above, comments questioning the President's legal authority to issue the Executive Order are not within the scope of this rulemaking action. To the extent that such comments challenge specific conclusions made by the Department in its economic and regulatory flexibility analyses set forth in the NPRM, those comments are addressed in sections IV and V of the preamble to this final rule. The Department did not receive any other comments addressing proposed § 10.1(a) and therefore implements the provision as it was proposed in the NPRM.

Proposed § 10.1(b) explained the general Federal Government requirement established in Executive Order 13658 that new contracts with the Federal Government include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, requiring, as a condition of payment, that the contractor and any subcontractors pay workers performing work on the contract or any subcontract thereunder at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) an amount determined by the Secretary pursuant to the Order, beginning January 1, 2016, and annually thereafter. Proposed § 10.1(b) also clarified that nothing in Executive Order 13658 or part 10 is to be construed to excuse noncompliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order. The Department did not receive any comments on proposed § 10.1(b) and therefore adopts the provision as proposed.

Proposed § 10.1(c) outlined the scope of this proposed rule and provided that neither Executive Order 13658 nor this part creates any rights under the Contract Disputes Act or any private right of action. In the NPRM, the Department explained that it does not interpret the Executive Order as limiting existing rights under the Contract Disputes Act. This provision also restated the Executive Order's directive that disputes regarding whether a contractor has paid the minimum wages prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Order. The provision clarified, however, that nothing in the Order is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. Finally, this paragraph clarified that neither the Order nor the proposed rule would preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

The PSC commented on proposed § 10.1(c), noting that it concurred with the provision as written but recommended that the Department modify the phrase ''*create* any rights under the Contract Disputes Act'' in the first sentence of that provision to ''*change* any rights under the Contract Disputes Act'' to recognize that this rule does not impact existing Contract Disputes Act rights. The Department agrees with this comment and, as stated in the NPRM, does not interpret the Executive Order as limiting any existing rights under the Contract Disputes Act. *See* 79 FR 34571. Accordingly, the Department has provided in § 10.1(c) of the final rule that neither Executive Order 13658 nor this part ''creates or changes'' any rights under the Contract Disputes Act. The Department has also made a technical edit to this section by adding a citation to the Administrative Procedure Act.

Section 10.2 Definitions

Proposed § 10.2 defined terms for purposes of this rule implementing Executive Order 13658. Section 4(c) of the Executive Order instructs that any regulations issued pursuant to the Order should ''incorporate existing definitions'' under the FLSA, the SCA, and the DBA ''to the extent practicable and consistent with section 8 of this order.'' 79 FR 9852. Most of the definitions provided in the Department's proposed rule were therefore based on either the Executive Order itself or the definitions of relevant terms set forth in the statutory text or implementing regulations of the FLSA, SCA, or DBA. Several proposed definitions adopted or relied upon definitions published by the FARC in section 2.101 of the FAR. 48 CFR 2.101. The Department also proposed to adopt, where applicable, definitions set forth in the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. 29 CFR 9.2. In the NPRM, the Department noted that, while the proposed definitions discussed in the proposed rule would govern the implementation and enforcement of Executive Order 13658, nothing in the proposed rule was

intended to alter the meaning of or to be interpreted inconsistently with the definitions set forth in the FAR for purposes of that regulation.

As a general matter, several commenters, such as Demos and the AFL–CIO, stated that the Department reasonably and appropriately defined the terms of the Executive Order. The AFL–CIO, for example, particularly supported ''the inclusive definitions and broad scope of the proposed rule.'' Many other individuals and organizations submitted comments supporting, opposing, or questioning specific proposed definitions that are addressed below.

The Department proposed to define the term *agency head* to mean the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency or any persons authorized to act on behalf of the agency head. This proposed definition was based on the definition of the term set forth in section 2.101 of the FAR. *See* 48 CFR 2.101. The CPL suggested that the Department consolidate this definition with the definition set forth for the term *Administrator* because the NPRM appeared to be using different terms to describe the same concept. The Department disagrees with the CPL's suggested consolidation of these two definitions because the term *agency head* is used to refer to the head of any executive agency whereas the term *Administrator,* as used in this part, refers specifically to the head of the Wage and Hour Division, U.S. Department of Labor. Because the Department did not receive any other comments addressing the term *agency head,* the Department has adopted the definition of that term as it was originally proposed.

The Department proposed to define *concessions contract* (or *contract for concessions*) to mean a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. In the NPRM, the Department explained that this proposed definition did not contain a limitation regarding the beneficiary of the services, and such contracts may be of direct or indirect benefit to the Federal Government, its property, its civilian or military personnel, or the general public. *See* 29 CFR 4.133. The proposed definition included but was not limited to all concessions contracts excluded by Departmental regulations under the SCA at 29 CFR 4.133(b).

Demos expressed its support for the Department's proposed definition of *concessions contract,* noting that the definition appropriately does not impose restrictions on the beneficiary of services offered by parties to a concessions contract with the Federal Government (*i.e.,* concessions contracts may be of direct or indirect benefit to the Federal Government, its property, its civilian or military personnel, or the general public). Several other commenters expressed concern or confusion regarding application of this definition to specific factual circumstances; such comments are addressed below in the preamble discussion of the coverage of concessions contracts. As the Department received no comments suggesting revisions to the proposed definition of this term, the Department adopts the definition as set forth in the NPRM.

The Department proposed to define *contract* and *contract-like instrument* collectively for purposes of the Executive Order as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition included, but was not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The proposed definition of the term *contract* broadly included all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing.

The Department explained that the proposed definition of the term *contract* shall be interpreted broadly to include, but not be limited to, any contract that may be consistent with the definition provided in the FAR or applicable Federal statutes. In the NPRM, the Department noted that this definition shall include, but shall not be limited to, any contract that may be covered under any Federal procurement statute. The Department specifically proposed to note in this definition that contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. The proposed definition also explained that, in addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The proposed definition also specified that, for purposes of the minimum wage requirements of the Executive Order, the term *contract* included contracts covered by the SCA, contracts covered by the DBA, and concessions contracts not otherwise subject to the SCA, as provided in section 7(d) of the Executive Order. *See* 79 FR 9853. The proposed definition of *contract* discussed herein was derived from the definition of the term *contract* set forth in Black's Law Dictionary (9th ed. 2009) and § 2.101 of the FAR (48 CFR 2.101), as well as the descriptions of the term *contract* that appear in the SCA's regulations at 29 CFR 4.110–.111, 4.130. The Department also incorporated the exclusions from coverage specified in section 7(f) of the Executive Order and provided that the term *contract* does not include grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended; or any contracts or contract-like instruments expressly excluded by § 10.4.

The Department noted that the mere fact that a legal instrument constitutes a *contract* under this definition does not mean that the contract is subject to the Executive Order. The NPRM explained that, in order for a contract to be covered by the Executive Order and the proposed rule, the contract must qualify as one of the specifically enumerated types of contracts set forth in section 7(d) of the Order and proposed § 10.3. For example, although a cooperative agreement would be considered a contract pursuant to the Department's proposed definition, a cooperative agreement would not be covered by the Executive Order and this part unless it was subject to the DBA or SCA, was a concessions contract, or was entered into ''in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.'' 79 FR 9853. In other words, the NPRM explained that this part would not apply to cooperative agreements that did not involve providing services for Federal employees, their dependents, or the general public.

Several individuals and entities submitted comments expressing their support for the Department's proposed definition of the terms *contract* and *contract-like instrument*. NELP and the

eight organizations that joined in its comment, for example, stated that the proposed definition ''fairly reflect[s] the increasing complexity of leasing and contracting relationships between the Federal Government and the private sector.'' The AFL–CIO similarly commended the Department's proposed definition because ''it is consistent both with the Executive Order and because it tracks the definitions contained in the SCA and DBA. . . . The proposal appropriately seeks to include the full range of contracts and other government procurement arrangements so as to effectuate the purposes of the Executive Order.''

However, the Department received several comments, such as those submitted by the Associated General Contractors of America (AGC), the Chamber/NFIB, the Equal Employment Advisory Council (EEAC), and the Association/IFA, expressing confusion or concern regarding the breadth of the Department's proposed definition of the terms *contract* and *contract-like instrument.* The National Ski Areas Association (NSAA), for example, described this proposed definition as ''all-encompassing'' and ''remarkably broad.'' NSAA asserted that the proposed definition of the term *contract* was so broad that it could extend to cover ''*any* agreement with a federal agency'' and could ''include even those hotels that accept a GSA room rate for government employees.''

The PSC similarly criticized the Department's ''very broad'' proposed definition and contended that it would cover situations and business relationships that are not subject to the FAR or the SCA's regulations, thus generating confusion among contractors. The PSC asserted that the proposed definition also ''over-scopes'' the term *contract* to include transactions, such as notices of awards that are not ''mutually binding legal relationships.'' The PSC further stated that the proposed definition of the term would cover instruments such as blanket purchase agreements, task orders, and delivery orders that it does not regard as ''contracts.'' The PSC thus urged the Department to adopt the definition of the term *contract* set forth in the FAR for purposes of covering Federal procurement transactions. The EEAC criticized the Department's proposed definition for including ''verbal agreements,'' and asserted that it is difficult to imagine how a proposed contract clause could be included in a verbal agreement. It further observed that the proposed definition would appear to cover any lease for space under the General Services Administration's (GSA) outlease program as well as any license or permit to use Federal land, including a permit to conduct a wedding on Federal property.

As a threshold matter, the Department notes that its proposed definition of the terms *contract* and *contract-like instrument* was primarily derived from the definitions of those terms in the FAR and the SCA's regulations and thus it should not have been wholly unfamiliar or unduly confusing to contractors. *See* 48 CFR 2.101; 29 CFR 4.110–.111, 4.130. For example, the PSC criticized the proposed definition for its inclusion of ''notices of awards,'' which the PSC argues are not ''mutually binding legal relationships.'' However, this language is taken verbatim from the FAR definition of the term *contract* that the PSC itself urges the Department to adopt. *See* 48 CFR 2.101 (defining the term *contract* as ''a mutually binding legal relationship'' and specifically stating that ''contracts include (but are not limited to) awards and notices of awards'').

Although the Department relied heavily on the FAR's definition of the term *contract,* the Department must reject the suggestion that it wholly adopt the FAR definition of the term because the term *contract* as used in the Executive Order applies to both procurement and non-procurement legal arrangements whereas the FAR definition only applies to procurement contracts. For that reason, the Department has also relied upon the Department's interpretation of the term ''contract'' under the SCA. For example, the proposed definition includes ''verbal agreements'' because the SCA's regulations specifically provide that the mere fact that an agreement is not written does not render such contract outside the scope of the SCA's coverage, *see* 29 CFR 4.110, even though the SCA mandates inclusion of a written contract clause. The inclusion of verbal agreements in the definition of the terms *contract* and *contract-like instrument* helps to ensure that coverage of the Executive Order can extend to situations where contracting parties, for whatever reason, rely on an oral agreement rather than a written contract. Although such instances are likely to be exceptionally rare, workers should not be deprived of the Executive Order minimum wage merely because the contracting parties neglected to formally memorialize their mutual agreement in an executed written contract.

With respect to all comments regarding the general breadth of the proposed definition of the terms *contract* and *contract-like instrument,* the Department notes that its proposed definition is intentionally all-encompassing. The proposed definition of these terms could indeed be applied to an expansive range of different types of legal arrangements, including purchase and task orders; the use of the term ''contract-like instrument'' in the Executive Order underscores that the Order was intended to be of potential applicability to virtually any type of agreement with the Federal Government that is contractual in nature. Importantly, however, the NPRM carefully explained that ''the mere fact that a legal instrument constitutes a contract under this definition does not mean that such contract is subject to the Executive Order.'' 79 FR 34572.

In order for a legal instrument to be covered by the Executive Order, the instrument must satisfy all of the following prongs: (1) It must qualify as a *contract* or *contract-like instrument* under the definition set forth in this part; (2) it must fall within one of the four specifically enumerated types of contracts set forth in section 7(d) of the Order and § 10.3 of this part; and (3) it must be a ''new contract'' pursuant to the definition provided in § 10.2. (Moreover, in order for the minimum wage protections of the Executive Order to actually extend to a particular worker on a covered contract, that worker's wages must be governed by the DBA, SCA, or FLSA.) For example, although an agreement between a contracting agency and a hotel pursuant to which the hotel accepts the GSA room rate for Federal Government workers would likely be regarded as a ''contract'' or ''contract-like instrument'' under the Department's proposed definition, such an agreement would not be covered by the Executive Order and this part because it is not subject to the DBA or SCA, is not a concessions contract, and is not entered into in connection with Federal property or lands. Similarly, a permit issued by the National Park Service (NPS) to an individual for purposes of conducting a wedding on Federal land would qualify as a ''contract'' or ''contract-like instrument'' but would not be subject to the Executive Order because it would not be a contract covered by the SCA or DBA, a concessions contract, or a contract in connection with Federal property related to offering services to Federal employees, their dependents, or the general public. The Department believes that this basic test for contract coverage was clearly stated in the NPRM, but has endeavored to provide additional clarification and examples of covered contracts in its preamble discussion of

the coverage provisions set forth at § 10.3 in this final rule.

Several other commenters, including AGC, requested that the Department separately define the term *contract-like instrument* and provide examples of contract-like instruments because the regulated community is generally unfamiliar with the term. The EEAC generally observed that the term *contract-like instrument* is not used in the FAR or the prevailing wage statutes with which most government contractors are familiar and thus the term has generated considerable confusion in the regulated community. Fortney and Scott, LLC (FortneyScott) similarly requested that the Department clarify the definition of a *contract-like instrument.* It asserted that all of the examples of ''contract-like instruments'' set forth in the NPRM would in fact qualify as ''contracts'' and therefore asked whether there would be any instruments that would be deemed to be ''contract-like instruments'' that would not also be considered ''contracts.'' FortneyScott suggested that the Department should expressly state in the final rule that there are no ''contract-like instruments'' subject to the Executive Order other than those that would be covered by the definition of ''contract.''

The Department acknowledges that the term *contract-like instrument* is not used in the FLSA, SCA, DBA, or FAR. For this reason, the Department has defined the term collectively with the well-known term *contract* in a manner that should be generally known and understood by the contracting community. As noted above, several commenters accurately observed that the Department's proposed definition of these terms is broad. The use of the term ''contract-like instrument'' in the Executive Order reflects that the Order is intended to cover all arrangements of a contractual nature, including those arrangements that may not be universally regarded as a ''contract.'' For example, the term *contract-like instrument* would encompass Forest Service permits that ''possess contract characteristics,'' *Son Broadcasting, Inc.* v. *United States,* 52 Fed. Cl. 815, 823 (Ct. Cl. 2002), and that use ''contract-like language.'' *Meadow-Green Wildcat Corp.* v. *Hathaway,* 936 F.2d 601, 604 (1st Cir. 1991). The large number of specific comments that the Department received regarding the coverage of ''contracts for concessions'' and ''contracts in connection with Federal property'' underscores the importance of the term ''contract-like instrument'' in the Executive Order; as the EEAC itself observed, ''[e]mployers may not think of these arrangements as contracts at all, and indeed may be surprised to learn that the new minimum wage mandate applies.'' For this precise reason, the Executive Order utilized the term ''contract-like instrument'' to help clarify that its minimum wage requirements are broadly applicable to all contractual arrangements so long as such arrangements fall within one of the four specifically enumerated types of arrangements set forth in section 7(d) of the Order. The Department acknowledges that the term *contract-like instrument* does not apply to an arrangement or an agreement that is truly not contractual. However, the use of such term helps to emphasize that the Executive Order was intended to sweep broadly to apply to concessions agreements and agreements in connection with Federal property or lands and related to offering services, regardless of whether the parties involved typically consider such arrangements to be ''contracts'' and regardless of whether such arrangements are characterized as ''contracts'' for purposes of the specific programs under which they are administered. Moreover, the Department believes that the Executive Order's use of the term *contract-like instrument* is intended to prevent disputes or extended discussions between contracting agencies and contractors regarding whether a particular legal instrument qualifies as a ''contract'' for purposes of coverage by the Order and this part. The broad definition set forth in this rule will help facilitate more efficient determinations by contractors, contracting officers, and the Department as to whether a particular legal arrangement is covered. The Department thus declines to separately define the term *contract-like instrument* as suggested by some commenters because the term is best understood contextually in conjunction with the well-known term *contract.*

The United States Department of Agriculture's Forest Service (FS) commented that the Department should consolidate the definition of the terms *contract* and *contract-like instrument* with the definition of the term *concessions contract* because it believes that the definition of *concessions contract* is subsumed in the more general definition of *contract.* Although the Department agrees that the definition of the term *contract* is relevant to determining whether a legal instrument qualifies as a ''*contract* for concessions,'' the Department continues to believe that a separate definition is necessary to inform the regulated community about the meaning of the term ''contract *for concessions.''* As noted above, commenters such as Demos expressed their strong support for the proposed definition of the term ''contract for concessions.'' The need for this specific and separate definition is underscored by the large number of comments that the Department received regarding the coverage of concessions contracts and contracts in connection with Federal property or lands. The Department addresses the specific concerns raised regarding the coverage of concessions contracts in the preamble discussion of coverage provisions below.

Several other commenters, including the America Outdoors Association (AOA) and the Association/IFA, urged the Department to include separate definitions of the terms *subcontract* and *subcontractor* in the final rule. In the NPRM, the Department stated that the proposed definition of the term *contract* broadly included all contracts and any subcontracts of any tier thereunder and also provided that the term *contractor* referred to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. The AOA and the Association/IFA expressed confusion regarding the ''flow-down'' provisions of the Executive Order and suggested that the Department could help to clarify coverage of subcontracts by expressly defining that term.

The applicability of the Executive Order to subcontracts is addressed in greater detail in the discussion of the rule's coverage provisions below, but with respect to these commenters' specific proposal to separately define the terms *subcontract* and *subcontractor,* the Department declines to set forth definitions of those terms in the final rule because it could generate significant confusion for contracting agencies, contractors, and workers. The Department notes that many commenters, including the Association/IFA itself, strongly urged the Department to align its definitions and coverage provisions with those set forth in the SCA, the DBA, and the FAR to ensure compliance and to minimize confusion. Neither the FAR nor the regulations implementing the DBA or SCA provide independent definitions of the terms ''subcontract'' and ''subcontractor.'' The SCA's regulations, for example, simply provide that the definition of the term ''contractor'' includes a subcontractor whose subcontract is subject to provisions of the SCA. *See* 29 CFR 4.1a(f).

As with the SCA and DBA, all of the provisions of the Executive Order that

are applicable to covered prime contracts and contractors apply with equal force to covered subcontracts and subcontractors, except for the value threshold requirements set forth in section 7(e) of the Order that only pertain to prime contracts. The final rule provides more clarity with respect to the rule's flow-down provisions and subcontractor coverage and liability below. For these reasons and to avoid using unnecessary and duplicative terms throughout this part, the Department therefore will continue to utilize the term *contract* to refer to all contracts and any subcontracts thereunder and use the term *contractor* to refer to a prime contractor and all of its subcontractors in the final rule, unless otherwise noted.

The Department has carefully considered all of the comments received on the proposed definition of the terms *contract* and *contract-like instrument* but, for the reasons set forth above, ultimately declines to make any of the suggested changes. However, the Department has modified the proposed definition of *contract* to delete reference to the exclusions from coverage specified in section 7(f) of the Executive Order (*i.e.,* grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended; or any contracts or contract-like instruments expressly excluded by § 10.4). As the Department has explained throughout this rule, the mere fact that an agreement qualifies as a ''contract'' under this definition does not necessarily mean that the agreement is covered by the Order. Accordingly, the Department has determined that its proposed reference to the exclusionary provisions of the Order in this definition is unnecessary and potentially confusing for the public. The Department has also made a clarifying edit to the definition of *contract* to reflect application of the Executive Order to contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public. Other than these changes, the Department adopts the definition as proposed in the NPRM.

The Department proposed to substantially adopt the definition of *contracting officer* in section 2.101 of the FAR, which means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term included certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. *See* 48 CFR 2.101. The Department did not receive any comments on its proposed definition of this term; the final rule therefore adopts the definition as proposed.

The Department defined *contractor* to mean any individual or other legal entity that (1) directly or indirectly (*e.g.,* through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract or a subcontract under a Government contract; or (2) conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor. In the NPRM, the Department noted that the term *contractor* refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. This proposed definition incorporated relevant aspects of the definitions of the term *contractor* in section 9.403 of the FAR, *see* 48 CFR 9.403; the SCA's regulations at 29 CFR 4.1a(f); and the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts at 29 CFR 9.2. This definition included lessors and lessees, as well as employers of workers performing on or in connection with covered Federal contracts whose wages are computed pursuant to special certificates issued under 29 U.S.C. 214(c). The Department noted that the term *employer* is used interchangeably with the terms *contractor* and *subcontractor* in this part. The proposed rule also explained that the U.S. Government, its agencies, and its instrumentalities are not considered contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of Executive Order 13658.

The Department received several comments on its proposed definition of the term *contractor.* The PSC, for example, contended that the proposed definition improperly covers entities that are not subject to the Executive Order, the FAR, or the SCA's regulations. In its comment, the PSC observed that the proposed definition covers an entity that ''submits an offer or reasonably may be expected to submit offers for'' a government contract and asserted that it is ''not aware of any federal procurement provision that applies to entities who 'may be expected to submit offers''' and urged the Department to delete this language. The Association/IFA similarly criticized the Department's proposed definition of the term *contractor* as including prospective bidders on a government contract ''with no explanation provided in the preamble.'' The Association/IFA further urged the Department to define specific words that appear in the proposed definition of *contractor,* such as ''affiliate'' and ''indirectly,'' and to clarify what it means to ''indirectly'' submit offers. The Association/IFA also challenged the proposed definition as including an ''exceedingly broad'' category of entities because it would apply to entities such as law firms that ''reasonably may be expected to conduct business . . . with the Government as an agent or representative of another contractor.'' The Association/IFA expressed concern that the Department's proposed definition could potentially cover ''hundreds of thousands of entities that never before considered themselves 'government contractors''' and would need to ascertain what, if any, legal obligations they have under the Executive Order. The National Industry Liaison Group (NILG) similarly requested that the Department narrow its proposed definition of the term *contractor* to exclude prospective and former Federal contractors.

The Department notes that all of the proposed definitional language to which the PSC, the Association/IFA, and the NILG object is taken verbatim from the FAR's definition of the term *contractor. See* 48 CFR 9.403. The Department proposed this definition, in part, because it believed that the definition would be of general familiarity to contractors. Moreover, the proposed definition purposely included both prospective and former contractors because, like section 9.403 of the FAR, this final rule also sets forth standards regarding the debarment, suspension, and ineligibility of contractors.

However, in light of the comments received by the Department expressing concern and confusion regarding the breadth of the proposed definition of the term *contractor,* the Department has decided to simplify the definition in the final rule to assist the general public in understanding coverage of the Executive Order. In the final rule, the Department has therefore deleted the first sentence of the definition derived from the FAR and instead defines *contractor* to mean any individual or other legal entity that is awarded a Federal Government contract or subcontract under a Federal Government contract. The Department has therefore removed the proposed definition's reference to prospective contractors and has eliminated use of terms such as ''affiliate'' and ''indirectly,'' which apparently confused several commenters. However, the Department notes that, despite the

removal of language regarding prospective contractors from this definition, such a deletion has no impact on the suspension and debarment provisions of the final rule. In other words, an individual that is awarded a Federal Government contract may be debarred pursuant to § 10.52 if he or she has disregarded obligations to workers or subcontractors under the Executive Order or this part.

Importantly, the Department notes that the mere fact that an individual or entity qualifies as a *contractor* under the Department's definition does not mean that such an entity has any legal obligations under the Executive Order. A contractor only has obligations under the Executive Order if it has a contract with the Federal Government that is specifically covered by the Order. Thus, while an individual that is awarded a contract with the Federal Government will qualify as a ''contractor'' pursuant to the Department's definition, that individual will only be subject to the minimum wage requirements of the Executive Order if he or she is awarded a ''new'' contract that falls within the scope of one of the four specifically enumerated categories of contracts covered by the Order.

Other than the revisions to the first sentence of the proposed definition of the term *contractor* explained above, the Department has retained the remainder of the proposed definition, which incorporates relevant aspects of the definition from the SCA's regulations at 29 CFR 4.1a(f) and the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts at 29 CFR 9.2. As in the proposed rule, the Department thus explains that the term *contractor* refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. The Department also notes that the term *contractor* includes lessors and lessees, as well as employers of workers performing on covered Federal contracts whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c). Finally, as stated in the NPRM, the Department explains that the term *employer* is used interchangeably with the terms *contractor* and *subcontractor* in various sections of this part and that the U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive Order.

The PSC commented on the portion of the proposed definition of *contractor* that states that neither the U.S. Government nor its agents are contractors or employers for purposes of the rule and stated that it has not yet had an opportunity to research whether the Department has the authority to make ''such a binding declaration by regulation'' or the potential effects of such a statement. The Department notes that this language identified by the PSC is taken directly from the SCA's definition of the term *contractor, see* 29 CFR 4.1a(f), and merely reflects that for purposes of this Executive Order the Federal Government does not contract with itself or enter into employment relationships with the contractors with whom it conducts business.

Finally, the Association/IFA suggested that the Department define the term ''Government contract'' because it is used in the definition of *contractor.* The Department disagrees with this comment because this part already contains definitions of the term *Federal Government* and *contract.* Because other commenters such as the CPL have urged the Department to avoid creating duplicative definitions and the Department believes that readers of this part already have clear guidance about what types of agreements qualify as contracts with the Federal Government, the Department declines to make this suggested revision.

For the reasons explained above, the Department has revised the first sentence of the definition of the term *contractor* as proposed in the NPRM to assist the general public in understanding coverage of the Executive Order, but has retained the remainder of the proposed definition in the final rule.

The Department proposed to define the term *Davis-Bacon Act* to mean the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 *et seq.,* and its implementing regulations. Because the Department did not receive any comments on this proposed definition, the Department adopts the proposed definition in this final rule.

In the NPRM, the Department defined *executive departments and agencies* that are subject to Executive Order 13658 by adopting the definition of *executive agency* provided in section 2.101 of the FAR. 48 CFR 2.101. The Department therefore interpreted the Executive Order to apply to executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31 U.S.C. 9101. The Department did not interpret this definition as including the District of Columbia or any Territory or possession of the United States. No comments were received on this proposed definition; the final rule therefore adopts the definition as set forth in the NPRM.

The Department defined the term *Executive Order minimum wage* as a wage that is at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of Executive Order 13658. This definition was based on the language set forth in section 2 of the Executive Order. 79 FR 9851–52. No comments were received on this proposed definition; accordingly, this definition is adopted in the final rule.

The Department proposed to define *Fair Labor Standards Act* as the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.,* and its implementing regulations. The Department did not receive any comments on this proposed definition and therefore adopts the definition as proposed, except that it has added the acronym FLSA to the definition.

The term *Federal Government* was defined in the NPRM as an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. This proposed definition was based on the definition of *Federal Government* set forth in 29 CFR 9.2, but eliminated the term ''procurement'' from that definition because Executive Order 13658 applies to both procurement and non-procurement contracts covered by section 7(d) of the Order. Consistent with the SCA, the proposed definition of the term *Federal Government* included nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies. *See* 29 CFR 4.107(a). For purposes of the Executive Order and this part, the Department's proposed definition did not include the District of Columbia or any Territory or possession of the United States. The Department did not receive any comments on the proposed definition of *Federal Government* and thus adopts the definition as set forth in the NPRM with one modification. For the reasons explained in the NPRM and set forth below, independent regulatory agencies within the meaning of 44 U.S.C. 3502(5) are not subject to the Executive Order or this part. The Department has therefore made a clarifying edit to this definition to reflect that, for purposes of the Executive Order, independent regulatory agencies are not included in the definition of *Federal Government.*

The Department proposed to define the term *independent agencies,* for the purposes of Executive Order 13658, as any independent regulatory agency within the meaning of 44 U.S.C. 3502(5). Section 7(g) of the Executive Order states that ''[i]ndependent agencies are strongly encouraged to comply with the requirements of this order.'' The Department interpreted this provision to mean that independent agencies are not required to comply with this Executive Order. This proposed definition was therefore based on other Executive Orders that similarly exempt independent regulatory agencies within the meaning of 44 U.S.C. 3502(5) from the definition of *agency* or include language requesting that they comply. *See, e.g.,* Executive Order 13636, 78 FR 11739 (Feb. 12, 2013) (defining *agency* as any executive department, military department, Government corporation, Government-controlled operation, or other establishment in the executive branch of the Government but excluding independent regulatory agencies as defined in 44 U.S.C. 3502(5)); Executive Order 13610, 77 FR 28469 (May 10, 2012) (same); Executive Order 12861, 58 FR 48255 (September 11, 1993) (''Sec. 4 Independent Agencies. All independent regulatory commissions and agencies are requested to comply with the provisions of this order.''); Executive Order 12837, 58 FR 8205 (Feb. 10, 1993) (''Sec. 4. All independent regulatory commissions and agencies are requested to comply with the provisions of this order.''). The Department did not receive any comments on the proposed definition of this term and therefore adopts the definition as proposed in this final rule.

The Department proposed to define the term *new contract* as a contract that results from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015. The proposed definition noted that this term includes both new contracts and replacements for expiring contracts provided that the contract results from a solicitation issued on or after January 1, 2015, or is awarded outside the solicitation process on or after January 1, 2015. This language was based on section 8 of the Executive Order, 79 FR 9853, and was consistent with the convention set forth in section 1.108(d) of the FAR, 48 CFR 1.108(d). The PSC commented that it supports the proposed definition of this term. In response to several comments requesting clarification of the Executive Order's applicability to new contracts, the Department has revised the definition of ''new contract'' provided in § 10.2 of the proposed rule, as explained below in the preamble discussion of the ''new contract'' coverage provisions set forth at § 10.3.

Proposed § 10.2 defined the term *option* by adopting the definition set forth in section 2.101 of the FAR, which provides that the term *option* means a unilateral right in a contract by which, for a specified time, the Federal Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. *See* 48 CFR 2.101. As noted above, many commenters expressed confusion or concern with the Department's discussion of the coverage of new contracts, including its proposed interpretation that the exercise of an option clause by the Federal Government does not constitute a ''new contract'' for purposes of the Executive Order. All such comments are addressed below in the preamble discussion of the coverage provisions set forth at § 10.3.

Several other commenters, including Bond, Schoeneck, and King, PLLC, and the Civil Works Program of the U.S. Army Corps of Engineers (USACE), observed that the Department's proposed definition of the term *option* refers only to a unilateral contractual right held by the Federal Government; these commenters questioned whether the Department would also include situations in which a contractor exercises a unilateral right to extend the term of a contact within its definition of an *option.* The USACE noted, for example, that many of its leases of Federal lands to third parties contain options for renewal that provide the lessee with the unilateral right to renew the lease with all terms and conditions of the existing lease, except that they occasionally provide for increased rent and are subject to USACE's discretion to terminate the lease or decline renewal of the lease for non-compliance with the terms and conditions of the agreement.

In response to these comments, the Department notes that its proposed definition of the term *option,* which solely refers to a unilateral contractual right exercised by the Federal Government, is taken directly from the FAR. *See* 48 CFR 2.101. The Department chose to utilize this definition in order to provide clarity and consistency with well-established contracting concepts to the regulated community. The Department understands that it is rare for the Federal Government to enter into agreements under which a contractor would have the unilateral right to extend the term of the contract without entering into bilateral negotiations with the contracting agency. Insofar as such a situation may arise in which a contractor holds a unilateral right to extend the contract, however, the Department believes that the interests of the Executive Order are best effectuated by adhering to its conclusion that only the unilateral exercise of a pre-negotiated option clause by the Federal Government itself falls outside the scope of the Order; if a contractor unilaterally elects to exercise an option period after January 1, 2015, that option period may be subject to the minimum wage requirements of the Order. After thorough review and consideration of these comments, the Department has decided to implement the definition as proposed in the NPRM without modification.

The Department proposed to define the term *procurement contract for construction* to mean a contract for the construction, alteration, or repair (including painting and decorating) of public buildings or public works and which requires or involves the employment of mechanics or laborers, and any subcontract of any tier thereunder. The proposed definition included any contract subject to the provisions of the DBA, as amended, and its implementing regulations. This proposed definition was derived from language found at 40 U.S.C. 3142(a) and 29 CFR 5.2(h). The Department did not receive any comments on this proposed definition and it is therefore adopted as set forth in the NPRM.

The Department proposed to define the term *procurement contract for services* to mean a contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder. This proposed definition included any contract subject to the provisions of the SCA, as amended, and its implementing regulations. This proposed definition was derived from language set forth in 41 U.S.C. 6702(a), 29 CFR 4.1a(e), and 29 CFR 9.2. No comments were submitted on this definition; accordingly, the Department implements the definition as proposed.

The Department proposed to define the term *Service Contract Act* to mean the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.,* and its implementing regulations. *See* 29 CFR 4.1a(a). The Department did not receive any comments on the proposed definition of this term and thus adopts the definition as proposed for purposes of the final rule.

In the NPRM, the term *solicitation* was defined to mean any request to

submit offers or quotations to the Federal Government. This definition was based on the language found at 29 CFR 9.2. The Department broadly interpreted the term *solicitation* to apply to both traditional and nontraditional methods of solicitation, including informal requests by the Federal Government to submit offers or quotations. In its comment, the PSC did not object to the proposed definition of this term as set forth in the regulatory text itself, but stated that the NPRM's preamble discussion of this term reflected that the Department intended to cover ''informal requests'' by the Federal Government to submit offers or quotations. The PSC urged the Department to reject this interpretation because it could be construed to inappropriately cover ''requests for information'' whereby agencies seek information from the public without providing any commitment to issuing solicitations or making awards. The PSC similarly contended that this interpretation of ''solicitation'' could even be deemed to apply to informal conversations with Federal workers. In response to the PSC's concerns, the Department has clarified that requests for information issued by Federal agencies and informal conversations with Federal workers are not ''solicitations'' for purposes of the Executive Order.

The final rule therefore adopts the definition as proposed, except that it clarifies that the term *solicitation* also includes any request to submit ''bids'' to the Federal Government. The Department believes that the NPRM was clear that ''bids'' were included within its reference to ''offers or quotations,'' but has determined that it would be helpful to the regulated community to include the more colloquially used term ''bids'' in the final rule.

The Department adopted in the proposed rule the definition of *tipped employee* in section 3(t) of the FLSA, that is, any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips. *See* 29 U.S.C. 203(t). The NPRM explained that, for purposes of the Executive Order, a worker performing on or in connection with a contract covered by the Executive Order who meets this definition is a tipped employee. One commenter, the CPL, criticized the Department for defining the term *tipped employee* twice in its proposed rule—first in the ''definitions'' section at proposed § 10.2 and subsequently in the section addressing contractor requirements with respect to tipped employees at proposed § 10.28(b)(1). The CPL added that the definition provided in proposed § 10.2 was ''incomplete'' because it did not include the additional clarifications provided in proposed § 10.28(b)(1). In response, the Department notes that the two definitions are consistent and believes that keeping the definitions of ''tipped employee'' in both sections is appropriate to the extent that doing so obviates the need for contractors to cross reference between sections when attempting to understand their obligations to tipped employees. For that reason, the Department adopts the definition of ''tipped employee'' in § 10.2 as it was originally proposed.

In proposed § 10.2, the Department defined the term *United States* by adopting the definition set forth in 29 CFR 9.2, which provides that the term means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities. The proposed definition also incorporated the definition of the term that appears in the FAR at 48 CFR 2.101, which explains that when the term is used in a geographic sense, the *United States* means the 50 States and the District of Columbia. The Department's proposed rule did not adopt any of the exceptions to the definition of this term that are set forth in the FAR. No comments were received on this proposed definition and it is therefore implemented in the final rule.

The Department proposed to define *wage determination* as including any determination of minimum hourly wage rates or fringe benefits made by the Secretary pursuant to the provisions of the SCA or the DBA. This term included the original determination and any subsequent determinations modifying, superseding, correcting, or otherwise changing the provisions of the original determination. The proposed definition was derived from 29 CFR 4.1a(h) and 29 CFR 5.2(q). The Department did not receive any comments on this proposed definition and thus adopts it as proposed for the final rule.

The Department proposed to define *worker* as any person engaged in the performance of a contract covered by the Executive Order, and whose wages under such contract are governed by the FLSA, the SCA, or the DBA, regardless of the contractual relationship alleged to exist between the individual and the employer. The proposed definition also incorporated the Executive Order's provision that the term *worker* includes any individual performing on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c). *See* 79 FR 9851, 9853. The proposed definition also included any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. *See* 29 CFR 4.6(p) (SCA); 29 CFR 5.2(n) (DBA). Consistent with the FLSA, SCA, and DBA and their implementing regulations, this proposed definition of *worker* excluded from coverage any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. *See* 29 U.S.C. 213(a)(1) (FLSA); 41 U.S.C. 6701(3)(C) (SCA); 29 CFR 5.2(m) (DBA).

The Department also emphasized the well-established principle under those statutes that worker coverage does not depend upon the existence or form of any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons. *See, e.g.,* 29 U.S.C. 203(d), (e)(1), (g) (FLSA); 41 U.S.C. 6701(3)(B), 29 CFR 4.155 (SCA); 29 CFR 5.5(a)(1)(i) (DBA). The proposed rule noted that, as reflected in the proposed definition, the Executive Order is intended to apply to a wide range of employment relationships. The Department thus explained that neither an individual's subjective belief about his or her employment status nor the existence of a contractual relationship is determinative of whether a worker is covered by the Executive Order.

The AFL–CIO supported the Department's proposed definition of the term *worker,* noting that it ''appropriately comports with the very broad definition of 'employee' contained in the FLSA,'' as well as with the relevant definitions of covered workers under the SCA and DBA.

A few commenters such as the Association/IFA noted a technical inconsistency in the regulatory text pertaining to the scope of the definition of the term *worker.* In the NPRM, the Department repeatedly stated in its preamble discussion that workers are entitled to the Executive Order minimum wage for all hours worked ''on or in connection with'' a covered contract. This language regarding coverage of workers performing ''on or

in connection with'' a covered contract is also set forth in the proposed definition of the term *worker* in specific reference to certain apprentices and workers whose wages are calculated pursuant to special certificates issued under section 14(c) of the FLSA; that language did not, however, appear in the regulatory text of the proposed definition in a more generally applicable way.

Based on the number of comments received regarding this standard and its application to all covered workers, the Department believes that commenters clearly understood the NPRM's intent to apply this standard to all covered workers. As recommended by the Association/IFA, however, the Department has added clarifying language to reconcile the definition of the term *worker* with its preamble discussion of worker coverage, reflecting that the definition applies to all individuals performing work on or in connection with a covered contract.

The Department also received many comments regarding its proposed interpretation of worker coverage under the Executive Order, all of which are addressed in the preamble and regulatory text for the coverage provisions at § 10.3 below.

Finally, the Department proposed to adopt the definitions for the terms *Administrative Review Board, Administrator, Office of Administrative Law Judges,* and *Wage and Hour Division* set forth in 29 CFR 9.2. No comments were received on the proposed definitions of these terms, and the Department thus adopts those definitions in the final rule with a technical modification. The Department has added the acronym ARB to the definition of *Administrative Review Board.*

Section 10.3 Coverage

Proposed § 10.3 addressed and implemented the coverage provisions of Executive Order 13658. Proposed § 10.3 explained the scope of the Executive Order and its coverage of executive agencies, new contracts, types of contractual arrangements and workers. Proposed § 10.4 implemented the exclusions expressly set forth in section 7(f) of the Executive Order and provided other limited exclusions to coverage as authorized by section 4(a) of the Order. 79 FR 9852–53. Several commenters, such as AGC and the Association/IFA, requested that the Department provide additional clarification and examples regarding covered contracts, workers, and work throughout its preamble discussion of this provision. The Association/IFA also generally urged the Department to include additional discussion of the coverage provisions in both the preamble and regulatory text. In response to these comments and as set forth below, the Department has endeavored to further clarify the scope of the Executive Order's coverage in both the preamble and regulatory text for § 10.3.

A number of commenters requested that the Department determine whether the Executive Order applies to a wide variety of particular factual arrangements and circumstances. To the extent that such commenters provided sufficient specific factual information for the Department to opine on a particular coverage issue and such a discussion of the specific coverage issue would be useful to the general public, the Department has addressed the specific factual questions raised in the preamble discussion below.

Executive Order 13658 provides that agencies must, to the extent permitted by law, ensure that new contracts, as described in section 7 of the Order, include a clause specifying, as a condition of payment, that the minimum wage to be paid to workers in the performance of the contract shall be at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) an amount determined by the Secretary, beginning January 1, 2016, and annually thereafter. 79 FR 9851. Section 7(d) of the Executive Order establishes that the Order's minimum wage requirement only applies to a new contract if: (i)(A) It is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Section 7(e) of the Order states that, for contracts covered by the SCA or the DBA, the Order applies only to contracts at the thresholds specified in those statutes. *Id.* It also specifies that, for procurement contracts where workers' wages are governed by the FLSA, the Order applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the Order pursuant to regulations or actions taken under section 4 of the Order. 79 FR 9853. The Executive Order states that it does not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended; or any contracts expressly excluded by the regulations issued pursuant to section 4(a) of the Order. 79 FR 9853.

Proposed § 10.3(a) implemented these coverage provisions by stating that Executive Order 13658 and this part apply to any contract with the Federal Government, unless excluded by § 10.4, that results from a solicitation issued on or after January 1, 2015, or that is awarded outside the solicitation process on or after January 1, 2015, provided that: (1)(i) It is a procurement contract for construction covered by the DBA; (ii) it is a contract for services covered by the SCA; (iii) it is a contract for concessions, including any concessions contract excluded by Departmental regulations at 29 CFR 4.133(b); or (iv) it is a contract in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (2) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Proposed § 10.3(b) incorporated the monetary value thresholds referred to in section 7(e) of the Executive Order. *Id.* Finally, proposed § 10.3(c) stated that the Executive Order and this part only apply to contracts with the Federal Government requiring performance in whole or in part within the United States. Several issues relating to the coverage provisions of the Executive Order and proposed § 10.3 are discussed below.

Coverage of Executive Agencies and Departments

Executive Order 13658 applies to all ''[e]xecutive departments and agencies.'' 79 FR 9851. As explained above, the Department proposed to define *executive departments and agencies* by adopting the definition of *executive agency* provided in section 2.101 of the Federal Acquisition Regulation (FAR). 48 CFR 2.101. The proposed rule therefore interpreted the Executive Order as applying to executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31 U.S.C. 9101. Pursuant to this proposed definition, contracts awarded by the District of Columbia or any Territory or possession of the United States would not be covered by the Order.

The Executive Order strongly encourages, but does not compel, ''[i]ndependent agencies'' to comply with its requirements. 79 FR 9853. The Department interpreted this provision, in light of the Executive Order's broad goal of adequately compensating workers on contracts with the Federal Government, as a narrow exemption from coverage. *See* 79 FR 9851. As discussed above, the proposed rule interpreted independent agencies to mean any independent regulatory agency within the meaning of 44 U.S.C. 3502(5). This interpretation is consistent with provisions in other Executive Orders. *See, e.g.,* Executive Order 13636, 78 FR 11739 (Feb. 12, 2013); Executive Order 12861, 58 FR 48255 (Sept. 11, 1993). Thus, under the proposed rule, the Executive Order would cover executive departments and agencies but would not cover any independent regulatory agency within the meaning of 44 U.S.C. 3502(5).

The Department did not receive any comments on its discussion of the proposed coverage of executive agencies and departments and thus adopts this coverage discussion in the final rule.

Coverage of New Contracts With the Federal Government

Proposed § 10.3(a) provided that the requirements of the Executive Order generally apply to ''contracts with the Federal Government.'' As discussed above, the NPRM set forth a broadly inclusive definition of the term *contract* that would include all contracts and contract-like instruments and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, intergovernmental service agreements, provider agreements, service agreements, licenses, permits, awards and notices of awards, job orders or task letters issued under basic ordering agreements, letter contracts, purchase orders, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. Unless otherwise noted, the use of the term *contract* throughout the Executive Order and this part therefore included *contract-like instruments* and subcontracts of any tier.

As reflected in proposed § 10.3(a), the minimum wage requirements of Executive Order 13658 apply only to ''new contracts'' with the Federal Government within the meaning of section 8 of the Order. 79 FR 9853–54. Section 8 of the Executive Order states that the Order shall apply to covered contracts where the solicitation for such contract has been issued on or after: (i) January 1, 2015, consistent with the effective date for the action taken by the FARC pursuant to section 4(a) of the Order; or (ii) for contracts where an agency action is taken pursuant to section 4(b) of the Order, on or after January 1, 2015, consistent with the effective date for such action. 79 FR 9853–54. Proposed § 10.3(a) of this rule therefore stated that this part applies to contracts with the Federal Government, unless excluded by § 10.4, that result from solicitations issued on or after January 1, 2015, or to contracts that are awarded outside the solicitation process on or after January 1, 2015. As stated in the NPRM, the Executive Order and this part thus would apply to both new contracts and replacements for expiring contracts provided that such a contract results from a solicitation issued on or after January 1, 2015, or is awarded outside the solicitation process on or after January 1, 2015. The Department proposed that the Executive Order and this part do not apply to subcontracts unless the prime contract under which the subcontract is awarded results from a solicitation issued on or after January 1, 2015, or is awarded outside the solicitation process on or after January 1, 2015. Pursuant to the proposed rule, the requirements of the Executive Order and this part would not apply to contracts entered into pursuant to solicitations issued prior to January 1, 2015, the automatic renewal of such contracts, or the exercise of options under such contracts. Under the NPRM, existing contracts would have been treated as ''new contracts'' subject to the Executive Order if they were extended, renewed, or modified in any way (other than administrative changes) as a result of bilateral negotiations on or after January 1, 2015.

As discussed above in the context of the Department's proposed definitions in § 10.2, the term *option* meant a unilateral right in a contract by which, for a specified time, the Federal Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. *See* 48 CFR 2.101. In the NPRM, the Department noted that only truly automatic renewals of contracts or exercises of options devoid of any bilateral negotiations fall outside the scope of the Executive Order. As discussed above, the Department's proposed definition of the term *contract* specifically included bilateral contract modifications. Pursuant to the proposed rule, any renewals or extensions of contracts resulting from bilateral negotiations involving contractual modifications other than administrative changes would therefore qualify as ''new contracts'' subject to the Executive Order if they are awarded on or after January 1, 2015, even if such negotiations occur during option periods. For example, pursuant to the proposed interpretation, renewals of GSA Schedule Contracts that occur on or after January 1, 2015, and subsequent task orders under such contracts, would be covered by the Executive Order and this part to the extent that such renewals reflect bilateral negotiations. By way of another example, if on January 1, 2015, a contracting agency and contractor renew an existing contract for construction after engaging in negotiations regarding the type, size, cost, or location for the construction work to be performed under the contract, the Department would view such a contractual renewal as a ''new contract'' subject to the Executive Order. However, when a contracting agency exercises its unilateral right to extend the term of an existing service contract and simply makes pricing adjustments based on increased labor costs that result from its obligation to include a current SCA wage determination pursuant to 29 CFR 4.4 but no bilateral negotiations occur (other than any necessary to determine and effectuate those pricing adjustments), the Department would not view the exercise of that option as a ''new contract'' covered by the Executive Order.

The Department received a number of comments relating to its proposed interpretation of ''new contracts'' that are subject to the minimum wage requirements of the Executive Order. As a general matter, the PSC expressed its support for the formulation of proposed § 10.3(a) because ''it is consistent with the definition of a 'new contract' in Section 10.2 and the provisions of the Executive Order.'' Other commenters, however, expressed confusion or concern regarding the Department's proposed interpretation, resulting in some changes to the proposed definition discussed above. Each of these comments, and any resulting change made, is addressed below.

A few comments were submitted regarding the Department's proposed interpretation that the minimum wage requirements of Executive Order 13658 do not apply to a unilateral exercise of an option clause because it is not a ''new contract.'' The AFL–CIO, the Office and Professional Employees International Union (OPEIU) and the Industrial Technical & Professional Employees Union, OPEIU Local 4873 (ITPEU), and the Building Trades

expressed concern regarding the Department's proposed interpretation of the term *new contract* and urged the Department to redefine the term in the Final Rule such that the exercise of an option period under an existing contract would be subject to the Executive Order if it is exercised on or after January 1, 2015. Those commenters noted that, under the SCA and DBA, the Department and the FARC require the inclusion of new or current prevailing wage determinations upon the exercise of options under existing contracts. *See, e.g.,* 48 CFR 22.404–1(a)(1). The Building Trades and AFL–CIO argued that the Department should apply this same standard to the Executive Order. The OPEIU and the ITPEU similarly asserted that the exercise of an option clause under an existing contract should be covered and suggested that the Department clarify that its proposed definition of *contract-like instrument* includes the exercise of an option period because it qualifies as a ''bilateral contract modification.'' This commenter cautioned that if the exercise of options is not considered a covered contract, the application of the Executive Order to many service contract workers could be delayed for years because concessions contracts are often long-term in nature.

The Department appreciates and has carefully considered the comments received on this issue, but ultimately declines to alter its conclusion that the unilateral exercise of an option clause under an existing contract does not qualify as a ''new contract'' for purposes of the Executive Order. As a threshold matter, the Department notes that its definition of the term *option* only refers to a pre-negotiated unilateral contractual right held by the Federal Government to purchase additional supplies or services or extend the term of the contract; contrary to the assertion made by the OPEIU and the ITPEU, the unilateral exercise of an option clause does not qualify as a ''bilateral contract modification'' for purposes of the Order because it is a pre-negotiated unilateral contractual right affording the contracting agency discretion in whether to exercise the option.

Sections 2(a), 7(d), and 8(a) of the Executive Order all contain express directives that the minimum wage requirements of the Order only extend to ''new contracts.'' 79 FR 9851–53. In extending only to ''new contracts,'' the Executive Order ensures that contracting agencies and contractors will have sufficient notice of any obligations under Executive Order 13658 and can take into account any potential economic impact of the Order on projected labor costs prior to negotiating ''new contracts'' on or after January 1, 2015.

The Department recognizes that, under the SCA and DBA, the Department and the FARC generally require the inclusion of new or current prevailing wage determinations upon the exercise of option clauses under existing contracts. *See, e.g.,* 29 CFR 4.143(b); 48 CFR 22.404–1(a)(1); All Agency Memorandum (AAM) No. 157 (1992); *In the Matter of the United States Army,* ARB Case No. 96–133, 1997 WL 399373 (ARB July 17, 1997).[4] The SCA's regulations, for example, provide that when the term of an existing contract is extended pursuant to an option clause, the contract extension is viewed as a ''new contract'' for SCA purposes. *See* 29 CFR 4.143(b). The rationale underlying this treatment of the exercise of option periods for purposes of the SCA and DBA, however, is distinguishable from the equities present with the Executive Order. Under the SCA and DBA, the interpretation of an exercise of an option period as a ''new contract'' is relevant for purposes of inserting a new or current prevailing wage determination in an existing multi-year contract that is *already* subject to the SCA or DBA; contracting parties affected by this interpretation thus knew that the agreement was covered by the prevailing wage statute at the time they entered into the original contract. Under the Executive Order, however, the ''new contract'' determination triggers coverage of the minimum wage requirements for contracts that previously were not subject to the Order at all. The Department thus finds its treatment of option periods under the SCA and DBA serves a substantively different purpose and function than its interpretation of option periods under the Executive Order.

For these reasons, the Department adheres to its conclusion that the unilateral exercise of a pre-negotiated option clause by the Federal Government under an existing contract is not a ''new contract'' for purposes of the Executive Order.

Under the Department's proposed interpretation set forth in the NPRM, any renewals extensions, or modifications of existing contracts resulting from bilateral negotiations (other than administrative changes) on or after January 1, 2015 would have qualified as ''new contracts'' subject to the Executive Order, even if such negotiations occurred during option periods. The USACE commented on this proposed interpretation, requesting clarification as to what constitutes an ''administrative change'' and as to what degree of contractual modification is required in order for a modification to be considered a ''new contract'' subject to the Executive Order, particularly for covered contracts that are not subject to the FAR. The USACE specifically wondered whether the Department would regard a change of ownership or control under a contract (*e.g.,* assignment of a lease) as an ''administrative change'' or if such change would be sufficient to trigger a ''new contract'' under this part.

The FS similarly requested clarification on the scope of bilateral contract modifications that would require application of the Executive Order minimum wage requirements to a concessions contract. It specifically asked the Department to explain whether the Executive Order is intended to apply to bilateral contract modifications exclusively in the context of contractual renewals or extensions, or whether bilateral contract modifications in any context (*e.g.,* revisions during the term of an existing concessions contract that do not modify the scope of the authorized use of Federal land or property) would be regarded as ''new contracts'' subject to the Order. The FS also asked the Department to clarify whether the Executive Order applies exclusively to bilateral contract modifications that affect the scope of offered services or facilities, or would extend more generally to any type of bilateral contract modifications, including those that do not change the scope of authorized services or facilities (such as updating annual operating plans or utilizing a land use fee offset agreement).

Similarly, the AOA asked about the application of the Executive Order to contractual amendments, specifically with respect to amendments to existing contracts and permits on Federal land. It also requested clarification as to whether the Executive Order would apply to extensions of National Park Service (NPS) concessions contracts pursuant to the Concessions Management Improvement Act or to extensions and/or renewals of FS priority use permits.

Under the NPRM, existing contracts would have been treated as ''new contracts'' if extended, renewed, or

[4] As stated in AAM 157 and as recognized by the Building Trades, the Department does not assert that the exercise of an option period qualifies as a new contract in all cases for purposes of the DBA and SCA. *See* 63 FR 64542 (Nov. 20, 1998). The Department considers the specific contract requirements at issue in making this determination. For example, the Department does not consider that a new contract has been created where a contractor is simply given additional time to complete its original obligations under the contract. *Id.*

modified in any way except for administrative changes as a result of bilateral negotiations on or after January 1, 2015. Based upon a thorough review of comments received and careful consideration of the issue, the Department has decided to modify and clarify its approach to ''new contract'' coverage in this final rule. A contractual arrangement is a ''new contract'' subject to the Executive Order if it is a contract that results from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015. The Department notes that this term includes both new contracts and replacements for expiring contracts, but it does not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. The Department further clarifies that, for purposes of the Executive Order, a contract entered into prior to January 1, 2015 will be deemed to be a *new contract* if, through bilateral negotiation, on or after January 1, 2015: (1) The contract is renewed; (2) the contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2014 providing for a short-term limited extension; or (3) the contract is amended pursuant to a modification that is outside the scope of the contract. The FARC, in consultation with the Department, will develop additional guidance, as necessary, as to what constitutes a short-term limited extension for these purposes.

In this final rule, the Department adopts its proposed interpretation in the NPRM that existing contracts that are renewed on or after January 1, 2015 as a result of bilateral negotiations qualify as ''new contracts'' subject to the Executive Order. As noted above, however, the final rule makes two changes with respect to the NPRM's treatment of contract extensions and modifications on or after January 1, 2015. First, extensions would not be treated as ''new contracts'' if such extensions were made pursuant to terms in the contract as of December 31, 2014 that authorized a short-term limited contract extension. Second, modifications (other than extensions or renewals that constitute new contracts) would not be treated as ''new contracts'' unless they qualify as modifications outside the scope of the contract. Each of these changes to the Department's proposed treatment of ''new contracts'' set forth in the NPRM are discussed below.

With respect to the coverage of contract modifications, the Department's approach in this final rule is designed to reflect that modifications within the scope of the contract do not in fact constitute new contracts. Long-standing contracting principles recognize that an existing contract, especially a larger one, will often require modifications, which may include very modest changes (*e.g.,* a small change to a delivery schedule). Therefore, regulations such as the FAR do not require agencies to create new contracts to support these actions. Accordingly, contract modifications that are within the scope of the contract within the meaning of the FAR, *see* 48 CFR 6.001(c) and related case law, are not ''new contracts'' for purposes of the Executive Order.

However, if the parties bilaterally negotiate a modification that is outside the scope of the contract, the agency will be required to create a new contract, triggering solicitation and/or justification requirements, and thus such a modification after January 1, 2015 will constitute a ''new contract'' subject to the minimum wage requirements of this rule. For example, if an existing SCA-covered contract for janitorial services at a Federal office building is modified by bilateral negotiation after January 1, 2015 to also provide for security services at that building, such a modification would likely be regarded as outside the scope of the contract and thus qualify as a ''new contract'' subject to the Executive Order. Similarly, if an existing DBA-covered contract for construction work at Site A was modified by bilateral negotiation after January 1, 2015 to also cover construction work at Site B, such a modification would generally be viewed as outside the scope of the contract and thus trigger coverage of the Executive Order. The Department cautions, however, that whether a modification qualifies as ''within the scope'' or ''outside the scope'' of the contract is necessarily a fact-specific determination. *See, e.g., AT&T Communications, Inc.* v. *Wiltel, Inc.,* 1 F.3d 1201 (Fed. Cir. 1993).

The Department further notes that, while in scope modifications do not create ''new contracts'' under this final rule, the Department strongly encourages agencies to bilaterally negotiate, as part of any such modification, application of the minimum wage requirements so that these contracts can take advantage of the benefits of a higher minimum wage.

With respect to contract extensions, the Department generally affirms its proposed approach that a bilaterally negotiated extension of an existing contract on or after January 1, 2015 will be viewed as a ''new contract.'' Importantly, however, the Department has carved out one exception to this general principle: If the extension is made pursuant to a term in the contract as of December 31, 2014 providing for a short-term limited extension, the extension will not constitute a ''new contract'' and will not be covered. These changes to the definition of *new contract* better align the final rule with notions of in scope and out of scope actions while still providing an important limitation on the length of the bilaterally negotiated extension. Thus, a short-term extension of contract terms (*e.g.,* an extension of six months or less) that was provided for by the pre-negotiated terms of the contract prior to January 1, 2015 would be an in scope change and would not constitute a new contract. Bilaterally negotiated extensions envisioned in the contract that are limited in duration, such as a bridge to prevent a gap in service, would not be considered a ''new contract,'' but a long-term extension that is tantamount to a replacement contract will be treated as a ''new contract'' for purposes of this rule. Similarly, an extension that was bilaterally negotiated and not previously authorized by the terms of the existing contract would be a ''new contract'' subject to the minimum wage requirements. The Department also notes that a long-term extension of an existing contract will qualify as a ''new contract'' subject to the Executive Order, even if such an extension was provided for by a pre-negotiated term of the contract. The Department would regard a long-term extension as tantamount to a renewal or replacement, which are covered by the Order.

The Department has consulted with the FARC and notes that contract extensions are commonly accomplished through options created by the agency pursuant to FAR clause 52.217–8 (which allows for an extension of time of up to six months for a contractor to perform services that were acquired but not provided during the contract period) or FAR clause 52.217–9 (which provides for an extension of the contract term to provide additional services for a limited term specified in the contract at previously agreed upon prices). The contracting agency's exercise of extensions under these clauses would not trigger application of the minimum wage requirements because the clauses give the contracting agency a discretionary right to unilaterally exercise the option to extend and unilateral options are excluded from the definition of ''new contract.'' However, as explained above, if an extension was

bilaterally negotiated and not made pursuant to an existing clause as of January 1, 2015, such action would create a new relationship with the Federal Government. As a result, such action would be treated as creating a ''new contract'' for purposes of this rule and trigger application of the minimum wage requirements.

The Department believes that these changes to its proposed approach to ''new contract'' coverage are responsive to several commenters, such as the USACE, the FS, and the AOA, that expressed confusion regarding the type or extent of contract modifications that the Department would consider sufficient to trigger coverage of the Executive Order. For example, with respect to the USACE's comment seeking clarification on the meaning of the phrase ''administrative change,'' as explained above, the Department has modified the definition of *new contract* in the final rule and removed reference to ''administrative changes.''

With respect to the specific questions raised by the AOA, the approach described above governs whether a ''new contract'' has been created for purposes of the Executive Order. Extensions of existing NPS concessions contracts pursuant to the Concessions Management Improvement Act will be treated in the same manner as all other concessions contracts. If the NPS exercises its unilateral right to exercise an option to extend the contract and no substantive modifications are made to the agreement, such agreement will not be considered a ''new contract.'' However, if, on or after January 1, 2015, the parties renew the agreement or extend the agreement bilaterally and such extension was not made pursuant to the terms of the contract as of December 31, 2014 or is not a short-term extension, the Department would view the resulting agreement as a ''new contract'' subject to the Executive Order. Similarly, if the parties amend the concessions contract pursuant to a modification that is outside the scope of the contract, the Department would regard the resulting agreement as a ''new contract'' subject to the Order.

Several commenters also requested the Department to clarify whether its interpretation of ''new contracts'' subject to the Executive Order applies to task orders issued on or after January 1, 2015, under existing master contracts. The AGC, for example, sought clarification as to whether the Order applies to task orders issued on or after January 1, 2015, pursuant to an ''indefinite delivery, indefinite quantity'' (IDIQ) contract that was awarded prior to January 1, 2015. FortneyScott similarly sought clarification regarding the coverage of task orders issued by a contracting agency under a GSA Schedule Contract. It specifically asked whether, if a GSA Schedule Contract is entered into prior to January 1, 2015, and remains unmodified after that date, any task orders issued under the GSA Schedule Contract, even if issued on or after January 1, 2015, would be subject to the Order. FortneyScott asked that the Department explicitly state in the regulations that task orders issued under GSA Schedule Contracts entered into prior to January 1, 2015, and prior to the renewal or modification of the GSA Schedule Contract are not subject to the Executive Order. Alternatively, it proposed that if the Department determines that such task orders are covered, contractors should be entitled to a contract price adjustment. Relatedly, the PSC observed that the Department's proposed interpretation of the coverage of new contracts would treat each new order under a task order as a new contract and that such an interpretation would raise labor costs without the contractor being able to anticipate or recover any price increase resulting from the minimum wage requirement, notwithstanding the pricing regimes in the base contract.

Under this final rule, a contract awarded under the GSA Schedules will be considered a ''new contract'' in certain situations. Of particular note, any covered contracts that are added to the GSA Schedule in response to GSA Schedule solicitations issued on or after January 1, 2015, qualify as ''new contracts'' subject to the Order; any covered task orders issued pursuant to those contracts would be deemed to be ''new contracts.'' This would include contracts to add new covered services as well as contracts to replace expiring contracts. As explained above, the Department is strongly encouraging agencies to bilaterally modify existing contracts, as appropriate, to include the minimum wage requirements of this rule when such contracts are not otherwise considered to be a ''new contract'' under the terms of this rule. For example, the FARC should encourage, if not require, contracting officers to modify existing indefinite-delivery, indefinite-quantity contracts in accordance with FAR section 1.108(d)(3) to include the Executive Order minimum wage requirements, particularly with respect to future orders if the amount of work or number of orders expected under the remaining performance period is substantial.

The Department declines the request made by FortneyScott to direct that a contract price adjustment be given to contractors reflecting any higher short-term labor costs that may arise by applying the Order to new task or purchase orders on or after January 1, 2015, that are issued under master contracts that were entered into prior to January 1, 2015. As a general matter, price adjustments, if appropriate, would need to be negotiated by the parties and based on the specific nature of the contract. In addition, as explained above, the Department is encouraging, but not requiring, agencies to modify existing IDIQ contracts that do not otherwise meet the definition of a new contract. Pursuant to this final rule, task orders that are issued under IDIQ contracts entered into prior to January 1, 2015 will thus only be covered by the Executive Order if and when the master contract is modified to include the minimum wage requirement.

The Department also received many comments from individuals and organizations such as the National Federation of the Blind and the National Association of Blind Lawyers urging the Department not to exempt contracts placed on the AbilityOne Procurement List from the Executive Order minimum wage requirements. These commenters noted that, although such contracts are exempt from external competition once placed on the Procurement List, they are subject to renewal and renegotiation in the same manner as any other contract. The Department agrees with such commenters that procurements through the AbilityOne program are not exempt and will be covered in the same manner as any other contract. For example, if an AbilityOne service contract was awarded on January 1, 2011 and provided for a five-year contract term, a decision by the contracting parties to renew the contract on January 1, 2016 would qualify as a ''new contract'' subject to the Executive Order.

The Department therefore adopts § 10.3(a) as proposed, except that it has used the term *new contract* in the regulatory text to improve clarity. As explained above, the Department has also revised its proposed definition of the term *new contract* set forth in § 10.2.

Coverage of Types of Contractual Arrangements

Proposed § 10.3(a)(1) set forth the specific types of contractual arrangements with the Federal Government that are covered by the Executive Order. As explained in the NPRM, Executive Order 13658 and this part are intended to apply to a wide range of contracts with the Federal Government for services or construction. Proposed § 10.3(a)(1)

implemented the Executive Order by generally extending coverage to procurement contracts for construction covered by the DBA; service contracts covered by the SCA; concessions contracts, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. Each of these categories of contractual agreements is discussed in greater detail below.

Procurement Contracts for Construction: Section 7(d)(i)(A) of the Executive Order extends coverage to ''procurement contract[s] for . . . construction.'' 79 FR 9853. The proposed rule at § 10.3(a)(1)(i) interpreted this provision of the Order as referring to any contract covered by the DBA, as amended, and its implementing regulations. The Department noted that this provision reflects that the Executive Order and this part apply to contracts subject to the DBA itself, but do not apply to contracts subject only to the Davis-Bacon Related Acts, including those set forth at 29 CFR 5.1(a)(2)–(60).

The DBA applies, in relevant part, to contracts to which the Federal Government is a party, for the construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Federal Government and which require or involve the employment of mechanics or laborers. 40 U.S.C. 3142(a). The DBA's regulatory definition of *construction* is expansive and includes all types of work done on a particular building or work by laborers and mechanics employed by a construction contractor or construction subcontractor. *See* 29 CFR 5.2(j). For purposes of the DBA and thereby the Executive Order, a contract is ''for construction'' if ''more than an incidental amount of construction-type activity'' is involved in its performance. *See, e.g., In the Matter of Crown Point, Indiana Outpatient Clinic,* WAB Case No. 86–33, 1987 WL 247049, at *2 (June 26, 1987) (citing *In re: Military Housing, Fort Drum, New York,* WAB Case No. 85–16, 1985 WL 167239 (Aug. 23, 1985)), *aff'd sub nom., Building and Construction Trades Dep't, AFL–CIO* v. *Turnage,* 705 F. Supp. 5 (D.D.C. 1988); 18 Op. O.L.C. 109, 1994 WL 810699, at *5 (May 23, 1994). The term ''contract for construction'' is not limited to contracts entered into with a construction contractor; rather, a contract for construction ''would seem to require only that there be a contract, and that one of the things required by that contract be construction of a public work.'' *Id.* at *3–4. The term ''public building or public work'' includes any building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public. *See* 29 CFR 5.2(k).

Proposed § 10.3(b) implemented section 7(e) of Executive Order 13658, 79 FR 9853, which provides that the Order applies only to DBA-covered prime contracts that exceed the $2,000 value threshold specified in the DBA. *See* 40 U.S.C. 3142(a). Consistent with the DBA, there is no value threshold requirement for subcontracts awarded under such prime contracts.

Several commenters, including the EEAC, expressed support for the Department's discussion of this category of covered contracts. In its comment, the EEAC noted that it concurred with the Department's interpretation that the Executive Order does not apply to contracts subject only to the Davis-Bacon Related Acts and appreciated that clarification in the NPRM's preamble.

The Building Trades submitted a comment expressing concern regarding the Department's interpretation that the Executive Order only applies to procurement contracts for construction that are subject to the DBA. The Building Trades argued that there is no ''legitimate or reasonable explanation'' for excluding FLSA-covered workers on construction contracts that are not subject to the DBA because the plain language of section 7(d) of the Executive Order states that its minimum wage requirements apply to workers on ''procurement contract[s] . . . for construction'' whose wages are governed by the FLSA, SCA, or DBA. In other words, the Building Trades urged the Department to extend coverage of the Executive Order to FLSA-covered workers performing work on prime construction contracts that are not subject to the Davis-Bacon Act because the value of the prime contract does not exceed the DBA's $2,000 statutory threshold.

As explained above, the DBA applies to all prime contracts for construction over $2,000 and all subcontracts thereunder regardless of the value of the subcontract. *See* 40 U.S.C. 3142(a). The Department has interpreted the Executive Order as applying to all procurement construction contracts covered by the DBA, which means that the Order covers all prime procurement contracts for construction worth at least $2,000 and all covered subcontracts thereunder. Based on the Department's enforcement experience under the DBA, there are very few construction contracts with the Federal Government that fall below the $2,000 statutory value threshold.

However, insofar as construction contracts with the Federal Government that fall below the $2,000 statutory value threshold may exist, the Department believes that it is constrained, by the plain language of section 7(e) of the Executive Order, from extending the protections of the Executive Order to FLSA-covered workers on prime construction contracts that are valued at less than $2,000. *See* 79 FR 9853. That provision expressly states that, for procurement contracts where workers' wages are governed by the FLSA, the Order applies only to contracts that exceed the $3,000 micro-purchase threshold, as defined in 41 U.S.C. 1902(a). Although section 7(e) of the Order allows the Department to depart from these value threshold standards in its regulations where appropriate, the Department believes that this provision constitutes compelling evidence that the Executive Order is not intended for construction contracts that are not covered by the DBA to be subject to the Order. Moreover, the Department received many comments specifically requesting it to align coverage of the Executive Order with coverage of the SCA and DBA to the greatest extent possible. Although the Department appreciates and has carefully considered the comment submitted by the Building Trades on this issue, the Department believes that its interpretation that only procurement contracts for construction that are subject to the DBA are within the scope of the Executive Order is reasonable and appropriate.

Contracts for Services: Proposed § 10.3(a)(1)(ii) provided that coverage of the Executive Order and this part encompasses ''contract[s] for services covered by the Service Contract Act.'' This proposed provision implemented sections 7(d)(i)(A) and (B) of the Executive Order, which state that the Order applies respectively to a ''procurement contract for services'' and a ''contract or contract-like instrument for services covered by the Service Contract Act.'' 79 FR 9853. The Department interpreted a ''procurement contract for services,'' as set forth in section 7(d)(i)(A) of the Executive Order, to mean a procurement contract that is subject to the SCA, as amended, and its implementing regulations. The proposed rule viewed a ''contract for services covered by the Service Contract Act'' under section 7(d)(i)(B) of the Order as including both procurement

and non-procurement contracts for services that are covered by the SCA. The Department therefore incorporated sections 7(d)(i)(A) and (B) of the Executive Order in proposed § 10.3(a)(1)(ii) by expressly stating that the requirements of the Order apply to service contracts covered by the SCA.

The SCA generally applies to every contract entered into by the United States that ''has as its principal purpose the furnishing of services in the United States through the use of service employees.'' 41 U.S.C. 6702(a)(3). The SCA is intended to cover a wide variety of service contracts with the Federal Government, so long as the principal purpose of the contract is to provide services using service employees. *See, e.g.,* 29 CFR 4.130(a). As reflected in the SCA's regulations, where the principal purpose of the contract with the Federal Government is to provide services through the use of service employees, the contract is covered by the SCA. *See* 29 CFR 4.133(a). Such coverage exists regardless of the direct beneficiary of the services or the source of the funds from which the contractor is paid for the service and irrespective of whether the contractor performs the work in its own establishment, on a Government installation, or elsewhere. *Id.* Coverage of the SCA, however, does not extend to contracts for services to be performed exclusively by persons who are not service employees, *i.e.,* persons who qualify as bona fide executive, administrative, or professional employees as defined in the FLSA's regulations at 29 CFR part 541. Similarly, a contract for professional services performed essentially by bona fide professional employees, with the use of service employees being only a minor factor in contract performance, is not covered by the SCA and thus would not be covered by the Executive Order or this part. *See* 41 U.S.C. 6702(a)(3); 29 CFR 4.113(a), 4.156; WHD Field Operations Handbook (FOH) ¶¶ 14b05, 14c07.

Although the SCA covers all non-exempted contracts with the Federal Government that have the ''principal purpose'' of furnishing services in the United States through the use of service employees regardless of the value of the contract, the prevailing wage requirements of the SCA only apply to covered contracts in excess of $2,500. 41 U.S.C. 6702(a)(2) (recodifying 41 U.S.C. 351(a)). Proposed § 10.3(b) of this rule implemented section 7(e) of the Executive Order, which provides that for SCA-covered contracts, the Executive Order applies only to those prime contracts that exceed the $2,500 threshold for prevailing wage requirements specified in the SCA. 79 FR 9853. Consistent with the SCA, there is no value threshold requirement for subcontracts awarded under such prime contracts.

Some commenters, including the EEAC, expressed support for the Department's interpretation of this category of covered contracts, noting that ''[b]y directly linking . . . coverage of service contracts to SCA coverage, the NPRM eliminates most of the confusion generated by the EO as to what service contracts might be covered as 'procurement contracts for services' but which are not 'contracts for services covered' by the SCA.'' However, other commenters such as the AFL–CIO and the Building Trades urged the Department to extend the Executive Order's minimum wage requirements to all service contracts with the Federal Government and not to restrict coverage to those service contracts covered by the SCA. The AFL–CIO noted, for example, that ''certain employees who perform service tasks on contracts that are exempt from the SCA because the principal purpose of the contract is not provision of services'' would not be covered under the proposed rule. It urged the Department to reconsider this approach for contracts that exceed the micro-purchase threshold because the plain language of the Executive Order extends coverage to workers performing on ''procurement contract[s] for services'' whose wages are governed by the FLSA.

The Department's proposed approach to interpret sections 7(d)(i)(A) and (B) of the Executive Order as referring to SCA-covered procurement and nonprocurement service contracts was similar to the manner in which the Department interpreted section 7(d)(i)(A) as referring to DBA-covered procurement construction contracts. The Department intended its interpretation of these two categories of contracts to be aligned with well-established SCA and DBA contract coverage standards in order to assist contracting agencies and contractors in determining their obligations under the Order and this part. The Department believes that this approach best effectuates the purposes of the Executive Order and is consistent with the directive set forth in section 4(c) of the Order to draft regulations that incorporate existing definitions, procedures, and processes under the FLSA, SCA, and DBA to the extent practicable. The Department emphasizes, however, that service contracts that are not subject to the SCA may still be covered by the Order if such contracts qualify as concessions contracts or contracts in connection with Federal property or lands and related to offering services to Federal employees, their dependents, or the general public pursuant to sections 7(d)(i)(C) and (D) of the Order. Because service contracts may be covered by the Order if they fall within any of these three categories (*e.g.,* SCA-covered contracts, concessions contracts, or contracts in connection with Federal property and related to offering services), the Department anticipates that most service contracts with the Federal Government will be covered by the Executive Order and this part.

The Department received a comment from an individual seeking clarification as to whether non-profit service providers who provide home and community-based services through the Medicaid waiver program are subject to the Executive Order because the Medicaid waiver program involves Federal funds. In response, the Department notes the mere receipt of Federal financial assistance by an individual or entity does not render an agreement subject to the Executive Order. With respect to the specific concerns raised by this commenter, contracts let under the Medicaid program that are financed by Federally-assisted grants to the states, and contracts that provide for insurance benefits to third parties under the Medicare program, are not subject to the SCA. *See* 29 CFR 4.107(b), 4.134(a); WHD FOH ¶ 14e01. Because such an agreement is not covered by the SCA and would not fall within the scope of the other three types of contracts covered by the Executive Order (*e.g.,* it is not a construction contract covered by the DBA, a concessions contract, or a contract in connection with Federal property or lands), the agreement is not subject to the requirements of the Order.

The American Health Care Association (AHCA) submitted a comment on the proposed coverage of service contracts under the Executive Order, seeking clarification as to the coverage of provider agreements with the Veterans Administration (VA). The AHCA noted that a proposed rule issued by the VA in 2013 would exempt nursing facilities operating under provider agreements with the VA from SCA coverage and such agreements would therefore not be covered by the Executive Order. The AHCA requested that, if the VA's proposed rule is not finalized by the time that the Department issues its final rule, the Department should expressly exempt VA provider agreements from coverage of the Executive Order. The AHCA asserted that if the Executive Order were

deemed to apply to nursing facilities operating pursuant to VA provider agreements, many such facilities would be unable to continue their VA contracts because nursing facilities ''will not be able to afford to pay all of their staff the wage increase.'' As a result, the AHCA maintained that application of the Executive Order to such nursing facilities ''will result in a health care access issue for our nation's veterans because a number of [nursing facilities] will no longer be able to provide VA services.''

For purposes of determining coverage under the Executive Order, the relevant inquiry is whether VA provider agreements fall into one of the specifically enumerated categories of covered contracts set forth in section 7(d) of the Order, *i.e.,* whether such agreements are covered by the SCA.[5] The SCA grants authority and responsibility for administering and enforcing the SCA to the Secretary of Labor. *See* 41 U.S.C. 6707(a) and (b) (stating that the Secretary of Labor has authority ''to enforce this chapter, . . . prescribe regulations, issue orders, hold hearings, make decisions based on findings of fact, and take other appropriate action'' and to ''provide reasonable limitations'' and ''prescribe regulations allowing reasonable variation, tolerances, and exemptions'' as the Secretary deems necessary and proper). The Secretary's authority includes the ability to make final determinations regarding coverage of the SCA, and such decisions are binding on contracting agencies. *See id.; Collins Int'l Serv. Co.* v. *United States,* 744 F.2d 812 (Fed. Cir. 1984); *Curtiss-Wright Corp.* v. *McLucas,* 381 F. Supp. 657 (D. N.J. 1974); *Midwest Service and Supply Co.,* Decision of the Comptroller General No. B–191554 (July 13, 1978); 43 Op. Atty. Gen. 14 (March 9, 1979). The Department is not asserting SCA coverage of VA provider agreements through this rulemaking; in fact, the AHCA has not pointed to any examples of VA provider agreements for which the Department has asserted SCA coverage. In the event that the Department is called upon to issue a coverage determination under the SCA regarding VA provider agreements and determines that such contracts are not covered by the SCA, they would not be subject to Executive Order 13658. In this circumstance, and because the Department finds that the AHCA's general claims of hardship that could result from application of the Order to VA provider agreements are inconsistent with the economy and efficiency rationale underlying the Executive Order, the Department believes that it would be inappropriate to grant a special exemption from the Executive Order for this type of agreement.

The Department also received a comment from EAP Lifestyle Management, LLC, seeking clarification about whether the Executive Order would apply to its provision of employee assistance programs, including critical incident response services, provided for Federal employees on private land. The Department notes that, based on the limited amount of information received, such a contract appears to be subject to the SCA because it is a contract with the Federal Government principally for services through the use of service employees and thus would indeed be covered by the Executive Order regardless of whether the services are performed on public or private land.

Finally, the AOA and the O.A.R.S. Companies, Inc. (O.A.R.S.) sought guidance regarding whether the Executive Order applies to special use permits issued by the FS, Commercial Use Authorizations (CUAs) issued by the NPS, and outfitter and guide permits issued by the Bureau of Land Management (BLM) and the United States Fish and Wildlife Service (USFWS), respectively. The Department notes that FS special use permits generally are SCA-covered contracts, unless a permit holder can invoke the SCA exemption for certain concessions contracts contained in 29 CFR 4.133(b). *See Cradle of Forestry in America Interpretive Association,* ARB Case No. 99–035, 2001 WL 328132, at *5 (ARB March 30, 2001) (noting that ''whether Forest Service [special use permits] are exempt from SCA coverage as concessions contracts would need to be evaluated based upon the specific services being offered at each site''). Thus, FS special use permits will normally be subject to the Executive Order's requirements under section 7(d)(i)(B) of the Order and § 10.3(a)(1)(ii). To the extent that a contractor may be able to invoke the 29 CFR 4.133(b) exemption from the SCA with respect to a specific special use permit, such a contract will be subject to the Executive Order's requirements under section 7(d)(i)(C) of the Order and § 10.3(a)(1)(iii).

The AOA also represents that its members ''provide services to the public on federal lands.'' O.A.R.S. refers to itself as a ''recreational service provider on federal lands.'' Accordingly, the Department's understanding is that the AOA's members and O.A.R.S. enter into CUA agreements with the NPS, and outfitter and guide permit agreements with the BLM and USFWS, respectively, the principal purpose of which (akin to the agreement at issue in the *Cradle of Forestry* decision cited above) is to furnish services through the use of service employees. Assuming this is true, the SCA, and thus the Executive Order, covers the CUA and outfitter and guide permit agreements that the AOA's members, and O.A.R.S., enter into with the NPS, BLM, and USFWS, respectively. The Department notes that a further discussion of the application of section 7(d)(i)(D) of the Executive Order to FS special use permits, NPS CUAs, and BLM and USFWS outfitter and guide permits is set forth below in the discussion of contracts in connection with Federal property and related to offering services.

Contracts for Concessions: Proposed § 10.3(a)(1)(iii) implemented the Executive Order's coverage of a ''contract or contract-like instrument for concessions, including any concessions contract excluded by the Department of Labor's regulations at 29 CFR 4.133(b).'' 79 FR 9853. As explained above, the NPRM interpreted a ''contract or contract-like instrument for concessions'' under section 7(d)(i)(C) of the Executive Order as a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The proposed definition of the term *concessions contract* included every contract the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public. The SCA generally covers contracts for concessionaire services. *See* 29 CFR 4.130(a)(11). However, pursuant to the Secretary's authority under section 4(b) of the SCA, the SCA's regulations specifically exempt from coverage concession contracts ''principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public.'' 29 CFR 4.133(b); Preamble to the SCA final rule, 48 FR 49736, 49753 (Oct. 27, 1983). Section 7(d)(i)(C) of the Executive Order specifies that the Order applies to all contracts with the Federal Government for concessions, including any concessions contracts that are

[5] Based on the information provided by the AHCA in its comment, it does not appear that its VA provider agreements would qualify as concessions contracts or as contracts in connection with Federal property or lands and related to offering services to Federal employees, their dependents, or the general public.

excluded from SCA coverage by 29 CFR 4.133(b). Proposed § 10.3(a)(1)(iii) implemented this provision and extended coverage of the Executive Order and this part to all concession contracts with the Federal Government. Consistent with the SCA's implementing regulations at 29 CFR 4.107(a), the Department noted in the NPRM that the Executive Order generally applies to concessions contracts with nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies.

Proposed § 10.3(b) of this rule implemented the value threshold requirements of section 7(e) of Executive Order 13658. 79 FR 9853. Pursuant to that section, the Executive Order applies to an SCA-covered concessions contract only if it exceeds $2,500. *Id.;* 41 U.S.C. 6702(a)(2). Section 7(e) of the Executive Order further provides that, for procurement contracts where workers' wages are governed by the FLSA, such as procurement contracts for concessionaire services that are excluded from SCA coverage under 29 CFR 4.133(b), this part applies only to contracts that exceed the $3,000 micro-purchase threshold, as defined in 41 U.S.C. 1902(a). There is no value threshold for subcontracts awarded under prime contracts or for non-procurement concessions contracts or contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Department received several comments expressing concern regarding application of the Executive Order to restaurant franchises on military bases. These comments, which were submitted by individual franchisees as well as organizations such as the Association/IFA and the Dunkin' Donuts Independent Franchise Owners, assert that the minimum wage requirements of the Order impose a uniquely burdensome obligation on fast food restaurants on military bases because the restaurant owners receive no funding from the Federal Government. They state that such contractors generally pay rent and a portion of their sales in exchange for the ability to conduct business on the military installation and that such funds are used to support the military's Morale, Welfare and Recreation (MWR) Programs. These commenters also assert that, due to restrictions in their contracts with the Federal Government, they cannot raise the prices that they charge for products sold on the military base above the prices offered by competitors in a three-mile radius.

Many franchise owners on military installations commented that they are small businesses and will not be able to absorb the increase in cost that may result from the Executive Order. These commenters asserted that having to pay the Executive Order minimum wage would result in their businesses reducing employee work hours, terminating workers, or closing store locations, all of which would affect customer service. The Coalition of Franchisee Associations similarly noted that the closure of such businesses could substantially impact the military's MWR Programs that are funded by the concessionaires' rent payments. These franchise owners also argued that application of the Executive Order minimum wage to their business establishments on military installations would cause them to operate at a competitive disadvantage because competitor businesses located off the military base would not be affected. The Association/IFA, for example, maintained that the application of the Executive Order minimum wage to concessions contracts and contracts in connection with Federal property and related to offering services places businesses operating under such contracts on an unfair playing field because their competitors are generally not subject to the minimum wage increase and thus have a competitive advantage due to their lower labor costs. Many of the commenters raising these concerns also noted that the potential economic impact of the Executive Order upon their businesses should not be analyzed in isolation; rather, they asked that the Department consider the costs of the Executive Order minimum wage as well as the costs associated with legal obligations to which they may be subject under other Federal laws (*e.g.,* SCA fringe benefit obligations). For these reasons, some commenters urged the Department to exempt from the Executive Order minimum wage requirements any entities that do not receive direct funds from the Federal Government (*e.g.,* concessionaires).

In response to all of the comments received about the economic impact of the Executive Order upon businesses operating on military installations under concessions contracts, the Department notes that such comments fail to account for a number of factors that the Department anticipates will substantially offset many potential adverse economic effects on their businesses. In particular, these commenters fail to consider that increasing the minimum wage of their workers can reduce absenteeism and turnover in the workplace, improve employee morale and productivity, reduce supervisory costs, and increase the quality of services provided to the Federal Government and the general public. These commenters similarly do not account for the potential that increased efficiency and quality of services will attract more customers and result in increased sales.

Moreover, and significantly, the Executive Order minimum wage requirements apply only to ''new contracts.'' Contracting agencies and contractors negotiating ''new contracts'' after January 1, 2015, will be aware of Executive Order 13658 and can take into account any potential economic impact of the Order on projected labor costs. For example, with respect to several commenters' concerns regarding the restrictions on pricing imposed by their concessions contracts, the Department notes that contractors typically will have the ability to negotiate a lower percentage of sales paid as rent or royalty to the Federal Government in new contracts prior to application of the Executive Order that could help to offset any costs that may be incurred as a result of the Order. The assertion that a franchisee must terminate workers or close businesses due to the Executive Order minimum wage requirements thus overlooks the benefits of the Executive Order wage increase as well as alternatives available through contract renegotiation. Sections 7(d)(i)(C) and (D) of the Executive Order reflects a clear intent that concessions contracts with the Federal Government are subject to the minimum wage requirement. The Department therefore declines the commenters' request to create an exemption for entities that do not receive direct funds from the Federal Government (*e.g.,* concessionaires).

A few commenters, such as ACCSES and SourceAmerica, requested that the Department address whether officers clubs and restaurants on military bases operated by nonappropriated Federal funds are subject to the Executive Order. The Department noted in the NPRM that, consistent with the SCA, the proposed definition of the term *Federal Government* includes nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies. *See* 29 CFR 4.107(a). Businesses that contract with nonappropriated fund instrumentalities to operate on military installations are thus subject to the Executive Order minimum wage requirement if the contract falls within one of the four specifically enumerated categories of contracts covered by the Order.

Contracts to operate officers clubs and restaurants on military bases would likely qualify as SCA-covered contracts as well as concessions contracts or contracts in connection with Federal lands and related to offering services; any such contracts which qualify as a ''new contract'' as explained in this part will thus be subject to the Executive Order.

The EEAC commented on the Department's interpretation of concessions contract coverage, noting it would be helpful for the Department to provide more examples of covered contracts. The EEAC further stated that the Executive Order ''appears to effectively eliminate the regulatory exception that the Department created for certain concessions contracts now codified at 29 CFR § 4.133(b).'' The EEAC also expressed confusion because it viewed the NPRM as implying that there might be concessions contracts covered by the third category of the Executive Order that are not exempt under the SCA's regulations.

Contrary to the EEAC's claim, the Executive Order does not eliminate the regulatory exemption to the SCA's requirements that the Department created for certain concessions contracts at 29 CFR 4.133(b). Even after enactment of Executive Order 13658, the SCA still does not apply to such contracts. While the Executive Order establishes a minimum wage for such contracts, SCA prevailing wage rate and fringe benefit requirements remain inapplicable to concessions contracts that fall within the 29 CFR 4.133(b) exemption.

With respect to this commenter's confusion about the types of concessions contracts that are not exempt from the SCA under 29 CFR 4.133(b), the regulatory text of that provision expressly states that the exemption only applies to certain kinds of concessions contracts. The SCA's regulatory exemption applies to certain concessions contracts that provide services to the general public; it does not, however, apply to concessions contracts that provide services to the Federal Government or its personnel or to concessions services provided incidentally to the principal purpose of a covered SCA contract. *See, e.g.,* 29 CFR 4.130 (providing an illustrative list of SCA-covered contracts); *In the Matter of Alcatraz Cruises, LLC,* ARB Case No. 07–024, 2009 WL 250456 (ARB Jan. 23, 2009) (holding that the SCA regulatory exemption at 29 CFR 4.133(b) does not apply to National Park Service contracts for ferry transportation services to and from Alcatraz Island). The Executive Order expressly applies to all concessions contracts with the Federal Government, including those exempted from the SCA's requirements. For example, the Executive Order's minimum wage requirements generally extend to fast food restaurants on military bases, souvenir shops at national monuments, child care centers in Federal buildings, and boat rental facilities at national parks.

The comment submitted by the FS also raised several issues pertaining to the Executive Order's coverage of concessions contracts. First, the FS urged the Department to consolidate the definition for the terms *contract* and *contract-like instrument* with the definition for the term *concessions contract.* As discussed above in the context of § 10.2, the Department has considered and declined this request. Second, the FS noted its disagreement with the Department's proposed interpretation of the term ''concessions.'' This commenter stated that ''the FS construes the term 'concession' much more narrowly'' than the definition proposed by the Department and that it specifically interprets the term ''to include only commercial recreation public services such as ski areas, marinas, and outfitting and guiding.'' The FS stated that it does not view ''concessions'' as including the provision of noncommercial educational or interpretive services or covering the provision of energy, transportation, communications, or water services to the public. Finally, the FS requested that the Department create a $3,000 de minimis threshold for nonprocurement concessions contracts whose workers' wages are subject to the FLSA. The FS noted that the Executive Order has value threshold requirements for SCA- and DBA-covered prime contracts, as well as for covered prime procurement contracts on which FLSA-covered workers perform work, but that it does not have a value threshold for nonprocurement concessions contracts under which workers' wages are subject to the FLSA. It urged the Department to apply the micro-purchase threshold set forth at 41 U.S.C. 1902(a) to all such nonprocurement concessions contracts and thus to determine that nonprocurement contracts under which a land use fee to the Federal Government falls below the $3,000 threshold are not covered by the Executive Order.

With respect to the FS's comment on the scope of the term ''concessions,'' the Department does not believe that the narrow view of the term proffered by the FS is an appropriate interpretation for purposes of the Executive Order.[6] The Department has proposed to more broadly define a concessions contract as any contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services without any substantive restrictions on the type of services provided or the beneficiary of the services rendered. The Department received supportive comments on its proposed definition of this term from several commenters such as Demos and NELP. Moreover, this broad interpretation of the term ''concessions'' best effectuates the inclusive nature of the Executive Order. By expressly applying to both concessions contracts covered by the SCA as well as concessions contracts exempt from the SCA, the Executive Order clearly is intended to cover concessions contracts for the benefit of the general public as well as for the benefit of the Federal Government itself and its personnel. The Department would thus generally view contracts for the provision of noncommercial educational or interpretive services, energy, transportation, communications, or water services to the general public as within the scope of concessions contracts covered by the Order. Regardless of the scope of the term ''concessions,'' however, the Department notes that such contracts may qualify as SCA-covered contracts and are also likely to fall within the ambit of the fourth category of covered contracts set forth at section 7(d)(i)(D) of the Executive Order because such contracts are entered into ''in connection with Federal property'' and ''related to offering services for . . . the general public.''

With respect to the FS's request that the Department establish a $3,000 de minimis threshold for nonprocurement concessions contracts, the Department has carefully considered this request. The Department declines to create such an exception to coverage of the Executive Order, however, because section 7(e) of the Order sets forth very specific value threshold requirements for other types of contracts and notably does not include a value threshold for nonprocurement contracts under which workers' wages are governed by the FLSA. The Department views such an omission as a deliberate decision reflecting a clear intent of the Executive

[6] The Department's interpretation of the term ''concessions'' for purposes of Executive Order 13658 and this final rule of course does not determine how that term may be interpreted under other laws, including laws implemented by the FS.

Order to cover concessions contracts regardless of dollar amount.

Contracts in Connection with Federal Property or Lands and Related to Offering Services: Proposed § 10.3(a)(1)(iv) implemented Section 7(d)(i)(D) of the Executive Order, which extends coverage of the Order to contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. *See* 79 FR 9853. To the extent that such agreements were not otherwise covered by § 10.3(a)(1), the Department interpreted this provision in the NPRM as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services to the Federal Government, its personnel, or the general public. In other words, under the Department's proposed interpretation, private entities that lease space in a Federal building to provide services to Federal employees or the general public would be covered by the Executive Order and this part.

In the NPRM, the Department noted that although evidence that an agency has retained some measure of control over the terms and conditions of the lease or license to provide services is not necessary for purposes of determining applicability of this section, such a circumstance strongly indicates that the agreement involved is covered by section 7(d)(i)(D) of the Executive Order and § 10.3(a)(1)(iv). Pursuant to this interpretation, a private fast food or casual dining restaurant that rents space in a Federal building and serves food to the general public would be subject to the Executive Order minimum wage requirement. Additional examples of agreements that would generally be covered by the Executive Order and this part under the Department's proposed approach include delegated leases of space in a Federal building from an agency to a contractor whereby the contractor operates a child care center, credit union, gift shop, barber shop, or fitness center in the Federal agency building to serve Federal employees and/or the general public.

Some commenters expressed support for the Department's interpretation of this category of covered contracts. In particular, NELP specifically supported extending coverage to contracts offering services to Federal employees, their dependents, or the general public. Similarly, the AFL–CIO applauded the inclusion of workers engaged on contracts connected to Federal property and lands (and related to offering services) within the scope of the Executive Order and implementing regulations. At the same time, a number of commenters raised questions and concerns regarding application of the Executive Order minimum wage in this context.

Two commenters, the AOA and O.A.R.S., specifically sought clarification as to whether FS special use permits (SUPs), NPS CUAs, and BLM and USFWS outfitter and guide permits constitute *contracts* under the Executive Order. As noted previously, the Department has defined the term *contract* and *contract-like instrument* collectively for purposes of the Executive Order as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition broadly includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including but not limited to lease agreements, licenses, and permits. The types of instruments (SUPs, CUAs, and outfitter and guide permits) identified by the AOA and O.A.R.S. authorize the use of Federal land for specific purposes in exchange for the payment of fees to the Federal Government. Indeed, as the AOA explained in its comment on the NPRM, AOA members that hold CUAs issued by the NPS or permits issued by the FS, BLM, and USFWS ''provide services to the public on federal lands.'' Such instruments create obligations that are enforceable or otherwise recognizable at law and hence constitute *contracts* for purposes of the Executive Order and this part.

Although the determination of whether an agreement qualifies as a *contract* or *contract-like instrument* under the Executive Order and this part does not turn on whether such agreements are characterized as ''contracts'' for other purposes (such as in connection with the specific programs under which they are administered), the Department nonetheless notes that its conclusion that such instruments are *contracts* for purposes of the Executive Order is consistent with pertinent precedent. For example, the Department's Administrative Review Board (ARB) previously has held that a FS SUP is a contract under the SCA, *see Cradle of Forestry,* 2001 WL 328132, at *5, and the Department likewise has determined that FS SUPs constitute contracts for purposes of the FLSA. *See* DOL Opinion Letter, WH–449, 1978 WL 51447 (Jan. 26, 1978) (FS SUP was a contract for purposes of FLSA section 13(a)(3)). *See also* DOL Opinion Letter, 1995 WL 1032476 (March 24, 1995) (Department of Agriculture license to operate amusement rides constituted a contract for purposes of FLSA section 13(a)(3)).

Colorado Ski Country USA (CSCUSA) asserted that FS ski area permits should not be treated as contracts under the Executive Order and this final rule because they have never been considered Federal contracts subject to Federal procurement requirements. Similarly, the AOA observed that an FS SUP is not a contract for purposes of the Contract Disputes Act, and NSAA noted that the FS has informed it that its members are not Federal contractors for purposes of the Crime Control Act of 1990. NSAA also asserted that because FS ski area permits are revocable at any time, they are not contracts.

In response to these comments, the Department notes that Executive Order 13658 expressly applies to non-procurement contracts that are not subject to the FAR; CSCUSA's assertion that FS ski area permits are not subject to Federal procurement requirements therefore does not weigh against application of the Executive Order to such permits. Similarly, the fact that a particular instrument may not be subject to the Contract Disputes Act or constitute a contract for purposes of a particular statute such as the Crime Control Act of 1990 is not determinative with respect to coverage of the instrument under Executive Order 13658. Indeed, the Department notes that notwithstanding Executive Order 13658's express application to contracts entered into with the Federal Government in connection with Federal property or lands and relating to offering services, the Executive Order provides that it creates no rights under the Contract Disputes Act. *See* 79 FR 9852.

As for NSAA's assertion that FS ski area permits are not contracts because they are revocable at any time, it remains that FS ski area permits constitute an agreement with the Federal Government creating obligations that are enforceable or otherwise recognizable at law. Furthermore, the Department understands that FS ski area permits may be revoked only for specified reasons. *See* 16 U.S.C. 497b(b)(5); 36 CFR 251.60.

NSAA and O.A.R.S. also expressed concern that the Department's designation of their members' agreements with the Federal Government as contracts for purposes of the Executive Order would render them subject to the legal requirements of a ''federal contractor.'' However, the Department's conclusion that FS SUPs,

CUAs, and similar instruments constitute contracts under Executive Order 13658 and this final rule does not render NSAA's members and O.A.R.S. ''federal contractors'' with respect to other Federal laws.

That FS SUPs, NPS CUAs, and BLM and USFWS outfitter and guide permits are contracts for purposes of the Executive Order does not necessarily mean individuals performing work on or in connection with the contract are covered workers. In order for the minimum wage protections of the Executive Order to extend to a particular worker performing work on or in connection with a covered contract, that worker's wages must be governed by the FLSA, SCA, or DBA. The FLSA generally governs the wages of employees of holders of CUAs issued by the NPS and permits issued by the FS, BLM and USFWS, at least to the extent such instruments are not covered by the SCA. 29 U.S.C. 213(a)(3) exempts employees of certain amusement and recreational establishments from the minimum wage and overtime provisions of the FLSA, but, as the AOA acknowledged, that provision ''does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture.'' *See* 29 U.S.C. 213(a)(3). As explained above, the Department has concluded that the holders of CUAs issued by the NPS, and permits issued by the FS, BLM and USFWS, are operating under a contract with the Secretary of the Interior or the Secretary of Agriculture. Thus, the exemption from the FLSA's minimum wage requirement will normally not apply and the FLSA will usually govern the wages of the employees of such holders for purposes of the Executive Order (unless, as noted, the SCA applies to such contracts).

NSAA also sought clarification as to whether the Executive Order applies to the holder of an FS ski area permit issued by the Department of Agriculture that provides services or facilities directly related to skiing. The AOA asserted that the Executive Order does not apply to FS ski area permits because entities providing services or facilities directly related to skiing under an FS special use permit are exempt from the FLSA's minimum wage requirements under section 213(a)(3) of the FLSA. To the extent that an entity providing services or facilities directly related to skiing satisfies the criteria for this specific exemption from the FLSA's minimum wage requirements, and to the extent that the wages of the entity's workers are also not governed by the SCA or DBA, Executive Order 13658 would not apply in this specific context because the contractor would not have any workers on the contract whose wages were governed by the FLSA, SCA, or DBA.

Multiple commenters, including the AOA, O.A.R.S., Ski New Hampshire, and CSCUSA assert that FS SUPs, NPS CUAs, and BLM and USFWS outfitter and guide permits create a relationship that, unlike procurement contracts, does not contain a mechanism by which the holder of the instrument can ''pass on'' costs related to operation of the Executive Order to contracting agencies. Such commenters generally asserted that an increase in the minimum wage permit holders will have to pay will cause them to operate at a competitive disadvantage because competitor businesses not operating under contracts covered by the Executive Order would not be affected. The AOA in particular asserted that its members believe application of the Executive Order will place a significant strain on their businesses. Another commenter, Advocacy, observed that small businesses have informed it that application of the Executive Order minimum wage requirement to these contracts will render their operations unprofitable. For these reasons, the AOA, Ski New Hampshire, O.A.R.S., and similar commenters requested an exemption from the Executive Order for permit and CUA holders' contracts with the Federal Government.

In response to these comments concerning the economic impact of the Executive Order upon permit and CUA holders' contracts with the Federal Government, the Department notes that, as with the comments from businesses operating on military installations under concessions contracts, the permit and CUA holders' comments fail to account for various factors that the Department anticipates will substantially offset many potential adverse economic effects on their businesses. In particular, these commenters fail to consider that increasing the minimum wage of their workers can reduce absenteeism and turnover in the workplace, improve employee morale and productivity, reduce supervisory costs, and increase the quality of services provided to the Federal Government and the general public. These commenters similarly do not account for the potential that increased efficiency and quality of services will attract more customers and result in increased sales.

Moreover, as noted previously, the Executive Order minimum wage requirements apply only to ''new contracts.'' Contracting agencies and contractors negotiating ''new contracts'' after January 1, 2015 will be aware of Executive Order 13658 and can take into account any potential economic impact of the Executive Order on projected labor costs. For example, the Department notes that the holders of covered permits and CUAs will likely have the ability to negotiate a lower fee in new contracts prior to application of the Executive Order that could help offset any costs that may be incurred as a result of the Order.

Section 7(d)(i)(D) of the Executive Order states that contracts in connection with Federal property and related to offering services for Federal employees, their dependents, or the general public are subject to the minimum wage requirement. For the reasons explained above, the Department therefore declines the commenters' request to create an exemption for permit and CUA holders' contracts with the Federal Government.

The AOA also expressed concern that the annual minimum wage increases the Executive Order authorizes the Secretary of Labor to make will create budgeting and pricing uncertainty for contractors operating under FS SUPs, NPS CUAs, and BLM and USFWS permits. As discussed below, however, the contract clause in the Department's final rule reflects that contractors may be compensated, if appropriate, for the increase in labor costs resulting from the annual inflation increases in the Executive Order minimum wage beginning on January 1, 2016. In addition, the CPI–W is published monthly, which allows parties, on a regular basis, to estimate what the annual wage increase will be. These circumstances should significantly reduce, if not eliminate, the budgeting and pricing uncertainty the AOA contends its members will face based on annual increases in the Executive Order minimum wage.

The EEAC sought clarification regarding whether the Department intended to interpret ''related to offering services'' in section 7(d)(i)(D) in a manner consistent with the principal purpose test the Department uses under the SCA. The threshold for a contract to ''relate to offering'' services is lower than the threshold for a contract to have as its ''principal purpose'' the furnishing of services. For example, the SCA will typically not cover a professional services contract with a

medical services company to operate a clinic for Federal employees on Federal land because the contract is not principally for services through the use of ''service employees.'' *See* 29 CFR 4.113(a)(2). However, because such a professional services agreement would constitute a contract with the Federal Government in connection with Federal property or lands and would be related to offering medical services to Federal employees, it would constitute a covered contract under section 7(d)(i)(D) of the Order. The Department accordingly has concluded that engrafting a ''principal purpose'' requirement onto the ''related to offering services'' standard set forth in section 7(d)(i)(D) of the Executive Order would be inconsistent with the text of the Executive Order. The Department notes, however, that pursuant to § 10.4(e), the Executive Order minimum wage does not apply to workers who are exempt from the minimum wage requirements of the FLSA under 29 U.S.C. 213(a) unless they are otherwise covered by the DBA or the SCA. An individual employed in a bona fide executive, administrative, or professional capacity performing on a professional services contract, for example, is thus not entitled to the Executive Order minimum wage.

The EEAC sought examples of arrangements that would not be covered contracts pursuant to section 7(d)(i)(D) of the Executive Order. As was mentioned in the NPRM, coverage of this section only extends to contracts that are ''in connection with Federal property or lands.'' 79 FR 9853. The Department does not interpret section 7(d)(i)(D)'s reference to ''Federal property'' to encompass money; as a result, purely financial transactions with the Federal Government, *i.e.,* contracts that are not in connection with physical property or lands, would not be covered by the Executive Order or this final rule. Section 7(d)(i)(D) coverage additionally only extends to contracts ''related to offering services for Federal employees, their dependents, or the general public.'' Thus, if a Federal agency contracts with a company to solely supply materials in connection with Federal property or lands, the Department will not consider the contract to be covered by section 7(d)(i)(D) because it is not a contract related to offering services. Likewise, because a license or permit to conduct a wedding on Federal property or lands generally would not relate to offering services for Federal employees, their dependents, or the general public, but rather would only relate to offering services to the specific individual applicant(s), the Department would not consider such a contract covered by section 7(d)(i)(D).

Relation to the Walsh-Healey Public Contracts Act: Finally, the Department noted in the proposed rule that contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, *i.e.,* those subject to the Walsh-Healey Public Contracts Act (PCA), 41 U.S.C. 6501 *et seq.,* are not covered by Executive Order 13658 or this part. The Department stated that it intended to follow the SCA's regulations at 29 CFR 4.117 in distinguishing between work that is subject to the PCA and work that is subject to the SCA (and therefore the Executive Order). The Department similarly proposed to follow the regulations set forth in the FAR at 48 CFR 22.402(b) in addressing whether the DBA (and thus the Executive Order) applies to construction work on a PCA contract. Under that proposed approach, where a PCA-covered contract involves a substantial and segregable amount of construction work that is subject to the DBA, workers whose wages are governed by the DBA or FLSA are covered by the Executive Order for the hours that they spend performing on such DBA-covered construction work.

The EEAC and Ogletree Deakins submitted comments expressing support for the NPRM's provision that the Executive Order does not apply to contracts subject to the PCA and recommending that the Department include some of the preamble discussion on this issue in the regulatory text of the final rule. The Department also received comments from NELP and the National Center for Law and Economic Justice (NCLEJ) expressing disappointment that Executive Order 13658 does not cover workers subject to the PCA.

The Executive Order expressly only applies to the enumerated types of service and construction contracts under which workers' wages are governed by the FLSA, SCA, or the DBA. The Department does not have the authority to extend coverage beyond the terms of the Order to PCA-covered workers or contracts. Because the lack of PCA contract coverage is an important limitation on the coverage of the Executive Order, the Department agrees with the comments recommending that the Department include some of its preamble discussion of this issue in the regulatory text itself. Accordingly, the Department has added a provision at § 10.3(d) clarifying that neither the Executive Order nor this part apply to PCA contracts.

Coverage of Subcontracts

The Department also received comments from ABC, AGC, the Association/IFA, the AOA, the Chamber/NFIB, and others requesting clarification of the Executive Order's coverage of subcontracts. AGC, for example, asked whether a subcontract for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government between a manufacturer or other supplier and a high-tier construction subcontractor for use on a DBA-covered construction project would be covered by the Order. The Chamber/NFIB similarly questioned whether, for example, a soft drink supplier to a fast food restaurant franchise on a military base would be considered a covered subcontractor under the Executive Order. The Mercatus Center at George Mason University also asserted that the Department overreached in its proposed interpretations and that ''if a federal contractor ordered materials from [a] construction materials retailer, it is conceivable that the rule could be applied to the retailer.'' The Mercatus Center noted that, if such an interpretation was applied, the retailer would then be considered a subcontractor and ''any supplier from whom the retailer purchased would also be considered bound by the rule.''

In response to these comments, the Department notes that the same test for determining application of the Executive Order to prime contracts applies to the determination of whether a subcontract is covered by the Order, with the sole distinction that the value threshold requirements set forth in section 7(e) of the Order do not apply to subcontracts. In other words, in order for the requirements of the Order to apply to a subcontract, the subcontract must satisfy all of the following prongs: (1) It must qualify as a *contract* or *contract-like instrument* under the definition set forth in this part, (2) it must fall within one of the four specifically enumerated types of contracts set forth in section 7(d) of the Order and § 10.3, and (3) the wages of workers under the contract must be governed by the DBA, SCA, or FLSA.

Pursuant to this approach, only covered subcontracts of covered prime contracts are subject to the requirements of the Executive Order. The Department has endeavored to clarify this point by referring to ''covered subcontracts'' rather than ''subcontracts'' more generally in the contract clause set forth at Appendix A. Just as the Executive

Order does not apply to prime contracts that are subject to the PCA, it likewise does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment. In other words, the Executive Order does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment between a manufacturer or other supplier and a covered contractor for use on a covered Federal contract (*e.g.,* a contract to supply napkins and utensils to a fast food restaurant franchise on a military base is not a covered subcontract for purposes of this Order). The Executive Order likewise does not apply to contracts under which a contractor orders materials from a construction materials retailer; the Mercatus Center's concerns about overreaching are therefore misplaced.

Coverage of Workers

Proposed § 10.3(a)(2) implemented section 7(d)(ii) of Executive Order 13658, which provides that the minimum wage requirements of the Order only apply to contracts covered by section 7(d)(i) of the Order if the wages of workers under such contracts are subject to the FLSA, SCA, or DBA. 79 FR 9853. The Executive Order thus provides that its protections only extend to workers performing on or in connection with contracts covered by the Executive Order whose wages are governed by the FLSA, SCA, or DBA. *Id.* For example, the Order does not extend to workers whose wages are governed by the PCA. Moreover, as discussed below, the Department proposes that, except for workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) and workers who are otherwise covered by the SCA or DBA, employees who are exempt from the minimum wage protections of the FLSA under 29 U.S.C. 213(a) are similarly not subject to the minimum wage protections of Executive Order 13658 and this part.

In determining whether a worker's wages are ''governed by'' the FLSA for purposes of section 7(d)(ii) of the Executive Order and this part, the Department interpreted this provision as referring to employees who are entitled to the minimum wage under FLSA section 6(a)(1), employees whose wages are calculated pursuant to special certificates issued under FLSA section 14(c), and tipped employees under FLSA section 3(t) who are not otherwise covered by the SCA or the DBA. *See* 29 U.S.C. 203(t), 206(a)(1), 214(c).

In evaluating whether a worker's wages are ''governed by'' the SCA for purposes of the Executive Order, the Department interpreted such provision as referring to service employees who are entitled to prevailing wages under the SCA. *See* 29 CFR 4.150–56. The Department noted that workers whose wages are subject to the SCA include individuals who are employed on an SCA contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

The Department also interpreted the language in section 7(d)(ii) of Executive Order 13658 and proposed § 10.3(a)(2) as extending coverage to FLSA-covered employees who provide support on an SCA-covered contract but who are not entitled to prevailing wages under the SCA. 41 U.S.C. 6701(3).[7] In the NPRM, the Department explained that such workers would be covered by the plain language of section 7(d) of the Executive Order because they are performing in connection with a contract covered by the Order and their wages are governed by the FLSA.

In evaluating whether a worker's wages are ''governed by'' the DBA for purposes of the Order, the proposed rule interpreted such language as referring to laborers and mechanics who are covered by the DBA. This includes any individual who is employed on a DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. The Department also interpreted the language in section 7(d)(ii) of Executive Order 13658 and proposed § 10.3(a)(2) as extending coverage to workers performing on or in connection with DBA-covered contracts for construction who are not laborers or mechanics but whose wages are governed by the FLSA. Although such workers are not covered by the DBA itself because they are not ''laborers and mechanics,'' 40 U.S.C. 3142(b), such individuals are workers performing on or in connection with a contract subject to the Executive Order whose wages are governed by the FLSA and thus are covered by the plain language of section 7(d) of the Executive Order. 79 FR 9853. The NPRM extended this coverage to FLSA-covered employees working on or in connection with DBA-covered contracts regardless of whether such employees are physically present on the DBA-covered construction worksite.

The Department noted in the NPRM that where state or local government workers are performing on covered contracts and their wages are subject to the FLSA or the SCA, such workers are entitled to the protections of the Executive Order and this part. The DBA does not apply to construction performed by state or local government workers.

The Department received a number of comments regarding the coverage of workers under the Executive Order. Some of these comments raised questions or concerns regarding the general application of the Order to workers, while others addressed very specific coverage issues pertinent to particular subsets of workers performing on or in connection with covered contracts. All of these comments are addressed below.

FLSA-Covered Workers on DBA and SCA Contracts

The Department received a number of comments regarding its proposed coverage of FLSA-covered workers performing on or in connection with SCA- and DBA-covered contracts. Some of the commenters, including NELP, the AFL–CIO, and the Building Trades, strongly supported the proposed coverage of such workers. However, other commenters, such as ABC and the National Industry Liaison Group, expressed significant concern regarding the inclusion of such workers. ABC, for example, generally argued that coverage of FLSA workers ''creates unnecessary confusion and imposes administrative burdens'' for SCA and DBA contractors by creating new wage and recordkeeping obligations for workers who are not ''laborers and mechanics'' or ''service employees'' and therefore are not subject to the prevailing wage laws, and who may not even be physically present on ''the site of the work.'' Many of these commenters similarly raised concerns regarding the meaning and scope of the Department's statement that the Executive Order minimum wage must be paid to all

[7] The Department notes that, under the SCA, ''service employees'' directly engaged in providing specific services called for by the SCA-covered contract are entitled to SCA prevailing wage rates. Meanwhile, ''service employees'' who do not perform the services required by an SCA-covered contract but whose duties are necessary to the contract's performance must be paid at least the FLSA minimum wage. *See* 29 CFR 4.150–155; WHD FOH ¶ 14b05(c). For purposes of clarity, the Department refers to this latter category of workers who are entitled to receive the FLSA minimum wage as ''FLSA-covered'' workers throughout this rule even though those workers' right to the FLSA minimum wage technically derives from the SCA itself. *See* 41 U.S.C. 6704(a).

covered workers ''performing on or in connection with'' a covered contract, which will be addressed in the section following this discussion of FLSA-covered workers.

The Department disagrees with such comments challenging its proposed inclusion of FLSA-covered workers performing on or in connection with SCA and DBA contracts. The Department views the plain language of section 7 of the Executive Order as compelling such coverage because it extends its minimum wage requirements to all SCA- and DBA-covered contracts where ''the wages of workers under such contract . . . are governed by the Fair Labor Standards Act.'' The Department thus believes that it reasonably and appropriately interpreted both the plain language and intent of the Executive Order to cover FLSA-covered employees that provide support on a SCA-covered contract but are not ''service employees'' for purposes of the SCA as well as workers who provide support on DBA-covered contracts for construction who are not ''laborers'' or ''mechanics'' for purposes of the DBA but whose wages are governed by the FLSA.

Workers ''Performing on or in Connection With'' Covered Contracts

In the NPRM, the Department proposed that all covered workers engaged in working ''on or in connection with'' a covered contract are entitled to the Executive Order minimum wage for all hours spent performing on the covered contract. The Department explained that this standard was intended to cover workers directly performing the specific services called for by the contract's terms (*i.e.,* ''service employees'' on SCA contracts and ''laborers and mechanics'' on DBA contracts) as well as those workers performing other duties necessary to the performance of the contract (*i.e.,* FLSA-covered administrative personnel on SCA and DBA contracts).

The Department received many comments regarding the meaning and scope of its proposed interpretation that workers performing ''on or in connection with'' a covered contract are entitled to the Executive Order minimum wage for all hours worked on the covered contract. A few commenters agreed with the Department's proposed interpretation. Demos, for example, expressed support for the Department's proposed interpretation and urged the Department ''to adopt an expansive interpretation of the duties necessary to the performance of a contract so that this clause does not become an unwarranted loophole used to limit the coverage of the Executive Order.'' Some commenters, including Bond, Schoeneck, and King, PLLC, requested that the Department clarify whether a worker who performs work on a covered contract for only part of a workweek needs to be paid the Executive Order minimum wage for all hours worked or only for the hours spent performing on or in connection with the covered contract.

Many other commenters, such as AGC, the PSC, the EEAC, the Association/IFA, and FortneyScott sought clarification of the meaning and scope of the ''performing on or in connection with'' standard for worker coverage. Several commenters asked the Department to provide more examples of FLSA-covered workers that the Department would consider to be performing ''in connection with'' a covered contract or to provide a list of the types of duties that the Department would regard as ''necessary'' to contractual performance. Several of these commenters also requested clarification regarding whether a worker would be covered by the Executive Order if he or she only spends an insubstantial amount of time performing on covered contract work. The Association/IFA asked, for example, whether an FLSA-covered accounting clerk who processes a single SCA-contract-related invoice out of 2,000 invoices processed during her workweek would be covered by the Executive Order. AGC requested inclusion of a provision in the Department's final rule whereby a worker would only be entitled to the Executive Order minimum wage if the worker spends 20 percent or more of his or her hours worked in a given workweek performing ''in connection with'' covered contracts. Commenters raising this issue noted that it would be difficult for contractors to record and segregate the hours that their workers spend on covered and non-covered contracts, particularly with respect to FLSA-covered workers performing work in connection with SCA and DBA contracts who may not be located at the site of contractual work.

As a threshold matter, the Department notes that the Executive Order minimum wage requirements only extend to the hours worked by covered workers performing on or in connection with covered contracts. The NPRM explained that in situations where contractors are not exclusively engaged in contract work covered by the Executive Order, and there are adequate records segregating the periods in which work was performed on covered contracts subject to the Order from periods in which other work was performed, the Executive Order minimum wage does not apply to hours spent on work not covered by the Order. *See* 79 34582. Accordingly, the regulatory text of § 10.22(a) emphasizes that contractors must pay covered workers performing on or in connection with a covered contract no less than the applicable Executive Order minimum wage for hours worked on or in connection with the covered contract.

In response to the large number of comments received on the Department's proposed interpretation that the Executive Order minimum wage applies to all hours in which a covered worker performs ''on or in connection with'' a covered contract, the Department notes that this standard was derived from the SCA's regulations at 29 CFR 4.150-.155, which provide that all service employees who are engaged in working on or in connection with an SCA-covered contract, either in performing the specific services called for by the contract's terms or in performing other duties necessary to contractual performance, are covered by the SCA unless a specific exemption is applicable. *See* 29 CFR 4.150. Under the SCA, ''service employees'' directly engaged in providing specific services called for by the SCA-covered contract are entitled to SCA prevailing wage rates. Meanwhile, employees who do not perform the services required by an SCA-covered contract but whose duties are necessary to the contract's performance must be paid at least the FLSA minimum wage. *See* 29 CFR 4.150-.155; WHD FOH ¶ 14b05(c). Thus, contrary to the assertion of the PSC and others that the Department should ''delet[e] the undefinable phrase 'in connection with'" and instead use the ''SCA formulation'' for worker coverage, the worker coverage standard applied in the NPRM and in this final rule is in fact adopted from the SCA's regulations.

Because section 7(d) of the Executive Order expressly requires payment of the Executive Order minimum wage to FLSA-covered workers in the performance of a SCA- or DBA-covered contract as explained above, the Department believes that the narrow interpretation urged by some commenters under which the Executive Order minimum wage would apply only to workers performing the specific duties called for by the terms of a covered contract (*e.g.,* a ''laborer'' on a DBA construction contract) would undermine the broad coverage directed by the plain language of the Order. The Department thus concludes that the economy and efficiency purposes of the Order are best effectuated by reaffirming

its interpretation that covered workers performing work ''on or in connection with'' a covered contract are entitled to the Executive Order's protections. The Executive Order evinces a clear intent that its minimum wage requirement extend to *all* DBA-, SCA-, and FLSA-covered workers ''in the performance of'' the covered contract, not merely those workers who are performing the specific duties called for by the contract's terms. *See* 79 FR 9851. Accordingly, the Department declines to implement the suggestion made by several commenters to narrow or limit the meaning of the ''in connection with'' standard.

However, the Department recognizes the concerns expressed by many commenters that such an interpretation could place new burdens on contractors, particularly DBA-covered contractors that did not previously segregate hours worked by FLSA-covered workers, including those who were not present on the site of the construction work. The responsibility to pay such workers performing in connection with covered contracts the Executive Order minimum wage may be regarded as particularly burdensome for SCA- and DBA-covered prime contractors because, under this part, they may be held liable for violations committed by their subcontractors.

The Department recognizes that it has utilized a 20 percent threshold for coverage determinations in a variety of SCA and DBA contexts. For example, 29 CFR 4.123(e)(2) exempts from SCA coverage contracts for seven types of commercial services, such as financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards and similar card services), contracts with hotels for conferences, transportation by common carriers of persons by air, real estate services, and relocation services. Certain criteria must be satisfied for the exemption to apply to a contract, including that each service employee spend only ''a small portion of his or her time'' servicing the contract. 29 CFR 4.123(e)(2)(ii)(D). The exemption defines ''small portion'' in relative terms and as ''less than 20 percent'' of the employee's available time. *Id.* Likewise, the Department has determined that the DBA applies to certain categories of workers (*i.e.,* air balance engineers, employees of traffic service companies, material suppliers, and repair employees) only if they spend 20 percent or more of their hours worked in a workweek performing laborer or mechanic duties on the covered site. *See* WHD FOH ¶¶ 15e06, 15e10(b), 15e16(c), and 15e19.

The Department has thoroughly reviewed and considered the numerous comments received regarding the Department's proposed interpretation that the Executive Order applies to all covered workers performing on or in connection with covered contracts. Based on its careful review and in light of the administrative practice under the SCA and the DBA of applying a 20 percent threshold to certain coverage determinations, the Department has decided in this final rule to create an exclusion whereby any covered worker performing only ''in connection with'' covered contracts for less than 20 percent of his or her hours worked in a given workweek will not be entitled to the Executive Order minimum wage for any hours worked. The Department expects that this exclusion will significantly mitigate the recordkeeping concerns identified by commenters without substantially affecting the Executive Order's economy and efficiency interests. The Department similarly does not believe that this exclusion undermines the Order's intent that the minimum wage protections extend broadly to protect FLSA-, SCA-, and DBA-covered workers directly performing the specific services (or construction) called for by the contract's terms as well as those workers performing other duties necessary to the performance of the contract. A detailed discussion of this new exclusion (which will be referred to as the ''20 percent of hours worked exclusion'') is set forth below, and the new exclusion itself appears in the regulatory text at § 10.4(f).

This new exclusion does not apply to any worker ''performing on'' a covered contract whose wages are governed by the FLSA, SCA, or DBA. Such workers will be entitled to the Executive Order minimum wage for all hours worked performing on or in connection with covered contracts. This approach is consistent with the interpretation proposed in the NPRM. However, for a worker solely ''performing in connection with'' a covered contract, the Executive Order minimum wage requirements will only apply if that worker spends 20 percent or more of his or her hours worked in a given workweek performing in connection with covered contracts. Thus, in order to apply this exclusion correctly, contractors must accurately distinguish between workers performing ''on'' a covered contract and those workers performing ''in connection with'' a covered contract based on the guidance provided in this section. The 20 percent of hours worked exclusion does not apply to any worker who spends any hours performing ''on'' a covered contract; rather, it applies only to workers ''performing in connection with'' a covered contract who do not spend any hours worked ''performing on'' the contract.

For purposes of administering the 20 percent of hours worked exclusion under the Executive Order, the Department views workers performing ''on'' a covered contract as those workers directly performing the specific services called for by the contract. Whether a worker is performing ''on'' a covered contract will be determined in part by the scope of work or a similar statement set forth in the covered contract that identifies the work (*e.g.,* the services or construction) to be performed under the contract. Specifically, consistent with the SCA, *see, e.g.,* 29 CFR 4.153, a worker will be considered to be performing ''on'' a covered contract if he or she is directly engaged in the performance of specified contract services or construction. All laborers and mechanics engaged in the construction of a public building or public work on the site of the work thus will be regarded as performing ''on'' a DBA-covered contract. All service employees performing the specific services called for by an SCA-covered contract will also be regarded as performing ''on'' a contract covered by the Executive Order. In other words, any worker who is entitled to be paid DBA or SCA prevailing wages is entitled to receive the Executive Order minimum wage for all hours worked on covered contracts, regardless of whether such covered work constitutes less than 20 percent of his or her overall hours worked in a particular workweek. For purposes of concessions contracts and contracts in connection with Federal property and related to offering services that are not covered by the SCA, the Department will regard any employee performing the specific services called for by the contract as performing ''on'' the covered contract in the same manner described above. Such workers will therefore be entitled to receive the Executive Order minimum wage for all hours worked on covered contracts, even if such time represents less than 20 percent of his or her overall work hours in a particular workweek.

However, for purposes of the Executive Order, the Department will view any worker who performs solely ''in connection with'' covered contracts for less than 20 percent of his or her hours worked in a given workweek to be excluded from the Order and this part. In other words, such workers will not be entitled to be paid the Executive Order

minimum wage for any hours that they spend performing in connection with a covered contract if such time represents less than 20 percent of their hours worked in a given workweek. For purposes of this exclusion, the Department regards a worker performing ''in connection with'' a covered contract as any worker who is performing work activities that are necessary to the performance of a covered contract but who are not directly engaged in performing the specific services called for by the contract itself.

Therefore, the 20 percent of hours worked exclusion may apply to any FLSA-covered employees who are not directly engaged in performing the specific construction identified in a DBA contract (*i.e.,* they are not DBA-covered laborers or mechanics) but whose services are necessary to the performance of the DBA contract. In other words, workers who may fall within the scope of this exclusion are FLSA-covered workers who do not perform the construction identified in the DBA contract either due to the nature of their non-physical duties and/or because they are not present on the site of the work, but whose duties would be regarded as essential for the performance of the contract.

In the context of DBA-covered contracts, workers who may qualify for this exclusion if they spend less than 20 percent of their hours worked performing in connection with covered contracts could include an FLSA-covered security guard patrolling or monitoring a construction worksite where DBA-covered work is being performed or an FLSA-covered clerk who processes the payroll for DBA contracts (either on or off the site of the work). However, if the security guard or clerk in these examples also performed the duties of a DBA-covered laborer or mechanic (for example, by painting or moving construction materials), the 20 percent of hours worked exclusion would not apply to any hours worked on or in connection with the contract because that worker performed ''on'' the covered contract at some point in the workweek.

The Department also reaffirms that the protections of the Order do not extend at all to workers who are not engaged in working on or in connection with a covered contract. For example, an FLSA-covered technician who is hired to repair a DBA contractor's electronic time system or an FLSA-covered janitor who is hired to clean the bathrooms at the DBA contractor's company headquarters are not covered by the Order because they are not performing the specific duties called for by the contract or other services or work necessary to the performance of the contract.

In the context of SCA-covered contracts, the 20 percent of hours worked exclusion may apply to any FLSA-covered employees performing in connection with an SCA contract who are not directly engaged in performing the specific services identified in the contract (*i.e.,* they are not ''service employees'' entitled to SCA prevailing wages) but whose services are necessary to the performance of the SCA contract. Any workers performing work in connection with an SCA contract who are not entitled to SCA prevailing wages but are entitled to at least the FLSA minimum wage pursuant to 41 U.S.C. 6704(a) would fall within the scope of this exclusion.

Examples of workers in the SCA context who may qualify for this exclusion if they perform in connection with covered contracts for less than 20 percent of their hours worked in a given workweek include an accounting clerk who processes a few invoices for SCA contracts out of thousands of other invoices for non-covered contracts during the workweek or an FLSA-covered human resources employee who assists for short periods of time in the hiring of the workers performing on the SCA-covered contract in addition to the hiring of workers on other non-covered projects. Neither the Executive Order nor the exclusion would apply, however, to an FLSA-covered landscaper at the home office of an SCA contractor because that worker is not performing the specific duties called for by the SCA contract or other services or work necessary to the performance of the contract.

With respect to concessions contracts and contracts in connection with Federal property or lands and related to offering services, the 20 percent of hours worked exclusion may apply to any FLSA-covered employees performing in connection with such contracts who are not at any time directly engaged in performing the specific services identified in the contract but whose services or work duties are necessary to the performance of the covered contract. One example of a worker who may qualify for this exclusion if he or she performed in connection with covered contracts for less than 20 percent of his or her hours in a given workweek includes an FLSA-covered clerk who handles the payroll for a child care center that leases space in a Federal agency building as well as the center's other locations that are not covered by the Executive Order. Another such example of a worker who may qualify for this exclusion if he or she performed in connection with covered contracts for less than 20 percent of his or her hours worked in a given workweek would be a job coach whose wages are governed by the FLSA who assists FLSA section 14(c) workers in performing work at a fast food franchise located on a military base as well as that franchisee's other restaurant locations off the base. Neither the Executive Order nor the exclusion would apply, however, to an FLSA-covered employee hired by a covered concessionaire to redesign the storefront sign for a snack shop in a national park unless the redesign of the sign was called for by the SCA contract itself or otherwise necessary to the performance of the contract.

As explained above, pursuant to this exclusion, if a covered worker performs ''in connection with'' contracts covered by the Executive Order as well as on other work that is not within the scope of the Order during a particular workweek, the worker will not be entitled to the Executive Order minimum wage for any hours worked if the number of his or her work hours spent performing in connection with the covered contract is less than 20 percent of that worker's total hours worked in that workweek. Importantly, however, this rule is only applicable if the contractor has correctly determined the hours worked and if it appears from the contractor's properly kept records or other affirmative proof that the contractor appropriately segregated the hours worked in connection with the covered contract from other work not subject to the Executive Order for that worker. *See, e.g.,* 29 CFR 4.169, 4.179. As discussed in greater detail in the preamble pertaining to rate of pay and recordkeeping requirements in §§ 10.22 and 10.26, if a covered contractor during any workweek is not exclusively engaged in performing covered contracts, or if while so engaged it has workers who spend a portion but not all of their hours worked in the workweek in performing work on or in connection with such contracts, it is necessary for the contractor to identify accurately in its records, or by other means, those periods in each such workweek when the contractor and each such worker performed work on or in connection with such contracts. *See* 29 CFR 4.179.

In the absence of records adequately segregating non-covered work from the work performed on or in connection with a covered contract, all workers working in the establishment or department where such covered work is performed will be presumed to have worked on or in connection with the contract during the period of its

performance, unless affirmative proof establishing the contrary is presented. Similarly, in the absence of such records, a worker performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. *Id.*

The quantum of affirmative proof necessary to adequately segregate non-covered work from the work performed on or in connection with a covered contract—or to establish, for example, that all of a worker's time associated with a contract was spent performing ''in connection with'' rather than ''on'' the contract—will vary with the circumstances. For example, it may require considerably less affirmative proof to satisfy the 20 percent of hours worked exclusion with respect to an FLSA-covered accounting clerk who only occasionally processes an SCA-contract-related invoice than would be necessary to establish the 20 percent of hours worked exclusion with respect to a security guard who works on a DBA-covered site at least several hours each week.

Finally, the Department notes that in calculating hours worked by a particular worker in connection with covered contracts for purposes of determining whether this exclusion may apply, contractors must determine the aggregate amount of hours worked on or in connection with covered contracts in a given workweek by that worker. For example, if an FLSA-covered administrative assistant works 40 hours per week and spends two hours each week handling payroll for each of four separate SCA contracts, the eight hours that the worker spends performing in connection with the four covered contracts must be aggregated for that workweek in order to determine whether the 20 percent of hours worked exclusion applies; in this case, the worker would be entitled to the Executive Order minimum wage for all eight hours worked in connection with the SCA contracts because such work constitutes 20 percent of her total hours worked for that workweek.

FLSA Section 14(c) Workers

The Department received numerous comments pertaining to the coverage of workers with disabilities whose wage rates are calculated pursuant to special certificates issued under section 14(c) of the FLSA. Executive Order 13658 expressly provides that its minimum wage protections extend to such workers. *See* 79 FR 9851. Many of the comments received by the Department, such as those submitted by the National Down Syndrome Congress, the American Association of People with Disabilities, the National Industries for the Blind, the National Federation of the Blind, and the State of Alaska's Governor's Council on Disabilities and Special Education, generally supported the inclusion of FLSA section 14(c) workers in the scope of the Order's coverage. A few commenters, including MVW Services, opposed the payment of the Executive Order minimum wage to workers paid pursuant to 14(c) certificates and requested that the Department exempt such workers from coverage of the Order. Comments questioning the coverage of such workers are not within the purview of this rulemaking action because the Executive Order explicitly provided that FLSA section 14(c) workers performing on or in connection with covered contracts are entitled to its protections. *See* 79 FR 9851.

The Department received many comments, including those submitted by the National Down Syndrome Congress, the Association for People Supporting EmploymentFirst (APSE), the Autism Society of America, and the World Institute on Disability, requesting that it include additional language in the contract clause set forth in Appendix A explicitly stating that workers with disabilities whose wages are calculated pursuant to special certificates issued under section 14(c) of the FLSA must be paid at least the Executive Order minimum wage (or the applicable commensurate wage rate under the certificate, if such rate is higher than the Executive Order minimum wage) for hours spent performing on or in connection with covered contracts. The Department agrees with this proposed addition to the contract clause because it helps to clarify the scope of the Executive Order's coverage and has thus made this change to the contract clause in Appendix A.

The National Association of Councils on Developmental Disabilities also suggested that the Department create a specific section of the final rule that would address all of the relevant issues regarding the coverage of FLSA section 14(c) workers. This commenter also recommended that the Department clarify that all of the contractor requirements set forth in the final rule apply with equal force to Federal contractors employing workers performing on or in connection with covered contracts pursuant to FLSA section 14(c) certificates. As noted, the Department has adopted this commenter's suggestion by creating a separate section of the preamble in the final rule addressing specific issues that were raised in comments regarding the coverage of FLSA section 14(c) workers. However, because the Department has expressly included FLSA section 14(c) workers within its definition of the term *worker* and has specifically revised the contract clause to expressly state that such workers are entitled to the Executive Order minimum wage, the Department does not believe that it is necessary to create a specific subsection of the regulatory text devoted to FLSA section 14(c) workers or the contractors that employ them. All workers performing on or in connection with covered contracts whose wages are governed by FLSA section 14(c), regardless of whether they are considered to be ''employees,'' ''clients,'' or ''consumers,'' are covered by the Executive Order (unless the 20 percent of hours worked exclusion applies). Moreover, all of the Federal contractor requirements set forth in this final rule apply with equal force to contractors employing FLSA section 14(c) workers performing on or in connection with covered contracts.

Some commenters, such as SourceAmerica, stated that they supported the payment of the Executive Order minimum wage to FLSA section 14(c) workers performing on covered contracts but also expressed concerns that such inclusion could potentially lead to a loss of employment or public benefits for those workers. A few of these commenters, like Goodwill Industries International, Inc., ACCSES, PRIDE Industries, and SourceAmerica, suggested that, in order to mitigate these potential problems, the Department should direct Federal agencies to subsidize the wage differential between the Executive Order minimum wage rate and the wage rate currently paid under the workers' FLSA section 14(c) certificate and/or direct Federal agencies to increase the funding of government contracts covered by the Order to allow disability service providers and other employers to pay the wage differential. Other commenters, such as Easter Seals, The Arc, and Goodwill Industries International, Inc., suggested that the Department implement a variety of other initiatives to mitigate potential problems, such as ensuring that all Federal contracts are designed to promote the hiring and retention of individuals with significant disabilities; annually tracking and monitoring the number of individuals with significant disabilities that may be displaced or shifted to non-Federal contract work

after implementation of the Executive Order minimum wage; or dedicating funds for on-the-job coaches, accommodations, and training to help promote the retention of workers with disabilities performing on Federal contracts.

The Department appreciates the concerns raised by these commenters regarding the potential loss of employment or reduction in public benefits that could result by requiring that the Executive Order minimum wage be paid to FLSA section 14(c) workers performing on or in connection with covered contracts, particularly with respect to workers with severe disabilities. The Department believes that many of these potential adverse employment effects will be mitigated by the economy and efficiency benefits that contractors will experience by paying their workforce, including workers with disabilities, the Executive Order minimum wage. The concerns raised by a few commenters that some workers with disabilities will lose their public benefits because, as a result of the Executive Order, they will now earn more than the statutory amount allowed (*e.g.,* their earnings will exceed the Substantial Gainful Activity limit for purposes of Social Security benefits) reflects a recognition that many workers will not experience a loss of employment or reduction in their work hours. The Department recognizes the concerns raised by commenters regarding a potential loss of public benefits that could result from application of the Executive Order minimum wage to workers receiving disability benefits, but lacks the regulatory authority to alter the criteria used by other Federal, State, and local agencies in determining eligibility for public benefits.

With respect to other commenters' suggestions that the Department could mitigate all of these potential adverse effects by engaging in a variety of different measures (*e.g.,* ordering contracting agencies to pay the resulting wage differential; ensuring that all Federal contracts are designed to promote the hiring and retention of individuals with significant disabilities; annually tracking and monitoring the number of individuals with disabilities that may be displaced or shifted to non-Federal contract work after implementation of the Executive Order; or dedicating funds for on-the-job coaches, accommodations, and training), the Department has carefully considered all of these suggestions but ultimately concludes that they are beyond the scope of the Department's rulemaking authority to implement the Executive Order.

Apprentices, Students, Interns, and Seasonal Workers

Several commenters, including AGC, Advocacy, the Chamber/NFIB, and ABC, expressed confusion regarding whether the Executive Order minimum wage requirements apply to apprentices. Several of these commenters opposed the payment of the Executive Order minimum wage to apprentices. The Chamber/NFIB, for example, argued that apprentices should not be covered because it would be ''inconsistent with the way apprentices have been treated and will reduce or eliminate the financial advantage of using them, thus damaging their ability to get the necessary experience to complete their training.''

The Department's proposed rule explained that individuals who are employed on an SCA- or DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, are entitled to the Executive Order minimum wage for the hours they spend working on covered contracts. *See* 79 FR 34577. The NPRM further explained, however, that apprentices whose wages are calculated pursuant to special certificates issued under section 14(a) of the FLSA are not entitled to the Executive Order minimum wage. *See* 79 FR 34579.

After careful review of the comments received, the Department has decided to adopt its proposed interpretation that DBA- and SCA-covered apprentices are subject to the Executive Order but that workers whose wages are governed by special subminimum wage certificates under FLSA sections 14(a) and (b) are excluded from the Order. With respect to a few commenters' confusion regarding the coverage of apprentices, the Department notes that the vast majority of apprentices employed by contractors on covered contracts will be individuals who are registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. Such apprentices are entitled to receive the full Executive Order minimum wage for all hours worked. The Executive Order directs that the minimum wage applies to workers performing on or in connection with a covered contract whose wages are governed by the DBA and the SCA. Moreover, the Department believes that the Federal Government's interests in economy and efficiency are best promoted by extending coverage of the Order to apprentices covered by the DBA and the SCA.

However, the Department interprets the plain language of the Executive Order as excluding workers whose wages are governed by FLSA sections 14(a) and (b) subminimum wage certificates (*i.e.,* FLSA-covered apprentices, learners, messengers, and full-time students). The Order expressly states that the minimum wage must ''be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c).'' 79 FR 9851. The Department believes that the explicit inclusion of FLSA section 14(c) workers reflects an intent to omit from coverage workers whose wages are calculated pursuant to special certificates issued under FLSA sections 14(a) and (b). Accordingly, the Department has adopted this proposed exclusion in the final rule.

With respect to other comments received regarding particular categories of workers, Advocacy commented that its members in the recreation and hospitality industry need clarification as to whether seasonal workers and students are covered by the Executive Order and this part. It also stated that the Alliance for International Educational and Cultural Exchange seeks clarification as to whether the Executive Order minimum wage applies to exchange students performing seasonal work in camps and restaurants located in National Parks. Advocacy further noted that a small camp would like for the Department to clarify whether this rule applies to their summer employees who are college graduates and graduate students that provide educational programming for a set summer rate, particularly in light of the adverse economic effects that the camp anticipates if this rule applies to it. EAP Lifestyle Management, LLC similarly requested clarification as to whether the Executive Order applies to students and interns.

The Department's proposed rule did not contain a general exclusion for seasonal workers or students. However, except with respect to workers who are otherwise covered by the SCA or the DBA, the proposed rule stated that this part does not apply to employees who are not entitled to the minimum wage set forth at 29 U.S.C. 206(a)(1) of the FLSA pursuant to 29 U.S.C. 213(a) and 214(a)–(b). Pursuant to this exclusion,

the Executive Order does not apply to full-time students whose wages are calculated pursuant to special certificates issued under section 14(b) of the FLSA, unless they are otherwise covered by the DBA or SCA. The exclusion would also apply to employees employed by certain seasonal and recreational establishments pursuant to 29 U.S.C. 213(a)(3).

Because the Department does not know the specific details regarding the types of seasonal workers and students employed by the small businesses mentioned in the above comments, the Department cannot opine on whether such workers are covered. Such commenters are encouraged to contact the Wage and Hour Division as necessary for compliance assistance in determining their rights and obligations under the Executive Order. Insofar as these commenters are generally requesting that the Department exclude such workers because of the alleged financial hardships that will result, the Department disagrees with these assertions and finds that they are insufficiently persuasive or unique to warrant creation of a broad exclusion for all seasonal workers or students. Notably, such assertions fail to account for the economy and efficiency benefits that the Department anticipates contractors will realize by paying their workers, including students and seasonal workers, the Executive Order minimum wage rate.

Scope of Department's Rulemaking Authority Regarding Worker Coverage

The ABC commented on the Department's proposed interpretation of workers covered by the Executive Order, stating that in order to ''avoid . . . unnecessary confusion'' and to ''preserve comity with both the governing statutes and the Department's own DBA and SCA rules,'' the Department should preserve all current DBA and SCA wage determinations and limit coverage of this part solely to employees who are *not* performing work covered by the DBA or the SCA. ABC asserted that section 4 of the Order instructs the Department to incorporate existing definitions, procedures, and processes under the DBA, the SCA, and the FLSA and thus ''confer[s] upon the Department all the discretion necessary to decline to enforce the Executive Order in a manner that is inconsistent with Congressional authority (i.e., by declining to set a new minimum wage for any employee covered by the DBA, SCA or FLSA that differs from the Congressionally mandated minimum wages under the foregoing statutes).''

The Department strongly disagrees with ABC's comment on the scope of its rulemaking authority and, in any event, declines to implement the truly sweeping limitation on worker coverage suggested by ABC. Section 4(a) of the Executive Order must be read in harmony with the entire Order, particularly with sections 1 and 7. When read as a whole, the Executive Order clearly does not confer authority on the Department to essentially nullify the policy, premise, and basic coverage protections of the Order, as suggested by ABC, by declining to extend the Executive Order minimum wage to any worker covered by the FLSA, SCA, or DBA that differs from the applicable minimum wages established under those statutes. As ABC recognizes, the FLSA, SCA and DBA set ''minimum'' wages, and thus it is not inconsistent with these wage floors to establish a higher minimum wage rate. Moreover, ABC's proposal is inconsistent with nearly every other comment received on worker coverage under the Executive Order. The Department thus reaffirms its conclusion that the Executive Order minimum wage must be paid to all workers performing on or in connection with covered contracts whose wages are governed by the FLSA, the SCA, or the DBA, unless specifically exempted; as explained in the Executive Order and throughout this part, the Federal Government's interests in economy and efficiency are best promoted through the broad inclusion of all such workers.

Geographic Scope

Finally, proposed § 10.3(c) provided that the Executive Order and this part only apply to contracts with the Federal Government requiring performance in whole or in part within the United States. This interpretation was similarly reflected in the Department's proposed definition of the term *United States,* which provided that when used in a geographic sense, the *United States* means the 50 States and the District of Columbia. Under this approach, the minimum wage requirements of the Executive Order and this part would not apply to contracts with the Federal Government to be performed in their entirety outside the geographical limits of the United States as thus defined. However, if a contract with the Federal Government is to be performed in part within and in part outside these geographical limits and is otherwise covered by the Executive Order and this part, the minimum wage requirements of the Order and this part would apply with respect to that part of the contract that is performed within these geographical limits. This proposed approach was consistent with the SCA's regulations. *See* 29 CFR 4.112(b).

The PSC commented that it supports proposed § 10.3(c), but noted that the preamble discussion of the geographic scope of the rule was more clear than the regulatory text itself. Specifically, the PSC stated that the regulatory text should reflect the preamble's discussion that, if a contract with the Federal Government is to be performed in part within and in part outside the United States and is otherwise covered by the Executive Order and this part, the minimum wage requirements apply only with respect to that portion of the contract that is performed within the United States. The Department agrees with this proposed change because it improves clarity of the regulatory text and will assist the regulated community in obtaining and maintaining compliance with the final rule. Accordingly, the Department has amended § 10.3(c) to reflect this change.

Section 10.4 Exclusions

Proposed § 10.4 addressed and implemented the exclusionary provisions expressly set forth in section 7(f) of Executive Order 13658 and provided other limited exclusions to coverage as authorized by section 4(a) of the Executive Order. *See* 79 FR 9852–53. Specifically, proposed §§ 10.4(a)–(d) set forth the limited categories of contractual arrangements for services or construction that are excluded from the minimum wage requirements of the Executive Order and this part, while proposed § 10.4(e) established narrow categories of workers that are excluded from coverage of the Order and this part. Each of these proposed exclusions is discussed below.

Proposed § 10.4(a) implemented section 7(f) of Executive Order 13658, which states that the Order does not apply to ''grants.'' 79 FR 9853. The Department interpreted this provision to mean that the minimum wage requirements of the Executive Order and this part do not apply to grants, as that term is used in the Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6301 *et seq.* That statute defines a ''grant agreement'' as ''the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States

Government; and (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.'' 31 U.S.C. 6304. Section 2.101 of the FAR similarly excludes ''grants,'' as defined in the Federal Grant and Cooperative Agreement Act, from its coverage of contracts. 48 CFR 2.101. Several appellate courts have similarly adopted this construction of ''grants'' in defining the term for purposes of other Federal statutory schemes. *See, e.g., Chem. Service, Inc.* v. *Environmental Monitoring Systems Laboratory,* 12 F.3d 1256, 1258 (3rd Cir. 1993) (applying same definition of ''grants'' for purposes of 15 U.S.C. 3710a); *East Arkansas Legal Services* v. *Legal Services Corp.,* 742 F.2d 1472, 1478 (D.C. Cir. 1984) (applying same definition of ''grants'' in interpreting 42 U.S.C. 2996a). If a contract or contract-like instrument qualifies as a grant within the meaning of the Federal Grant and Cooperative Agreement Act, it would thereby be excluded from coverage of Executive Order 13658 and this part pursuant to the proposed rule. The Department did not receive any comments on this provision and thus implements it as proposed.

Proposed § 10.4(b) implemented the other exclusion set forth in section 7(f) of Executive Order 13658, which states that the Order does not apply to ''contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended.'' 79 FR 9853. The Department did not receive any comments on this provision; accordingly, it is adopted as set forth in the NPRM.

The remaining exclusionary provisions of the proposed rule were derived from the authority granted to the Secretary pursuant to section 4(a) of the Executive Order to ''provid[e] exclusions from the requirements set forth in this order where appropriate'' in implementing regulations. 79 FR 9852. In issuing such regulations, the Executive Order instructs the Secretary to ''incorporate existing definitions'' under the FLSA, SCA, and DBA ''to the extent practicable.'' *Id.* Accordingly, the proposed exclusions discussed below incorporated existing applicable statutory and regulatory exclusions and exemptions set forth in the FLSA, SCA, and DBA.

As discussed in the coverage section above, the Department proposed to interpret section 7(d)(i)(A) of the Executive Order, which states that the Order applies to ''procurement contract[s] for . . . construction,'' 79 FR 9853, as referring to any contract covered by the DBA, as amended, and its implementing regulations. *See* proposed § 10.3(a)(1)(i). In order to provide further definitional clarity to the regulated community for purposes of proposed § 10.3(a)(1)(i), the Department thus established in proposed § 10.4(c) that any procurement contracts for construction that are not subject to the DBA are similarly excluded from coverage of the Executive Order and this part. To assist all interested parties in understanding their rights and obligations under Executive Order 13658, the Department proposed to make coverage of construction contracts under the Executive Order and this part consistent with coverage under the DBA to the greatest extent possible. No comments were submitted on proposed § 10.4(c) and it is thus adopted as proposed.

Similarly, the Department proposed to implement the coverage provisions set forth in sections 7(d)(i)(A) and (B) of the Executive Order, which state that the Order applies respectively to a ''procurement contract for services'' and a ''contract or contract-like instrument for services covered by the Service Contract Act,'' 79 FR 9853, by providing that the requirements of the Order apply to all service contracts covered by the SCA. *See* proposed § 10.3(a)(1)(ii). Proposed § 10.4(d) provided additional clarification by incorporating, where appropriate, the SCA's exclusion of certain service contracts into the exclusionary provisions of the Executive Order. This proposed provision excluded from coverage of the Executive Order and this part any contracts for services, except for those expressly covered by proposed § 10.3(a)(1)(ii)–(iv), that are exempted from coverage under the SCA. The SCA specifically exempts from coverage seven types of contracts (or work) that might otherwise be subject to its requirements. *See* 41 U.S.C. 6702(b). Pursuant to this statutory provision, the SCA expressly does not apply to (1) a contract of the Federal Government or the District of Columbia for the construction, alteration, or repair, including painting and decorating, of public buildings or public works; (2) any work required to be done in accordance with chapter 65 of title 41; (3) a contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect; (4) a contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934, 47 U.S.C. 151 *et seq.;* (5) a contract for public utility services, including electric light and power, water, steam, and gas; (6) an employment contract providing for direct services to a Federal agency by an individual; or (7) a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations. *Id.; see* 29 CFR 4.115–4.122; WHD FOH ¶ 14c00.

The SCA also authorizes the Secretary to ''provide reasonable limitations'' and to ''prescribe regulations allowing reasonable variation, tolerances, and exemptions with respect to this chapter . . . but only in special circumstances where the Secretary determines that the limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Federal Government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.'' 41 U.S.C. 6707(b); *see* 29 CFR 4.123. Pursuant to this authority, the Secretary has exempted a specific list of contracts from SCA coverage to the extent regulatory criteria for exclusion from coverage are satisfied as provided at 29 CFR 4.123(d) and (e). To assist all interested parties in understanding their rights and obligations under Executive Order 13658, the Department proposed to make coverage of service contracts under the Executive Order and this part consistent with coverage under the SCA to the greatest extent possible.

Therefore, the Department provided in proposed § 10.4(d) that contracts for services that are exempt from SCA coverage pursuant to its statutory language or implementing regulations are not subject to this part unless expressly included by proposed § 10.3(a)(1)(ii)–(iv). For example, the SCA exempts contracts for public utility services, including electric light and power, water, steam, and gas, from its coverage. *See* 41 U.S.C. 6702(b)(5); 29 CFR 4.120. Such contracts would also be excluded from coverage of the Executive Order and this part under the proposed rule. Similarly, certain contracts principally for the maintenance, calibration, or repair of automated data processing equipment and office information/word processing systems are exempted from SCA coverage pursuant to the SCA's implementing regulations at 29 CFR 4.123(e)(1)(i)(A); such contracts would thus not be covered by the Executive Order or the proposed rule. However, certain types of concessions contracts are excluded from SCA coverage

pursuant to 29 CFR 4.133(b) but are explicitly covered by the Executive Order and this part under proposed § 10.3(a)(1)(iii). 79 FR 9853. Moreover, to the extent that a contract is excluded from SCA coverage but subject to the DBA (*e.g.,* a contract with the Federal Government for the construction, alteration, or repair, including painting and decorating, of public buildings or public works that would be excluded from the SCA under 41 U.S.C. 6702(b)(1)), such a contract would be covered by the Executive Order and this part as a ''procurement contract for . . . construction.'' 79 FR 9853; proposed § 10.3(a)(1)(i).

The Department received a few comments on its proposed exclusion set forth at § 10.4(d). The Association/IFA criticized the language in proposed § 10.4(d) as ''circular and unnecessarily confusing.'' It argued that, by referencing § 10.3(a)(1)(ii), the Department's description of the exclusion in this provision actually reads: ''Service contracts, except for those [contracts for services covered by the SCA], that are exempt from coverage of the Service Contract Act pursuant to its statutory language or implementing regulations are not subject to this part.'' The Association/IFA stated that this circular construction cannot be what was intended by the Department because, as drafted, it appears to state that all covered service contracts are excluded from the use of exemptions and thus that there are no exemptions. The Association/IFA thus suggested that the Department rewrite proposed § 10.4(d) to clarify that, with the exception of concessions contracts, all of the SCA's exemptions are applicable to the Executive Order. It also requested that the Department include within the regulatory text a specific citation to those exemptions. Ogletree Deakins also requested that the Department insert specific citations to the SCA's statutory and regulatory text of the final rule.

The Department agrees with the Association/IFA's comment regarding the need for clarification of the scope of § 10.4(d) and clarifies that all of the SCA's exemptions are applicable to the Executive Order, unless such SCA-exempted contracts are otherwise covered by the Executive Order and this final rule (*e.g.,* they qualify as concessions contracts or contracts in connection with Federal land and related to offering services). Accordingly, the Department has modified the regulatory text of § 10.4(d) by deleting the reference to § 10.3(a)(1)(ii). The Department also agrees with the suggestion made by the Association/IFA and Ogletree Deakins and has added specific citations to the SCA exemptions to the regulatory text to better assist the regulated community in understanding its obligations and rights under the Executive Order. The Department notes that subregulatory and other coverage determinations made by the Department for purposes of the SCA will also govern whether a contract is covered by the SCA for purposes of the Executive Order.

The Department proposed to provide in § 10.4(e) that, except for workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) and workers who are otherwise covered by the SCA or DBA, employees who are exempt from the minimum wage protections of the FLSA under 29 U.S.C. 213(a) are similarly not subject to the minimum wage protections of Executive Order 13658 and this part. Proposed §§ 10.4(e)(1)–(3), which are discussed briefly below, highlighted some of the narrow categories of employees that are not entitled to the minimum wage protections of the Order and this part pursuant to this exclusion.

Proposed §§ 10.4(e)(1) and (2) specifically excluded from the requirements of Executive Order 13658 and this part workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a) and (b). Specifically, proposed § 10.4(e)(1) excluded from coverage learners, apprentices, or messengers employed under special certificates pursuant to 29 U.S.C. 214(a). *Id.; see* 29 CFR part 520. Proposed § 10.4(e)(2) also excluded from coverage full-time students employed under special certificates issued under 29 U.S.C. 214(b). *Id.; see* 29 CFR part 519. Proposed § 10.4(e)(3) provided that the Executive Order and this part do not apply to individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR part 541. This proposed exclusion was consistent with the FLSA, SCA, and DBA and their implementing regulations. *See, e.g.,* 29 U.S.C. 213(a)(1) (FLSA); 41 U.S.C. 6701(3)(C) (SCA); 29 CFR 5.2(m) (DBA).

Because the Department did not receive any comments requesting revisions to proposed § 10.4(e), the Department adopts the provision as proposed.

For reasons discussed earlier, § 10.4 now includes an explicit exclusion for FLSA-covered workers performing ''in connection with'' covered contracts for less than 20 percent of their hours worked in a given workweek. This new exclusion at § 10.4(f) is explained in greater detail in the preamble for § 10.3 discussing this part's coverage of workers ''performing on or in connection with'' covered contracts.

Section 10.5 Executive Order 13658 Minimum Wage for Federal Contractors and Subcontractors

Proposed § 10.5 set forth the minimum wage rate requirement for Federal contractors and subcontractors established in Executive Order 13658. *See* 79 FR 9851–52. This section generally discussed the minimum hourly wage protections provided by the Executive Order for workers performing on covered contracts with the Federal Government, as well as the methodology that the Secretary will utilize for determining the applicable minimum wage rate under the Executive Order on an annual basis beginning at least 90 days before January 1, 2016. The Executive Order provides that the minimum wage beginning January 1, 2016, and annually thereafter, will be an amount determined by the Secretary. It further provides that such rates be increased by the annual percentage increase in the CPI for the most recent month, quarter, or year available as determined by the Secretary. The Secretary proposed to base such increases on the most recent year available to minimize the impact of seasonal fluctuations on the Executive Order minimum wage rate. This section emphasized that nothing in the Executive Order or this part shall excuse noncompliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Executive Order and this part. *See* 79 FR 9851. This section has been retained in the final rule as proposed.

Section 10.6 Antiretaliation

Proposed § 10.6 established an antiretaliation provision stating that it shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or has testified or is about to testify in any such proceeding. This language was derived from the FLSA's antiretaliation provision set forth at 29 U.S.C. 215(a)(3) and was consistent with the Executive Order's direction to adopt enforcement mechanisms as consistent as practicable with the FLSA, SCA, or DBA. As explained in the NPRM, the Department believes that such a provision will help

ensure effective enforcement of Executive Order 13658. Consistent with the Supreme Court's observation in interpreting the scope of the FLSA's antiretaliation provision, enforcement of Executive Order 13658 will depend ''upon information and complaints received from employees seeking to vindicate rights claimed to have been denied.'' *Kasten* v. *Saint-Gobain Performance Plastics Corp.,* 131 S. Ct. 1325, 1333 (2011) (internal quotation marks omitted). Accordingly, the Department proposed to include an antiretaliation provision based on the FLSA's antiretaliation provision. *See* 29 U.S.C. 215(a)(3). Importantly, and consistent with the Supreme Court's interpretation of the FLSA's antiretaliation provision, the Department's proposed rule would protect workers who file oral as well as written complaints. *See Kasten,* 131 S. Ct. at 1336.

Moreover, as under the FLSA, the proposed antiretaliation provision under this part would protect workers who complain to the Department as well as those who complain internally to their employers about alleged violations of the Order or this part. *See, e.g., Minor* v. *Bostwick Laboratories,* 669 F.3d 428, 438 (4th Cir. 2012); *Hagan* v. *Echostar Satellite, LLC,* 529 F.3d 617, 626 (5th Cir. 2008); *Lambert* v. *Ackerley,* 180 F.3d 997, 1008 (9th Cir. 1999) (en banc); *Valerio* v. *Putnam Associates,* 173 F.3d 35, 43 (1st Cir. 1999); *EEOC* v. *Romeo Community Sch.,* 976 F.2d 985, 989 (6th Cir. 1992). The Department also noted that the antiretaliation provision set forth in the proposed rule, like the FLSA's antiretaliation provision, would apply in situations where there is no current employment relationship between the parties; for example, it would protect a worker from retaliation by a prospective or former employer.

Several commenters, including the Building Trades, Demos, the AFL–CIO, the EEAC, and the PSC, expressed their general support for the Department's inclusion of an antiretaliation provision in the rule. The AFL–CIO particularly supported the Department's statement that the proposed antiretaliation provision would extend to protect workers who file oral as well as written complaints because such an interpretation is appropriate and consistent with Supreme Court precedent.

The PSC and the EEAC commented, however, that the preamble discussion of the NPRM stated that this protection would apply where there is no current employment relationship (*e.g.,* retaliation by ''a prospective or former employer''). The PSC, the Association/IFA, and the EEAC questioned whether current case law permits such coverage because some courts have determined that prospective employees cannot bring an antiretaliation claim under the FLSA. The EEAC further commented that the Supreme Court has never held that the FLSA's antiretaliation provision extends to internal complaints and urged the Department to interpret the antiretaliation provision in the final rule consistently with interpretations under the FLSA.

The Department appreciates the general support for its inclusion of an antiretaliation provision reflected in the comments received on the proposed rule and continues to believe that the antiretaliation provision serves an important purpose in effectuating and enforcing the Executive Order. With respect to the comments received regarding the scope of this provision, the Executive Order's antiretaliation provision is intended to mirror the scope of the FLSA's antiretaliation provision, as interpreted by the Department. The Department regards the FLSA's antiretaliation provision as extending to job applicants and internal complaints, and the NPRM and this final rule reflect this interpretation as well. At the same time, the Department recognizes, for example, that the U.S. Court of Appeals for the Fourth Circuit has disagreed with its interpretation with respect to the coverage of job applicants, *see Dellinger* v. *Science Applications Int'l Corp.,* 649 F.3d 226 (4th Cir. 2011), and the Department therefore would not enforce its interpretation on this issue in that circuit. To the extent that application of the FLSA's antiretaliation provision to job applicants or internal complaints is definitively resolved through the judicial process by the Supreme Court or otherwise, the Department would interpret the antiretaliation provision under the Executive Order in accordance with such precedent. The Department adopts § 10.6 as proposed without modification.

Section 10.7 Waiver of Rights

Proposed § 10.7 provided that workers cannot waive, nor may contractors induce workers to waive, their rights under Executive Order 13658 or this part. The Supreme Court has consistently concluded that an employee's rights and remedies under the FLSA, including payment of minimum wage and back wages, cannot be waived or abridged by contract. *See, e.g., Tony & Susan Alamo Found.* v. *Sec'y of Labor,* 471 U.S. 290, 302 (1985); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc.* v. *Gangi,* 328 U.S. 108, 112–16 (1946); *Brooklyn Sav. Bank* v. *O'Neil,* 324 U.S. 697, 706–07 (1945). The Supreme Court has reasoned that the FLSA was intended to establish a ''uniform national policy of guaranteeing compensation for all work'' performed by covered employees. *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers,* 325 U.S. 161, 167 (1945) (internal quotation marks omitted). Consequently, the Court has held that ''[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.'' *Id.* (internal quotation marks omitted). In *Barrentine,* the Supreme Court reaffirmed the ''nonwaivable nature'' of these fundamental FLSA protections and stated that ''FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.'' 450 U.S. at 740 (quoting *Brooklyn Sav. Bank,* 324 U.S. at 707). Moreover, FLSA rights are not subject to waiver because they serve an important public interest by protecting employers against unfair methods of competition in the national economy. *See Tony & Susan Alamo Found.,* 471 U.S. at 302. Releases and waivers executed by employees for unpaid wages (and fringe benefits) due them under the SCA are similarly without legal effect. 29 CFR 4.187(d). Because the public policy interests underlying the issuance of the Executive Order would be similarly thwarted by permitting workers to waive, or contractors to induce workers to waive, their rights under Executive Order 13658 or this part, proposed § 10.7 made clear that such waiver of rights is impermissible.

The Department received a number of comments, including comments submitted by Demos and the AFL–CIO, expressing support for the Department's proposed prohibition on waiver of rights. The Department did not receive any comments opposing this provision. Section 10.7 of this part is adopted as proposed.

Subpart B—Federal Government Requirements

In the NPRM, the Department proposed subpart B of part 10 to establish the requirements for the Federal Government to implement and comply with Executive Order 13658. The Department proposed § 10.11 to address contracting agency requirements and proposed § 10.12 to

address the requirements placed upon the Department.

Section 10.11 Contracting Agency Requirements

Proposed § 10.11(a) implemented section 2 of Executive Order 13658, which directs that executive departments and agencies must include a contract clause in any new contracts or solicitations for contracts covered by the Executive Order. 79 FR 34580. The proposed section described the basic function of the contract clause, which is to require that workers performing work on or in connection with covered contracts be paid the applicable Executive Order minimum wage. The proposed section stated that for all contracts subject to Executive Order 13658, except for procurement contracts subject to the FAR, the contracting agency must include the Executive Order minimum wage contract clause set forth in Appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 10.3. It further stated that the required contract clause directs, as a condition of payment, that all workers performing work on or in connection with covered contracts must be paid the applicable, currently effective minimum wage under Executive Order 13658 and § 10.5. The proposed section additionally provided that for procurement contracts subject to the FAR, contracting agencies must use the clause that will be set forth in the FAR to implement this rule. The FAR clause will accomplish the same purposes as the clause set forth in Appendix A and be consistent with the requirements set forth in this rule.

Two commenters, the NILG and the EEAC, requested that the Department allow for incorporation of the contract clause by reference. The NILG suggested that the length of the clause rendered it burdensome and environmentally unfriendly to incorporate in its entirety, while the EEAC asserted that ''the utility of including such a detailed clause in each and every contract and contract-like instrument is questionable.''

Including the full contract clause in a covered contract is an effective and practical means of ensuring that contractors receive notice of their obligations under the Executive Order and this final rule, and the Department therefore prefers that covered contracts include the contract clause in full. At the same time, there will be instances in which a contracting agency, or a contractor, does not include the entire contract clause verbatim in a covered contract, but the facts and circumstances establish that the contracting agency, or contractor, sufficiently apprised a prime or lower-tier contractor that the Executive Order and its requirements apply to the contract. It will be appropriate to find in such circumstances that the full contract clause has been properly incorporated by reference. *See Nat'l Electro-Coatings, Inc.* v. *Brock,* Case No. C86–2188, 1988 WL 125784 (N.D. Ohio 1988); *In the Matter of Progressive Design & Build, Inc.,* WAB Case No. 87–31, 1990 WL 484308 (WAB Feb. 21, 1990). The Department notes, for example, that the full contract clause will be deemed to have been incorporated by reference in a covered contract if the contract provides that ''Executive Order 13658—Establishing a Minimum Wage for Contractors, and its implementing regulations, including the applicable contract clause, are incorporated by reference into this contract as if fully set forth in this contract,'' with a citation to a Web page that contains the contract clause in full, to the provision of the Code of Federal Regulations containing the contract clause set forth at Appendix A of this part, or to the provision of the FAR containing the contract clause promulgated by the FARC to implement this rule.

The EEAC questioned how parties might include a contract clause in a verbal agreement. The Department anticipates that the vast majority of covered contracts will be written. However, the Department's decision to include verbal agreements as part of its definition of the term ''contract'' derives from the SCA's regulations. *See* 29 CFR 4.110. Under the SCA, a contract may be embodied in a verbal agreement, *see id.,* notwithstanding the regulatory obligation to include the SCA contract clause found at 29 CFR 4.6 in the contract. The purpose of including verbal agreements in the definition of contract and contract-like instrument is to ensure that the Executive Order's minimum wage protections apply in instances where the contracting parties, for whatever reason, rely on a verbal rather than written contract. As noted, such instances are likely to be exceedingly rare, but workers should not be deprived of the Executive Order's minimum wage because contracting parties neglected to memorialize their understanding in a written contract.

The Department of Defense (DoD) commented that the proposed clause is ''inefficient as portions are duplicative with other NAF [non-appropriated fund] clauses, and any modifications would require a change to the CFR.'' This commenter expressed their view that ''[n]owhere else in the CFR are clauses mandated for use by NAFIs [non-appropriated fund instrumentalities], and they should not be in this [part].'' The DoD requested that rather than requiring contracting agencies to incorporate the contract clause prescribed in the NPRM, the Department should permit contracting agencies to create and incorporate their own contract clause into covered contracts. As discussed more fully later in this preamble, the Department believes requiring non-procurement contractors potentially to become familiar with distinct Executive Order contract clauses whenever they contract with more than one Federal agency, as opposed to the single, uniform clause attached as Appendix A, imposes on them an unnecessary inconvenience and burden. The Department additionally believes that requiring such contractors to use multiple contract clauses could result in confusion, potentially undercutting the Department's mandate under the Executive Order to adopt regulations that obtain compliance with the Order. Therefore, the Department is not adopting the DoD's request to allow contracting agencies that enter into non-procurement contracts subject to the Executive Order to create their own contract clauses.

Upon careful review and consideration of the comments, the Department has accordingly decided to adopt § 10.11(a) as proposed, except that the Department has made a technical modification to the section's first sentence. As discussed more fully later in this preamble with respect to the contract clause, the sentence retains the same meaning as in the NPRM by requiring the contracting agency to include the Executive Order minimum wage contract clause set forth in Appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 10.3, except for procurement contracts subject to the FAR. For procurement contracts subject to the FAR, contracting agencies shall use the clause set forth in the FAR developed to implement this rule; that clause must both accomplish the same purposes as the clause set forth in Appendix A and be consistent with the requirements set forth in this rule.

Proposed § 10.11(b) stated the consequences in the event that a contracting agency fails to include the contract clause in a covered contract. Proposed § 10.11(b) provided that if a contracting agency made an erroneous determination that Executive Order 13658 or this part did not apply to a particular contract or failed to include the applicable contract clause in a contract to which the Executive Order

applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department, must include the clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed. The Department noted in the NPRM that the Administrator possesses analogous authority under the DBA, *see* 29 CFR 1.6(f), and it believed a similar mechanism for addressing an agency's failure to include the contract clause in a contract subject to the Executive Order would enhance its ability to obtain compliance with the Executive Order.

Some commenters, including the Association/IFA, the EEAC, and the NILG, expressed concern that contractors might have to absorb costs associated with retroactive enforcement of a contract clause that should have been originally inserted by the contracting agency. The commenters expressed the view that it would be unfair to hold contractors financially responsible under such circumstances, and pointed to existing language under the regulations implementing the SCA and DBA that they asserted provide for reimbursement of contractors where the contracting agency fails to include an appropriate wage determination under those statutes. *See* 29 CFR 4.5 (SCA) (permitting contracting agencies to exercise their authority ''where necessary . . . to pay any necessary additional costs''); 29 CFR 1.6(f) (DBA) (authorizing retroactive incorporation of an omitted wage determination ''provided that the contractor is compensated for any increases in wages resulting from such change''). Upon further consideration of this issue, the Department agrees that a contractor is entitled to an adjustment where necessary to pay any necessary additional costs when a contracting agency initially omits and then subsequently includes the contract clause in a covered contract. This approach, which is consistent with the SCA's implementing regulations, *see* 29 CFR 4.5(c), is therefore reflected in revised § 10.44(e). The Department recognizes that the mechanics of providing such an adjustment may differ between covered procurement contracts and the non-procurement contracts that the Department's contract clause covers. With respect to covered non-procurement contracts, the Department believes that the authority conferred on agencies that enter into such contracts under section 4(b) of the Executive Order includes the authority to provide such an adjustment. The Department notes that such an adjustment is not warranted under the Executive Order or this part when a contracting agency includes the applicable Executive Order contract clause but fails to include an applicable SCA or DBA wage determination. This final rule requires inclusion of a contract clause, not a wage determination, in covered contracts; thus, unlike the DBA's regulations at 29 CFR 1.6(f), it is a contracting agency's failure to include the required contract clause, not a failure to include a wage determination, that triggers the entitlement to an adjustment as described in this paragraph.

Aside from the insertion of this language in the event that a contracting agency fails to include the applicable contract clause in a covered contract, § 10.11(b) is adopted as originally proposed.

Proposed § 10.11(c) addressed the obligations of a contracting agency in the event that the contract clause has been included in a covered contract but the contractor may not have complied with its obligations under the Executive Order or this part. Specifically, proposed § 10.11(c) provided that the contracting agency must, upon its own action or upon written request of an authorized representative of the Department, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be necessary to pay workers the full amount of wages required by the Executive Order. Both the SCA and DBA provide for withholding to ensure the availability of monies for the payment of back wages to covered workers when a contractor or subcontractor has failed to pay the full amount of required wages. 29 CFR 4.6(i); 29 CFR 5.5(a)(2). Withholding likewise is an appropriate remedy under the Executive Order for all covered contracts because the Order directs the Department to adopt SCA and DBA enforcement processes to the extent practicable and to exercise authority to obtain compliance with the Order. 79 FR 9852. Consistent with withholding procedures under the SCA and DBA, proposed § 10.11(c) allowed the contracting agency and the Department to withhold or cause to be withheld funds from the prime contractor not only under the contract on which covered workers were not paid the Executive Order minimum wage, but also under any other contract that the prime contractor has entered into with the Federal Government. Finally, the NPRM noted that a withholding remedy is consistent with the requirement in section 2(a) of the Executive Order that compliance with the specified obligations is an express ''condition of payment'' to a contractor or subcontractor. 79 FR 9851. The Department received no substantive comments on proposed § 10.11(c) and adopts the regulation as proposed.

Proposed § 10.11(d) described a contracting agency's responsibility to forward to the WHD any complaint alleging a contractor's non-compliance with Executive Order 13658, as well as any information related to the complaint. Although the Department proposed in § 10.41 that complaints be filed with the WHD rather than with contracting agencies, the Department recognizes that some workers or other interested parties nonetheless may file formal or informal complaints concerning alleged violations of the Executive Order or this part with contracting agencies. Proposed § 10.11(d) therefore specifically required the contracting agency to transmit the complaint-related information identified in § 10.11(d)(1)(ii)(A)–(E) to the WHD's Branch of Government Contracts Enforcement within 14 calendar days of receipt of a complaint alleging a violation of the Executive Order or this part, or within 14 calendar days of being contacted by the WHD regarding any such complaint. This language is substantially similar to an analogous provision in the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. *See* 29 CFR 9.11(d). The Department explained that it believes adoption of the language in proposed § 10.11(d), which includes an obligation to send such complaint-related information to WHD even absent a specific request (*e.g.,* when a complaint is filed with a contracting agency rather than with the WHD), is appropriate because prompt receipt of such information from the relevant contracting agency will allow the Department to fulfill its charge under the Order to implement enforcement mechanisms for obtaining compliance with the Order. 79 FR 9852.

NELP commended the Department for specifying that contracting agencies must report all complaint-related information to the WHD's Branch of Government Contract Enforcement within 14 days of receipt of a complaint. The FS sought confirmation that if it receives a complaint regarding payment of wages under the contract clause, it should refer that complaint to the Department. This confirms that

contracting agencies must refer all complaints lodged under the Executive Order to the Department in accordance with the procedures described in § 10.11(d). This further confirms that the Department will process the complaint received and will notify the contractor and the contracting agency should it be necessary for either or both to take corrective action. No comments were received in opposition to proposed § 10.11(d) and the Department therefore adopts § 10.11(d) as proposed.

Section 10.12 Department of Labor Requirements

Proposed § 10.12 addressed the Department's requirements under the Executive Order. The Order requires the Secretary to establish a minimum wage that contractors must pay to workers on covered contracts. 79 FR 9851. Proposed § 10.12(a) set forth the Secretary's obligation to establish the Executive Order minimum wage on an annual basis in accordance with the Order. No comments were received regarding proposed § 10.12(a) and the Department thus adopts the regulation as proposed.

Proposed § 10.12(b) explained that the Secretary will determine the applicable minimum wages on an annual basis by utilizing the method set forth in proposed § 10.5(b). The AOA commented on this provision, contending that ''[a]llowing the Secretary of Labor to set and raise the minimum wage annually for businesses included under the Proposed Rule (presumably raising it consistent with the CPI) will present significant complications for members of our industry.'' The commenter expressed concern about contractors' ability to forecast and adjust prices. The Department has carefully considered the comment and has decided to adopt § 10.12(b) as proposed. As discussed in greater detail in the preamble section for § 10.22, contractors concerned about potential increases in the minimum wage provided under the Executive Order may consult the CPI–W, which the Federal Government publishes monthly, to monitor the likely magnitude of the annual increase. Furthermore, the Department has decided to include language in the required contract clause (provided in Appendix A of this part) that, if appropriate, requires contractors to be compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order minimum wage beginning on January 1, 2016. This new provision in the contract clause should mitigate contractors' concerns about unanticipated financial burdens associated with annual increases in the Executive Order minimum wage.

Section 10.12(c) explained how the Secretary will provide notice to contractors and subcontractors of the applicable Executive Order minimum wage on an annual basis. The proposed section indicated that the WHD Administrator will publish a notice in the **Federal Register** on an annual basis at least 90 days before any new minimum wage is to take effect. Additionally, the proposed provision stated that the Administrator would publish and maintain on Wage Determinations OnLine (WDOL), *www.wdol.gov,* or any successor Web site, the applicable minimum wage to be paid to workers on covered contracts, including the cash wage to be paid to tipped employees. The proposed section further stated that the Administrator may also publish the applicable wage to be paid to workers on covered contracts, including the cash wage to be paid to tipped employees, on an annual basis at least 90 days before any such minimum wage is to take effect in any other media the Administrator deems appropriate.

AGC expressed concern that few contractors have staff devoted to reading the **Federal Register** on a daily basis and contractor staff generally visit Wage Determinations Online only when they need specific information from the Web site. The organization expressed its view that such notification is inadequate. AGC recommended that the Department work with the FARC to direct contracting agencies to notify their current and recent contractors individually and in writing of any increase in the Executive Order minimum wage within a short span of time (*e.g.,* 14 days from publication in the **Federal Register**). The NCLEJ and NELP also expressed their view that the notice provisions proposed in the NPRM were ''inadequate notice to affected workers in a system that depends upon their monitoring of their own pay.'' NELP and the NCLEJ added that ''[t]he Administrator of the WHD should be required to publish the annual applicable minimum wage in mainstream media outlets.'' A few commenters, including Women Construction Owners & Executives, USA, recommended that the Department include the Executive Order minimum wage on DBA and SCA wage determinations because DBA and SCA contractors go ''first and foremost to the published wage determination to determine'' the applicable wage rates on a project. The Building Trades also suggested that SCA and DBA wage determinations should include a short explanation of contractors' wage payment obligations under the Executive Order.

After careful review of the comments received regarding proposed § 10.12(c), the Department has decided to modify § 10.12(c) of this final rule. The Department shares the concerns of commenters who raised the notice issue for both contractors and workers. Therefore, the Department intends to publish a prominent general notice on SCA and DBA wage determinations that will state the Executive Order minimum wage and that the Executive Order minimum wage applies to all DBA- and SCA-covered contracts. The Department also intends to update this general notice on all DBA and SCA wage determinations annually to reflect any inflation-based adjustments to the Executive Order minimum wage. As will be discussed in more detail in the preamble section pertaining to § 10.29 in subpart C, the Department has also decided to develop a poster regarding the Executive Order minimum wage for contractors with FLSA-covered workers performing on or in connection with a covered contract. The Department has added a provision to the final rule requiring that contractors provide notice of the Executive Order minimum wage to FLSA-covered workers performing work on or in connection with covered contracts via posting of the poster that will be provided by the Department. This new notice provision is discussed below in the preamble section pertaining to § 10.29 of this final rule.

Proposed § 10.12(d) addressed the Department's obligation to notify a contractor in the event of a request for the withholding of funds. Under § 10.11(c), the WHD Administrator may direct that payments due on the covered contract or any other contract between the contractor and the Federal Government may be withheld as may be considered necessary to pay unpaid wages. If the Administrator exercises his or her authority under § 10.11(c) to request withholding, proposed § 10.12(d) required the Administrator or the contracting agency to notify the affected prime contractor of the Administrator's withholding request to the contracting agency. No comments were received on proposed § 10.12(d) and the Department has adopted the section as proposed with a slight modification. The modification in the final rule text clarifies that both the Administrator and the contracting agency may notify the contractor in the event of a withholding even though notice is required from only one of them. The proposed text merely required one or the other to notify the affected prime contractor of the

Administrator's withholding request to the contracting agency, without also noting that the other could choose in its discretion to provide notice as well.

Subpart C—Contractor Requirements

Proposed subpart C articulated the requirements that contractors must comply with under Executive Order 13658 and this part. This section set forth the general obligation to pay no less than the applicable Executive Order minimum wage to workers for all hours worked on or in connection with the covered contract, and to include the Executive Order minimum wage contract clause in all contracts and subcontracts of any tier thereunder. Proposed subpart C also set forth contractor requirements pertaining to permissible deductions, frequency of pay, and recordkeeping, as well as a prohibition against taking kickbacks from wages paid on covered contracts.

Section 10.21 Contract Clause

Proposed § 10.21(a) required the contractor, as a condition of payment, to abide by the terms of the Executive Order minimum wage contract clause described in proposed § 10.11(a). The contract clause contains the obligations with which the contractor must comply on the covered contract and is reflective of the contractor's requirements as stated in the proposed regulations. Proposed § 10.21(b) articulated the obligation that contractors and subcontractors must insert the Executive Order minimum wage contract clause in any covered subcontracts and must require, as a condition of payment, that subcontractors include the clause in all lower-tier subcontracts. Under the proposal, the prime contractor and upper-tier contractor would be responsible for compliance by any covered subcontractor or lower-tier subcontractor with the Executive Order minimum wage contract clause. This responsibility on the part of prime and upper-tier contractors for subcontractor compliance parallels that of the SCA and DBA. *See* 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA).

The Department received several comments regarding the flow-down obligations of contractors under § 10.21(a). AGC expressed its view, shared by other commenters, that it is ''unfair'' to hold the prime or any upper-tier subcontractor responsible for all tiers of subcontractor compliance with the Executive Order's requirement to flow-down the contract clause. It also expressed the view that it is unfair to hold such contractors responsible for all lower-tier subcontractors' compliance with the Executive Order's minimum wage requirements. While AGC acknowledged that construction contractors already may be held responsible for lower-tier subcontractor violations of the DBA, it expressed the view that holding contractors responsible for such violations of the Executive Order is a significant expansion of potential liability because coverage of the Executive Order on DBA-covered projects extends to workers whose wages are governed by the FLSA. AGC accordingly requested that WHD include a ''safe harbor'' for prime contractors and upper-tier subcontractors with regard to lower-tier subcontractors' violations.

After careful consideration of the comments received, the Department has decided to adopt § 10.21 as proposed. Specifically, the Department declines to adopt the request to provide a safe harbor from flow-down liability to a contractor that includes the contract clause in its contracts with subcontractors. As discussed more fully in the preamble section for § 10.44, which discusses remedies and sanctions under this part, neither the SCA nor DBA, both of which have long permitted the Department to hold a contractor responsible for compliance by any lower-tier contractor and to which the Executive Order directs the Department to look in adopting remedies, contain a safe harbor. Such a safe harbor could diminish the level of care contractors exercise in selecting subcontractors on covered contracts and reduce contractors' monitoring of the performance of subcontractors—two ''vital functions'' served by the flow-down responsibility. *In the Matter of Bongiovanni,* WAB Case No. 91–08, 1991 WL 494751 (WAB April 19, 1991). Additionally, a contractor's responsibility for the compliance of its lower-tier subcontractors would enhance the Department's ability to obtain compliance with the Executive Order. With respect to the concern AGC expressed regarding coverage of workers on DBA-covered contracts whose wages are governed solely by the FLSA, the Department expects the percentage of workers on SCA- and DBA-covered contracts who are covered by the SCA and/or DBA to greatly exceed those whose wages are solely governed by the FLSA. Thus, the vast majority of covered workers on SCA- and DBA-covered contracts will almost certainly be workers covered by the SCA and/or DBA to which the contractor already has a flow-down obligation. Moreover, as explained above in the preamble for subpart A, the Department has created an exclusion under which workers performing work in connection with covered contracts for less than 20 percent of their hours worked in a given workweek are not subject to the Executive Order. For these reasons, the Department declines to grant the request for a safe harbor.

Finally, AGC sought clarification as to how ''far down the line'' a contractor's flow-down responsibility extends. The Department notes that, as under the SCA and DBA, a contractor under this part is responsible for compliance by all covered lower-tier subcontractors. This obligation applies regardless of the number of covered lower-tier subcontractors and regardless of how many levels of subcontractors separate the responsible prime or upper-tier contractor from the subcontractor that failed to comply with the Executive Order.

Section 10.22 Rate of Pay

Proposed § 10.22 addressed contractors' obligations to pay the Executive Order minimum wage to workers performing work on or in connection with a covered contract under Executive Order 13658. Proposed § 10.22(a) stated the general obligation that contractors must pay workers on a covered contract the applicable minimum wage under Executive Order 13658 for all hours spent performing work on the covered contract. The proposed section also provided that workers performing work on or in connection with contracts covered by the Executive Order must receive not less than the minimum hourly wage of $10.10 beginning January 1, 2015. Under the proposal, in order to comply with the Executive Order's minimum wage requirement, a contractor could compensate workers on a daily, weekly, or other time basis (no less often than semi-monthly), or by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis each workweek, will provide a rate per hour that is no lower than the applicable Executive Order minimum wage. Whatever system of payment is used, however, must ensure that each hour of work in performance of the contract is compensated at not less than the required minimum rate. Failure to pay for certain hours at the required rate cannot be transformed into compliance with the Executive Order or this part by reallocating portions of payments made for other hours that are in excess of the specified minimum.

In determining whether a worker is performing within the scope of a covered contract, the Department proposed that all workers who, on or

after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are subject to the Executive Order and this part unless a specific exemption is applicable. This standard was derived from the SCA's implementing regulations at 29 CFR 4.150.

In the NPRM, the Department explained that, because workers covered by the Executive Order are entitled to its minimum wage protections for all hours worked in performance of a covered contract, a computation of their hours worked on the covered contract in each workweek is essential. *See* 29 CFR 4.178. The proposed rule provided that, for purposes of the Executive Order, the hours worked by a worker generally include all periods in which the worker is suffered or permitted to work, whether or not required to do so, and all time during which the worker is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. *Id.* The hours worked which are subject to the minimum wage requirement of the Executive Order are those in which the worker is engaged in performing work on or in connection with a contract subject to the Executive Order. *Id.* However, unless such hours are adequately segregated or there is affirmative proof to the contrary that such work did not continue throughout the workweek, as discussed below, compensation in accordance with the Executive Order will be required for all hours worked in any workweek in which the worker performs any work on or in connection with a contract covered by the Executive Order. *Id.*

In the NPRM, the Department further stated that, in situations where contractors are not exclusively engaged in contract work covered by the Executive Order, and there are adequate records segregating the periods in which work was performed on or in connection with contracts subject to the Order from periods in which other work was performed, the minimum wage requirement of the Executive Order need not be paid for hours spent on work not covered by the Order. *See* 29 CFR 4.169, 4.178–.179. However, in the absence of records adequately segregating non-covered work from the work performed on or in connection with the covered contract, all workers working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance, unless affirmative proof establishing the contrary is presented. *Id.* Similarly, a worker performing any work on or in connection with the covered contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. *Id.*

The Department's proposed rule noted that if a contractor desires to segregate covered work from non-covered work under the Executive Order for purposes of applying the minimum wage established in the Order, the contractor must identify such covered work accurately in its records or by other means. As explained in the NPRM, the Department believes that the principles, processes, and practices that it utilizes in its implementing regulations under the SCA, which incorporate by reference the principles applied under the FLSA as set forth in 29 CFR part 785, will be useful to contractors in determining and segregating hours worked on contracts with the Federal Government subject to the Executive Order. *See* 29 CFR 4.169, 4.178–.179; WHD FOH ¶¶ 14c07, 14g00–01.[8] In this regard, an arbitrary assignment of time on the basis of a formula, as between covered and non-covered work, is not sufficient. However, if the contractor does not wish to keep detailed hour-by-hour records for segregation purposes under the Executive Order, records can be segregated on the wider basis of departments, work shifts, days, or weeks in which covered work was performed. For example, if on a given day no work covered by the Executive Order was performed by a contractor, that day could be segregated and shown in the records. *See* WHD FOH ¶ 14g00.

Finally, the Department noted that the Supreme Court has held that when an employer has failed to keep adequate or accurate records of employees' hours under the FLSA, employees should not effectively be penalized by denying them recovery of back wages on the ground that the precise extent of their uncompensated work cannot be established. *See Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 687 (1946). Specifically, the Supreme Court concluded that where an employer has not maintained adequate or accurate records of hours worked, an employee need only prove that ''he has in fact performed work for which he was improperly compensated'' and produce ''sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.'' *Id.* Once the employee establishes the amount of uncompensated work as a matter of ''just and reasonable inference,'' the burden then shifts to the employer ''to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence.'' *Id.* at 687–88. If the employer fails to meet this burden, the court may award damages to the employee ''even though the result be only approximate.'' *Id.* at 688. These principles for determining hours worked and accompanying back wage liability apply with equal force to the Executive Order.

In response to these rate of pay issues discussed in the preamble, the NCLEJ commented that workers should be provided with clear information about which of their work hours were performed on or in connection with a contract subject to the Executive Order if the contractor intends to assign them both covered and uncovered job duties. The Department notes that contractors are required under this rule to notify workers of the Executive Order minimum wage and to maintain records for each worker stating, inter alia, the number of hours worked and rate of pay for all hours worked. Because the Department anticipates that such notice will be sufficient to inform workers of their rights under the Order, the Department declines this request.

The Department did not receive any comments opposing its proposed interpretation of the rate of pay and hours worked principles set forth above and reaffirms all of its discussion and guidance set forth in the NPRM regarding determining and segregating hours worked and calculating the rate of pay.

AGC and ABC suggested that the applicable minimum wage rate under the Executive Order should remain frozen for the duration of covered multi-year contracts. Both commenters asserted that wage determinations applicable at the beginning of a multi-year contract covered by the DBA remain unchanged for the life of the contract, and AGC argued that allowing ''mid-performance'' changes in the applicable minimum wage rate could lead to ''claims and change orders that could cause project delays or cost overruns.'' As a ''less ideal alternative,''

[8] In the NPRM, the Department noted that contractors subject to the Executive Order are likely already familiar with these segregation principles and should, as a matter of usual business practices, already have recordkeeping systems in place that enable the segregation of hours worked on different contracts or at different locations. The Department further expressed its belief that such systems will enable contractors to identify and pay for hours worked subject to the Executive Order without having to employ additional systems or processes.

AGC requested the insertion of a mandatory clause that would allow for contract adjustments based on increases in the applicable minimum wage rate.

The Department declines to adopt the proposal to freeze the applicable minimum wage rate for the duration of multi-year contracts. Nothing in the Executive Order suggests that the minimum wage requirement can remain stagnant during the span of a covered multi-year contract. Allowing the applicable minimum wage to increase throughout the duration of multi-year contracts fulfills the Executive Order's intent to raise the minimum wage of workers according to annual increases in the CPI–W. It additionally ensures simultaneous application of the same minimum wage rate to all covered workers. For these reasons, the Department has declined to include any new language in § 10.22(a) ''freezing'' the applicable minimum wage rate for the duration of multi-year contracts. With respect to AGC's alternative suggestion on this issue, as mentioned in the preamble to § 10.11(b) and discussed in further detail in relation to § 10.44(e), the Department has revised the language of the contract clause contained in Appendix A to require contracting agencies, if appropriate, to ensure the contractor is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 13658 minimum wage beginning on January 1, 2016.

Proposed § 10.22(a) explained that the contractor's obligation to pay the applicable minimum wage to workers on covered contracts does not excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under Executive Order 13658. This provision implemented section 2(c) of the Executive Order. 79 FR 9851.

The Department noted that the minimum wage requirements of Executive Order 13658 are separate and distinct legal obligations from the prevailing wage requirements of the SCA and the DBA. If a contract is covered by the SCA or DBA and the wage rate on the applicable SCA or DBA wage determination for the classification of work the worker performs is less than the applicable Executive Order minimum wage, the contractor must pay the Executive Order minimum wage in order to comply with the Order and this part. If, however, the applicable SCA or DBA prevailing wage rate exceeds the Executive Order minimum wage rate, the contractor must pay that prevailing wage rate to the SCA- or DBA-covered worker in order to be in compliance with the SCA or DBA.[9]

In the NPRM, the Department indicated that the minimum wage requirements of Executive Order 13658 are also separate and distinct from the commensurate wage rates under 29 U.S.C. 214(c). If the commensurate wage rate paid to a worker on a covered contract whose wages are calculated pursuant to a special certificate issued under 29 U.S.C. 214(c), whether hourly or piece rate, is less than the Executive Order minimum wage, the contractor must pay the Executive Order minimum wage rate to achieve compliance with the Order. The Department noted in the NPRM that if the commensurate wage due under the certificate is greater than the Executive Order minimum wage, the contractor must pay the 14(c) worker the greater commensurate wage. In response to a suggestion submitted by many commenters, the Department has decided to add a provision to paragraph (b)(5) of the contract clause that states this point explicitly. A more detailed discussion of that provision is included in the preamble section for Appendix A.

The Chamber/NFIB requested suspension of application of the Executive Order minimum wage to contractors that have negotiated a wage below the Order's minimum wage in collective bargaining agreements (CBAs) until the contractors' current CBAs expire. The Chamber/NFIB submit that suspending application of the Executive Order in this manner will preserve the terms bargained by the contractor with its workers' union and provide contractors with the wage certainty associated with a CBA. Another commenter, SourceAmerica, similarly sought guidance regarding the relationship between CBA rates and the Order's minimum wage requirement.

In response to these comments, the Department notes that in the event that a collectively bargained wage rate is below the applicable DBA rate, a DBA-covered contractor must pay no less than the applicable DBA rate to covered workers on the project. Although a successor contractor on an SCA-covered contract is required only to pay wages and fringe benefits not less than those contained in the predecessor contractor's CBA even if an otherwise applicable area-wide SCA wage determination contains higher wage and fringe benefit rates, that requirement is derived from a specific statutory provision that expressly bases SCA obligations on the predecessor contractor's CBA wage and fringe benefit rates in particular circumstances. *See* 41 U.S.C. 6707(c); 29 CFR 4.1b. There is no similar indication in the Executive Order of an intent to permit a CBA rate lower than the Executive Order minimum wage rate to govern the wages of workers covered by the Order. The Department accordingly concludes that permitting payment of CBA wage rates below the Executive Order minimum wage is inconsistent with the Executive Order and declines to suspend application of the Executive Order minimum wage for contractors that have negotiated a CBA wage rate lower than the Order's minimum wage.

After careful review of the comments, the Department has decided to adopt § 10.22(a) as proposed, except that the Department has revised the regulatory text to correct a typographical error (the word ''this'' instead of ''thus'') that was identified by a number of commenters.

Proposed § 10.22(b) explained how a contractor's obligation to pay the applicable Executive Order minimum wage applies to workers who receive fringe benefits. It proposed that a contractor may not discharge any part of its minimum wage obligation under the Executive Order by furnishing fringe benefits or, with respect to workers whose wages are governed by the SCA, the cash equivalent thereof. Under the proposed rule contractors must pay the Executive Order minimum wage rate in monetary wages, and may not receive credit for the cost of fringe benefits furnished.

Two commenters, ABC and the Association/IFA, requested that the Department permit construction contractors performing on an Executive Order covered contract to satisfy the minimum wage obligation by paying any combination of wages and bona fide fringe benefits. The Association/IFA commented that the Department should expressly state, as it does for the SCA, how fringe benefits should be handled under the DBA. Additionally, the Association/IFA asked that the Department reconsider its position with respect to the SCA fringe benefits and allow cash equivalent payments related to such benefits to satisfy the Executive Order minimum wage.

As the Department noted in the NPRM, Executive Order 13658

[9] The Department further notes that if a contract is covered by a state prevailing wage law that establishes a higher wage rate applicable to a particular worker than the Executive Order minimum wage, the contractor must pay that higher prevailing wage rate to the worker. Section 2(c) of the Order expressly provides that it does not excuse noncompliance with any applicable State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the Executive Order minimum wage.

increases, initially to $10.10, ''the hourly minimum wage'' paid by contractors with the Federal Government. 79 FR 9851. By repeatedly referencing that it is establishing a higher hourly minimum wage, without any reference to fringe benefits, the text of the Executive Order makes clear that a contractor cannot discharge its minimum wage obligation by furnishing fringe benefits. This interpretation is consistent with the SCA, which does not permit a contractor to meet its minimum wage obligation through the furnishing of fringe benefits, but rather imposes distinct ''minimum wage'' and ''fringe benefit'' obligations on contractors. 41 U.S.C. 6703(1)–(2); 29 CFR 4.177(a). Similarly, the FLSA does not allow a contractor to meet its minimum wage obligation through the furnishing of fringe benefits. Although the DBA specifically includes fringe benefits within its definition of minimum wage, thereby allowing a contractor to meet its minimum wage obligation, in part, through the furnishing of fringe benefits, 40 U.S.C. 3141(2), Executive Order 13658 contains no similar provision expressly authorizing a contractor to discharge its Executive Order minimum wage obligation through the furnishing of fringe benefits. Consistent with the Executive Order, § 10.22(b) of the final rule precludes a contractor from discharging its minimum wage obligation by furnishing fringe benefits.

Proposed § 10.22(b) also prohibited a contractor from discharging its Executive Order minimum wage obligation to workers whose wages are governed by the SCA by furnishing the cash equivalent of fringe benefits. As noted, the SCA imposes distinct ''minimum wage'' and ''fringe benefit'' obligations on contractors. 41 U.S.C. 6703(1)–(2); 29 CFR 4.177(a). A contractor cannot satisfy any portion of its SCA minimum wage obligation by furnishing fringe benefits or their cash equivalent. *Id.* Consistent with the treatment of fringe benefits or their cash equivalent under the SCA, § 10.22(b) of the final rule does not allow contractors to discharge any portion of their minimum wage obligation under the Executive Order to workers whose wages are governed by the SCA through the provision of either fringe benefits or their cash equivalent.

After careful consideration of the views submitted, the Department has decided to adopt § 10.22(b) as proposed. Consistent with the Executive Order, and for the reasons discussed in the proposed rule and above, the Department declines to adopt the suggestion of the Association/IFA with respect to SCA fringe benefits and cash equivalent payments.

Proposed § 10.22(c) stated that a contractor may satisfy the wage payment obligation to a tipped employee under the Executive Order through a combination of an hourly cash wage and a credit based on tips received by such employee pursuant to the provisions in proposed § 10.28. The Department received no comments on this provision and implements § 10.22(c) as proposed. Comments received concerning the implementation of the Executive Order minimum wage with respect to tipped employees are addressed in § 10.28.

As mentioned above, NELP and the NCLEJ requested that the Department require the Administrator of WHD to ''publish the annual applicable minimum wage in mainstream media outlets.'' They further requested that the Department require contractors to provide the applicable wage rate to workers on a regular basis. The Department has concluded that additional notice to workers will promote compliance with the Order and has accordingly adopted, in part, the commenters' request by adding § 10.29 to this final rule, as discussed later in this preamble.

Section 10.23 Deductions

Proposed § 10.23 explained that deductions that reduce a worker's wages below the Executive Order minimum wage rate may only be made under the limited circumstances set forth in this section. Proposed § 10.23(a) permitted deductions required by Federal, State, or local law, including Federal or State withholding of income taxes. *See* 29 CFR 531.38 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 3.5(a) (DBA). Proposed § 10.23(b) permitted deductions for payments made to third parties pursuant to court orders. Permissible deductions made pursuant to a court order may include such deductions as those made for child support. *See* 29 CFR 531.39 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 3.5(c) (DBA). The EEAC asked whether the phrase ''court order'' in proposed § 10.23(b) precludes deductions made pursuant to garnishment orders ''issued by an administrative tribunal and not necessarily a court of law.'' Proposed § 10.23(b) echoes the principle established under the FLSA, SCA and DBA that only garnishment orders made pursuant to an ''order of a court of competent and appropriate jurisdiction'' may deduct a worker's hourly wage below the minimum wage set forth under the Executive Order. 29 CFR 531.39(a) (FLSA); 29 CFR 4.168(a) (SCA) (permitting garnishment deductions ''required by court order''); 29 CFR 3.5(c) (DBA) (permitting garnishment deductions ''required by court process''). For purposes of deductions made under Executive Order 13658, the phrase ''court order'' includes orders issued by Federal, state, local, and administrative courts.

The EEAC further asked whether the Executive Order minimum wage will affect the formula establishing the maximum level of garnishment under the Consumer Credit Protection Act (CCPA). The Executive Order minimum wage will not affect the formula for establishing the maximum amount of wage garnishment permitted under the CCPA, which, as the commenter noted, is derived in part from the FLSA minimum wage. *See* 15 U.S.C. 1673(a)(2).

Proposed § 10.23(c) permitted deductions directed by a voluntary assignment of the worker or his or her authorized representative. *See* 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). Deductions made for voluntary assignments include items such as, but not limited to, deductions for the purchase of U.S. savings bonds, donations to charitable organizations, and the payment of union dues. Deductions made for voluntary assignments must be made for the worker's account and benefit pursuant to the request of the worker or his or her authorized representative. *See* 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA).

In commenting on this subsection, the Association/IFA asked the Department to clarify whether deductions for health insurance premiums that reduce a worker's wages below the Executive Order minimum wage are permissible. Deductions for health insurance premiums that reduce a worker's wages below the minimum wage required by the Executive Order are generally impermissible under § 10.22(b). However, a contractor may make deductions for health insurance premiums that reduce a worker's wages below the Executive Order minimum wage if the health insurance premiums are the type of deduction that 29 CFR 531.40(c) permits to reduce a worker's wages below the FLSA minimum wage. The regulations at 29 CFR 531.40(c) allow deductions for insurance premiums paid to independent insurance companies provided that such deductions occur as a result of a voluntary assignment from the employee or his or her authorized representative, where the employer is under no obligation to supply the insurance and derives, directly or

indirectly, no benefit or profit from it. The Department reiterates, however, that in accordance with § 10.22(b), a contractor may not discharge any part of its minimum wage obligation under the Executive Order by furnishing fringe benefits or, with respect to workers whose wages are governed by the SCA, the cash equivalent thereof. This provision similarly does not change a contractor's obligation under the SCA to furnish fringe benefits (including health insurance) or the cash equivalent thereof ''separate from and in addition to the specified monetary wages'' under that Act. 29 CFR 4.170.

Finally, proposed § 10.23(d) permitted deductions made for the reasonable cost or fair value of board, lodging, and other facilities. *See* 29 CFR part 531 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). Deductions made for these items must be in compliance with the regulations in 29 CFR part 531. The Department noted that an employer may take credit for the reasonable cost or fair value of board, lodging, or other facilities against a worker's wages, rather than taking a deduction for the reasonable cost or fair value of these items. *See* 29 CFR part 531. The Department did not receive any comments about proposed § 10.23(d).

After carefully considering all of the comments received regarding the categories of deductions permitted under this section, the Department has decided to implement § 10.23 as it was originally proposed.

Section 10.24 Overtime Payments

Proposed § 10.24(a) explained that workers who are covered under the FLSA or the Contract Work Hours and Safety Standards Act (CWHSSA) must receive overtime pay of not less than one and one-half times the regular hourly rate of pay or basic rate of pay, respectively, for all hours worked over 40 hours in a workweek. *See* 29 U.S.C. 207(a); 40 U.S.C. 3702(a). These statutes, however, do not require workers to be compensated on an hourly rate basis; workers may be paid on a daily, weekly, or other time basis, or by piece rates, task rates, salary, or some other basis, so long as the measure of work and compensation used, when reduced by computation to an hourly basis each workweek, will provide a rate per hour (*i.e.,* the regular rate of pay) that will fulfill the requirements of the Executive Order or applicable statute. The regular rate of pay under the FLSA is generally determined by dividing the worker's total earnings in any workweek by the total number of hours actually worked by the worker in that workweek for which such compensation was paid. *See* 29 CFR 778.5–.7, .105, .107, .109, .115 (FLSA); 29 CFR 4.166, 4.180–.182 (SCA); 29 CFR 5.32(a) (DBA).

Proposed § 10.24(b) addressed the payment of overtime premiums to tipped employees who are paid with a tip credit. In calculating overtime payments, the regular rate of an employee paid with a tip credit consists of both the cash wages paid and the amount of the tip credit taken by the contractor. Overtime payments are not computed based solely on the cash wage paid; for example, if after January 1, 2015, a contractor pays a tipped employee performing on a covered contract a cash wage of $4.90 and claims a tip credit of $5.20, the worker is entitled to $15.15 per hour for each overtime hour ($10.10 × 1.5), not $7.35 ($4.90 × 1.5). A contractor may not claim a higher tip credit in an overtime hour than in a straight time hour. Accordingly, as of January 1, 2015, for contracts covered by the Executive Order, if a contractor pays the minimum cash wage of $4.90 per hour and claims a tip credit of $5.20 per hour, then the cash wage due for each overtime hour would be $9.95 ($15.15 − $5.20). Tips received by a tipped employee in excess of the amount of the tip credit claimed are not considered to be wages under the Executive Order and are not included in calculating the regular rate for overtime payments.

The Department did not receive any comments addressing the payment of overtime under the Executive Order provided in proposed § 10.24. As such, the language in proposed § 10.24 has been adopted without change, except that the Department has, as a technical edit, added a reference to the FLSA in the second sentence of § 10.24(a).

Section 10.25 Frequency of Pay

Proposed § 10.25 described how frequently the contractor must pay its workers. Under the proposed rule, wages must be paid no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. Proposed § 10.25 also provided that a pay period under the Executive Order may not be of any duration longer than semi-monthly. (The Department notes that workers whose wages are governed by the DBA must be paid no less often than once a week and reiterates that compliance with the Executive Order does not excuse noncompliance with applicable FLSA, SCA, or DBA requirements.) The Department derived § 10.25 from the contract clauses applicable to contracts subject to the SCA and the DBA, *see* 29 CFR 4.6(h) (SCA); 29 CFR 5.5(a)(1) (DBA). While the FLSA does not expressly specify a minimum pay period duration, it is a violation of the FLSA not to pay a worker on his or her regular payday. *See Biggs* v. *Wilson,* 1 F.3d 1537, 1538 (9th Cir. 1993) (holding that ''under the FLSA wages are 'unpaid' unless they are paid on the employees' regular payday''). *See also* 29 CFR 778.106 (''The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.''). As the Department's experience suggests that most covered contractors pay no less frequently than semi-monthly, the Department believes § 10.25 as proposed will not be a burden to FLSA-covered contractors.

The Department received one comment addressing the frequency of pay requirements provided in proposed § 10.25. That commenter, the AFL–CIO, voiced support for the proposed language. The language in proposed § 10.25 has been adopted without change.

Section 10.26 Records To Be Kept by Contractors

Proposed § 10.26 explained the recordkeeping and related requirements for contractors. The obligations set forth in proposed § 10.26 are derived from and consistent across the FLSA, SCA, and DBA. *See* 29 CFR 516.2(a) (FLSA); 29 CFR 4.6(g)(1) (SCA); 29 CFR 5.5(a)(3)(i) (DBA). Proposed § 10.26(a) stated that contractors and subcontractors shall make and maintain, for three years, records containing the information enumerated in that section for each worker. The proposed section further provided that contractors performing work subject to the Executive Order must make such records available for inspection and transcription by authorized representatives of the WHD.

The Department received comments from Advocacy, the Chamber/NFIB, and others, which expressed concern that recordkeeping obligations of this rule are ''burdensome'' for contractors with workers performing both covered and non-covered work. As discussed earlier in this preamble, the records required to be kept by contractors pursuant to this part are coextensive with recordkeeping requirements that already exist under the FLSA, SCA, and DBA. Therefore, compliance with these obligations by a covered contractor will not impose any obligations to which the contractor is not already subject under the FLSA, SCA, or DBA. With respect to contractors' concerns regarding the burden associated with segregating hours worked on covered and non-

covered work, the Department has already responded to this concern in subpart A of this part, in which it explained that it has created a new exclusion for workers who perform in connection with covered contracts for less than 20% of their hours worked in a given workweek.

As the Department received no other substantive comments on this section, the final rule implements § 10.26(a) as proposed, with two modifications. In addition to the four recordkeeping requirements enumerated in proposed § 10.26(a)(1)–(4) of the NPRM, two additional recordkeeping requirements have been included in the final rule publication: The requirement to maintain records reflecting each worker's occupation or classification (or occupations/classifications), and the requirement to maintain records reflecting total wages paid. Contractor obligations to maintain these records derive from and are consistent across the FLSA, SCA, and DBA, just as with those records enumerated in the NPRM. The addition of these two new recordkeeping requirements thus imposes no new burdens on contractors.[10] The Department notes that while the concept of ''total wages paid'' is consistent in the FLSA's, SCA's, and DBA's implementing regulations, the exact wording of the requirement varies (''total wages paid each pay period,'' *see* 29 CFR 516.2(a)(11) (FLSA); ''total daily or weekly compensation of each employee,'' *see* 29 CFR 4.6(g)(1)(ii) (SCA); ''actual wages paid,'' *see* 29 CFR 5.5(a)(3)(i) (DBA)). The Department has opted to use the language ''total wages paid'' in this rule for simplicity; however, compliance with this recordkeeping requirement will be determined in relation to the applicable statute (FLSA, SCA, and/or DBA).

Proposed § 10.26(b) required the contractor to permit authorized representatives of the WHD to conduct interviews of workers at the worksite during normal working hours. Proposed § 10.26(c) provided that nothing in this part limits or otherwise modifies a contractor's payroll and recordkeeping obligations, if any, under the FLSA, SCA, or DBA, or their implementing regulations, respectively. The Department received no comments related to proposed § 10.26(b) or § 10.26(c) and the final rule adopts those provisions as proposed, except that it has changed the word ''employees'' to ''workers'' in § 10.26(b) to be consistent with the terminology used in the Executive Order and this part.

Section 10.27 Anti-Kickback

Proposed § 10.27 made clear that all wages paid to workers performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (unless set forth in proposed § 10.23), rebate, or kickback on any account. Kickbacks directly or indirectly to the contractor or to another person for the contractor's benefit for the whole or part of the wage are also prohibited. This provision was intended to ensure full payment of the applicable Executive Order minimum wage to covered workers. The Department also notes that kickbacks may be subject to civil penalties pursuant to the Anti-Kickback Act, 41 U.S.C. 8701–07. The Department received no comments related to proposed § 10.27 and has accordingly retained the section in its proposed form.

Section 10.28 Tipped Employees

Proposed § 10.28 explained how tipped workers must be compensated under the Executive Order on covered contracts. Section 3 of the Executive Order governs how the minimum wage for Federal contractors and subcontractors applies to tipped employees. Section 3 of the Order provides: (a) For workers covered by section 2 of the Order who are tipped employees pursuant to 29 U.S.C. 203(t), the hourly cash wage that must be paid by an employer to such workers shall be at least: (i) $4.90 an hour, beginning on January 1, 2015; (ii) for each succeeding 1-year period [beginning on January 1, 2016] until the hourly cash wage under this section equals 70 percent of the wage in effect under section 2 of the Order for such period, an hourly cash wage equal to the amount determined under this section for the preceding year, increased by the lesser of: (A) $0.95; or (B) the amount necessary for the hourly cash wage under this section to equal 70 percent of the wage under section 2 of the Order; and (iii) for each subsequent year, 70 percent of the wage in effect under section 2 for such year rounded to the nearest multiple of $0.05; (b) Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their wages are equal to the minimum wage under section 2 of the Order, the cash wage paid by the employer, as set forth in this section for those workers, shall be increased such that their wages equal the minimum wage under section 2 of the Order. Consistent with applicable law, if the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 et seq., or any other applicable law or regulation is higher than the wage required by section 2, the employer shall pay additional cash wages sufficient to meet the highest wage required to be paid.

Accordingly, as of January 1, 2015, section 3 of the Executive Order requires contractors to pay tipped employees covered by the Executive Order performing on covered contracts a cash wage of at least $4.90, provided the employees receive sufficient tips to equal the minimum wage under section 2 when combined with the cash wage. In each succeeding year, beginning January 1, 2016, the required cash wage increases by $0.95 (or a lesser amount if necessary) until it reaches 70 percent of the minimum wage under section 2 of the Executive Order. For subsequent years, the cash wage for tipped employees is 70 percent of the Executive Order minimum wage rounded to the nearest $0.05. At all times, the amount of tips received by the employee must equal at least the difference between the cash wage paid and the Executive Order minimum wage; if the employee does not receive sufficient tips, the contractor must increase the cash wage paid so that the cash wage in combination with the tips received equals the Executive Order minimum wage. If the contractor is required to pay a wage higher than the Executive Order minimum wage by the Service Contract Act or other applicable law or regulation, the contractor must pay additional cash wages equal to the difference between the higher required wage and the Executive Order minimum wage.

The Department received a number of comments addressing the pace of future increases in the minimum cash wage due to tipped employees covered by section 3 of the Executive Order. The Association/IFA expressed concern that such increases are ''unsustainable,'' warning that ''such a rapid increase in the labor costs . . . will be crippling to the restaurants that employee (sic) tipped employees.'' NELP and the

[10] To alleviate concerns that § 10.26 might impose any new recordkeeping burdens on employers, the Department is specifically providing here the FLSA, SCA, and DBA regulatory citations from which these recordkeeping obligations are derived. The citations for all records named in the final rule are as follows: Name, address, and Social Security number (*see* 29 CFR 516.2(a)(1)–(2) (FLSA); 29 CFR 4.6(g)(1)(i) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)); the occupation or occupations in which employed (*see* 29 CFR 516.2(a)(4) (FLSA); 29 CFR 4.6(g)(1)(ii) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)); the rate or rates of wages paid to the worker (*see* 29 CFR 516.2(a)(6)(i)–(ii) (FLSA); 29 CFR 4.6(g)(1)(ii) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)); the number of daily and weekly hours worked by each worker (*see* 29 CFR 516.2(a)(7) (FLSA); 29 CFR 4.6(g)(1)(iii) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)); any deductions made (*see* 29 CFR 516.2(a)(10) (FLSA); 29 CFR 4.6(g)(1)(iv) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)).

NCLEJ, however, argued that increases in the minimum cash wages provided under section 3 of the Executive Order ''could prove slow for workers who are struggling to make ends meet.'' Similarly, National Consumers League argued that ''in light of the extraordinarily low base pay earned by many tipped workers today, the Executive Order could—and should—have accelerated the increase of the tipped minimum wage.'' While the Department takes note of these comments, the pace of future increases in the minimum cash wage for tipped employees is a factor outside the scope of the Department's rulemaking authority, as the formula for determining the minimum cash wage for tipped employees is clearly provided in section 3 of the Executive Order itself.

For purposes of the Executive Order and this part, tipped workers (or tipped employees) are defined by section 3(t) of the FLSA. 29 U.S.C. 203(t). The FLSA defines a tipped employee as ''any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.'' *Id.* Section 3 of the Executive Order sets forth a wage payment method for tipped employees that is similar to the tipped employee wage provision of the FLSA. 29 U.S.C. 203(m). As with the FLSA ''tip credit'' provision, the Executive Order permits contractors to take a partial credit against their wage payment obligation to a tipped employee under the Order based on tips received by the employee. The wage paid to the tipped employee comprises both the cash wage paid under section 3(a) of the Executive Order and the amount of tips used for the tip credit, which is limited to the difference between the cash wage paid and the Executive Order minimum wage. Because contractors with a contract subject to the Executive Order may be required by the SCA or any other applicable law or regulation to pay a wage in excess of the Executive Order minimum wage, section 3(b) of the Order provides that in such circumstances contractors must pay the difference between the Executive Order minimum wage and the higher required wage in cash to the tipped employees and may not make up the difference with additional tip credit.

In the proposed regulations implementing section 3 of the Executive Order, the Department set forth procedures that closely follow the FLSA requirements for payment of tipped employees with which employers are already familiar. This was consistent with the directive in section 4(c) of the Executive Order that regulations issued pursuant to the order should, to the extent practicable, incorporate existing procedures from the FLSA, SCA and DBA. 79 FR 9852. In an effort to assist contractors who employ tipped workers and avoid the need for extensive cross references to the FLSA tip credit regulations, the requirements for paying tipped employees under the Executive Order were fully set forth in proposed § 10.28. The Department also sought to use plain language in the proposed tipped employee regulations to make clear contractors' wage payment obligations to tipped employees under the Executive Order. Because the Department did not receive any substantive comments addressing the text of proposed § 10.28, the Department has adopted the section as proposed with only one minor modification.

Section 10.28(a) of the final rule sets forth the provisions of section 3 of the Executive Order explaining contractors' wage payment obligation under section 2 to tipped employees. Section 10.28(a)(1) and (2) makes clear that the wage paid to a tipped employee under section 2 of the Executive Order consists of two components: A cash wage payment (which must be at least $4.90 as of January 1, 2015, and rises yearly thereafter) and a credit based on tips (tip credit) received by the worker equal to the difference between the cash wage paid and the Executive Order minimum wage. Accordingly, on January 1, 2015, if a contractor pays a tipped employee performing on a covered contract a cash wage of $4.90 per hour, the contractor may claim a tip credit of $5.20 per hour (assuming the worker receives at least $5.20 per hour in tips). Under no circumstances may a contractor claim a higher tip credit than the difference between the required cash wage and the Executive Order minimum wage; contractors may, however, pay a higher cash wage than required by section 3 and claim a lower tip credit. Because the sum of the cash wage paid and the tip credit equals the Executive Order minimum wage, any increase in the amount of the cash wage paid will result in a corresponding decrease in the amount of tip credit that may be claimed, except as provided in proposed § 10.28(a)(4). For example, if on January 1, 2015, a contractor on a contract subject to the Executive Order paid a tipped worker a cash wage of $5.50 per hour instead of the minimum requirement of $4.90, the contractor would only be able to claim a tip credit of $4.60 per hour to reach the $10.10 Executive Order minimum wage. If the tipped employee does not receive sufficient tips in the workweek to equal the amount of the tip credit claimed, the contractor must increase the cash wage paid so that the amount of cash wage paid and tips received by the employee equal the section 2 minimum wage for all hours in the workweek.

Section 10.28(a)(3) of the final rule makes clear that a contractor may pay a higher cash wage than required by subsection (3)(a)(i) of the Executive Order—and claim a correspondingly lower tip credit—but may not pay a lower cash wage than that required by section 3(a)(i) of the Executive Order and claim a higher tip credit. In order for the contractor to claim a tip credit the employee must receive tips equal to at least the amount of the credit claimed. If the employee receives less in tips than the amount of the credit claimed, the contractor must pay the additional cash wages necessary to ensure the employee receives the Executive Order minimum wage in effect under section 2 on the regular pay day.

Section 10.28(a)(4) sets forth the contractors' wage payment obligation when the wage required to be paid under the SCA or any other applicable law or regulation is higher than the Executive Order minimum wage. In such circumstances, the contractor must pay the tipped employee additional cash wages equal to the difference between the Executive Order minimum wage and the highest wage required to be paid by other applicable State or Federal law or regulation. This additional cash wage is on top of the cash wage paid under § 10.28(a)(1) and any tip credit claimed. Unlike raising the cash wage paid under § 10.28(a)(1), additional cash wages paid under § 10.28(a)(4) do not impact the calculation of the amount of tip credit the employer may claim.

Section 10.28(b) follows section 3(t) of the FLSA, 29 U.S.C. 203(t), in defining a *tipped employee* as one who customarily and regularly receives more than $30 a month in tips. If an employee receives less than that amount, he or she is not considered a tipped employee and is entitled to not less than the full Executive Order minimum wage in cash. Workers may be considered tipped employees regardless of whether they work full time or part time, but the amount of tips required per month to be considered a tipped employee is not prorated for part time workers. Only the tips actually retained by the employee may be considered in determining if he or she is a tipped employee (*i.e.,* only tips retained after any redistribution of tips through a valid tip pool). As explained in proposed § 10.28(b), the tip credit may only be taken for hours an

employee works in a tipped occupation. Accordingly, where a worker works in both a tipped and a non-tipped occupation for the contractor (dual jobs), the tip credit may only be used for the hours worked in the tipped occupation and no tip credit may be taken for the hours worked in the non-tipped occupation. As further explained in § 10.28(b), the tip credit may be used for some time spent performing incidental activities related to the tipped occupation that do not directly produce tips, such as cleaning tables and filling salt shakers, etc. In response to a comment from the CPL, the phrase, ''In general'' was deleted from the beginning of proposed § 10.28(b) and replaced with the phrase, ''As provided in § 10.2,''.

Section 10.28(c) of the final rule defines what constitutes a tip. Consistent with common understanding, a tip is defined as a sum presented by a customer in recognition of a service performed for the customer. Whether a tip is to be given and its amount are determined solely by the customer. Thus, a tip is different from a fixed charge assessed by a business for service. Tips may be made in cash presented to, or left for, the worker, or may be designated on a credit card bill or other electronic payment. Gifts that are not cash equivalents are not considered to be tips for purposes of wage payments under the Executive Order. A contractor with a contract subject to the Executive Order is prohibited from using an employee's tips, whether it has claimed a tip credit or not, for any reason other than as a credit against the contractor's wage payment obligations under section 3 of the Executive Order, or in furtherance of a valid tip pool. Employees and contractors may not agree to waive the employee's right to retain his or her tips.

Section 10.28(d) addresses payments that are not considered to be tips. Paragraph (d)(1) addresses compulsory service charges added to a bill by the business, which are not considered tips. Compulsory service charges are considered to be part of the business' gross receipts and, even if distributed to the worker, cannot be counted as tips for purposes of determining if a worker is a tipped employee. Paragraph (d)(2) of this section addresses a contractor's use of service charges to pay wages to tipped employees. Where the contractor distributes compulsory service charges to workers the money will be considered wages paid to the worker and may be used in their entirety to satisfy the minimum wage payment obligation under the Executive Order.

Section 10.28(e) addresses a common practice at many tipped workplaces of pooling all or a portion of employees' tips and redistributing them to other employees. Contractors may not use employees' tips to supplement the wages paid to non-tipped employees. Accordingly, a valid tip pool may only include workers who customarily and regularly receive tips; inclusion of employees who do not receive tips such as ''back of the house'' workers (dishwashers, cooks, etc.), will invalidate the tip pool and result in denial of the tip credit for any tipped employees who contributed to the invalid tip pool. A contractor that requires tipped employees to participate in a tip pool must notify workers of any required contribution to the tip pool, may only take a credit for the amount of tips ultimately received by a tipped employee, and may not retain any portion of the employee's tips for any other purpose.

Section 10.28(f) addresses the requirements for a contractor with a contract subject to the Executive Order to avail itself of a tip credit in paying wages to a tipped employee under the Executive Order. These requirements follow the requirements for taking a tip credit under the FLSA and are familiar to employers of tipped employees. Before a contractor may claim a tip credit it must inform the tipped employee of the amount of the cash wage that will be paid; the additional amount of tip credit that will be claimed in determining the wages paid to the employee; that the amount of tip credit claimed may not be greater than the amount of tips received by the employee in the workweek and that the contractor has the obligation to increase the cash wage paid in any workweek in which the employee does not receive sufficient tips; that all tips received by the worker must be retained by the employee except for tips that are redistributed through a valid tip pool and the amount required to be contributed to any such pool; and that the contractor may not claim a tip credit for any employee who has not been informed of its use of the tip credit.

Section 10.29 Notice

As discussed earlier in the preamble for § 10.12(c) in subpart B, the Department has established a new notice requirement for contractors in § 10.29. Specifically, contractors must notify all workers performing on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. This notice requirement was created in response to comments submitted by NELP and the NCLEJ expressing concern that the proposed rule did not contain a mechanism for adequately informing workers of their rights under the Executive Order. Given that the regulations implementing the FLSA, SCA and DBA each contain separate notice requirements for the employers covered by those statutes, the Department agrees with the commenters who raised this issue that a similar notice requirement is necessary for effective implementation of the Executive Order. *See, e.g.,* 29 CFR 516.4 (FLSA); 29 CFR 4.6(e) (SCA); 29 CFR 5.5(a)(1)(i) (DBA).

Contractors may satisfy this notice requirement in a variety of ways. For example, with respect to service employees on contracts covered by the SCA and laborers and mechanics on contracts covered by the DBA, § 10.29(a) clarifies that contractors may meet the notice requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination.[11] As stated earlier, the Department intends to publish a prominent general notice on all SCA and DBA wage determinations informing workers of the applicable Executive Order minimum wage rate, to be updated on an annual basis in the event of any inflation-based increases to the rate pursuant to § 10.5(b)(2). Because contractors covered by the SCA and DBA are already required to display the applicable wage determination in a prominent and accessible place at the worksite pursuant to those statutes, *see* 29 CFR 4.6(e) (SCA), 29 CFR 5.5(a)(1)(i) (DBA), the notice requirement in § 10.29 will not impose any additional burden on contractors with respect to those workers already covered by the SCA or DBA.

Section 10.29(b) provides that contractors with FLSA-covered workers performing on or in connection with a covered contract may satisfy the notice requirement by displaying a poster provided by the Department of Labor in a prominent or accessible place at the worksite. This poster is appropriate for contractors with FLSA-covered workers performing work ''in connection with'' a covered SCA or DBA contract, as well as for contractors with FLSA-covered

[11] SCA contractors are required by 29 CFR 4.6(e) to notify workers of the minimum monetary wage and any fringe benefits required to be paid, or to post the wage determination for the contract. DBA contractors similarly are required by 29 CFR 5.5(a)(1)(i) to post the DBA wage determination and a poster at the site of the work in a prominent and accessible place where they can be easily seen by the workers. SCA and DBA contractors may use these same methods to notify workers of the Executive Order minimum wage under section 10.29 of this rule.

workers performing on or in connection with concessions contracts and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. The Department will make the poster available on the WHD Web site and will provide the poster in a variety of languages.

Finally, § 10.29(c) provides that contractors that customarily post notices to workers electronically may post the notice required by this section electronically, provided that such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and is customarily used for notices to workers about terms and conditions of employment. This kind of an electronic notice may be made in lieu of physically displaying the notice poster in a prominent or accessible place at the worksite.

As discussed earlier in the preamble for § 10.3, some FLSA-covered workers performing ''in connection with'' a covered contract may not work at the main worksite with other covered workers. These covered off-site workers nonetheless are entitled to adequate notice of the Executive Order minimum wage rate under § 10.29. For example, an off-site administrative assistant spending more than 20% of her weekly work hours processing paperwork for a DBA-covered contract would be entitled to notice under this section separate from the physical posting of the DBA wage determination at the main worksite where the DBA-covered laborers and mechanics perform ''on'' the contract. Contractors may notify these off-site workers of the Executive Order minimum wage rate by displaying the poster for FLSA-covered workers described in § 10.29(b) at the off-site worker's location, or if they customarily post notices to workers electronically, by providing an electronic notice that meets the criteria described in § 10.29(c).

The Department does not anticipate that this new notice requirement will impose a significant burden on contractors. As mentioned earlier, contractors are already required to notify workers of the required wage and/or to display the applicable wage determination for workers covered by the SCA or DBA in a prominent and accessible place at the worksite, which will satisfy this section's notice requirement with respect to those workers. To the extent that § 10.29 imposes a new notice requirement with respect to workers whose wages are governed by the FLSA, such a requirement is not significantly different from the existing notice requirement for FLSA-covered workers provided at 29 CFR 516.4, which requires employers to post a notice explaining the FLSA in conspicuous places in every establishment where such employees are employed. Moreover, the Department will develop and provide the Executive Order minimum wage poster. If display of the poster is necessary at more than one site in order to ensure that it is seen by all workers performing on or in connection with covered contracts, additional copies of the poster may be obtained without cost from the Department. Moreover, as discussed above, the Department will also permit contractors that customarily post notices electronically to utilize electronic posting of the notice. The Department's experience enforcing the FLSA, SCA and DBA reflect that this notice provision will serve an important role in obtaining and maintaining contractor compliance with the Executive Order.

Subpart D—Enforcement

Section 5 of Executive Order 13658, titled ''Enforcement,'' grants the Secretary ''authority for investigating potential violations of and obtaining compliance with th[e] order.'' 79 FR 9852. Section 4(c) of the Order directs that the regulations the Secretary issues should, to the extent practicable, incorporate existing procedures, remedies, and enforcement processes under the FLSA, SCA and DBA. *Id.* The Department has adhered to these requirements in drafting subpart D.

Specifically, consistent with these requirements, subpart D of this part incorporates FLSA, SCA, and DBA remedies, procedures, and enforcement processes that the Department believes will facilitate investigations of potential violations of the Order, address and remedy violations of the Order, and promote compliance with the Order. Most of the enforcement procedures and remedies contained in this part accordingly are based on the statutory text or implementing regulations of the FLSA, SCA, and DBA. The Department also adopts, in instances where it is appropriate, enforcement procedures set forth in the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. *See* 29 CFR part 9.

Section 10.41 Complaints

The Department proposed a procedure for filing complaints in § 10.41. Proposed § 10.41(a) outlined the procedure to file a complaint with any office of the WHD. It additionally provided that a complaint may be filed orally or in writing and that the WHD would accept a complaint in any language if the complainant was unable to file in English. Proposed § 10.41(b) stated the well-established policy of the Department with respect to confidential sources. *See* 29 CFR 4.191(a); 29 CFR 5.6(a)(5). As the Department received no substantive comments on this section, the final rule implements § 10.41 as proposed.

NELP suggested the Department ensure the integration of complaints under the Executive Order into the Federal Awardee Performance Integrity Information System (FAPIIS) database. The Department understands that the purpose of the FAPIIS database is to collect data related to certain ''dispositions'' in civil, criminal or administrative proceedings, rather than to gather documents evincing the filing of a complaint. *See* Duncan Hunter National Defense Authorization Act of 2009, Public Law 110–417, Section 872(c). It is the Department's further understanding that, consistent with the statutory mandate, the database is not used to collect data related to complaints. Thus, while the Department appreciates the commenter's recommendation, it declines to ensure integration of complaint data into the FAPIIS database.

Section 10.42 Wage and Hour Division Conciliation

Proposed § 10.42 would establish an informal complaint resolution process for complaints filed with the WHD. The provision would allow WHD, after obtaining the necessary information from the complainant regarding the alleged violations, to contact the party against whom the complaint is lodged and attempt to reach an acceptable resolution through conciliation. The Department received no comments pertinent to § 10.42 and has adopted the section as proposed.

Section 10.43 Wage and Hour Division Investigation

The Department derived proposed § 10.43, which outlined WHD's investigative authority, primarily from regulations implementing the SCA and the DBA, *see* 29 CFR 4.6(g)(4) and 29 CFR 5.6(b). Proposed § 10.43 would permit the Administrator to initiate an investigation either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator would be able to inspect the relevant records of the applicable contractors (and make copies or transcriptions thereof) as well

as interview the contractors. The Administrator would additionally be able to interview any of the contractors' workers at the worksite during normal work hours, and require the production of any documentary or other evidence deemed necessary to determine whether a violation of this part (including conduct warranting imposition of debarment) has occurred. The section would also require Federal agencies and contractors to cooperate with authorized representatives of the Department in the inspection of records, in interviews with workers, and in all aspects of investigations. The Department received no comments on proposed § 10.43, and the final rule thus implements the provision as proposed.

Section 10.44 Remedies and Sanctions

The Department proposed remedies and sanctions to assist in enforcement of the Executive Order in § 10.44. Proposed § 10.44(a), which the Department derived from the back wage and withholding provisions of the SCA and the DBA, provided that when the Administrator determined a contractor had failed to pay the Executive Order's minimum wage to workers, the Administrator would notify the contractor and the contracting agency of the violation and request the contractor to remedy the violation. It additionally stated that if the contractor did not remedy the violation, the Administrator would direct the contractor to pay all unpaid wages in the Administrator's investigation findings letter issued pursuant to proposed § 10.51. Proposed § 10.44(a) further provided that the Administrator could additionally direct that payments due on the contract or any other contract between the contractor and the Government be withheld as necessary to pay unpaid wages, and that, upon the final order of the Secretary that unpaid wages were due, the Administrator could direct the relevant contracting agency to transfer the withheld funds to the Department for disbursement.

NELP specifically endorsed the Department's proposal to permit withholding as necessary to pay unpaid wages. Because the Department received no additional comments related to § 10.44(a), the final rule adopts the section as proposed.

Proposed § 10.44(b), which the Department derived from the FLSA's antiretaliation provision set forth at 29 U.S.C. 215(a)(3), stated that the Administrator could provide for any relief appropriate, including employment, reinstatement, promotion and payment of unpaid wages, when the Administrator determined that any person had discharged or in any other manner retaliated against a worker because such worker had filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or had testified or was about to testify in any such proceeding. *See* 29 U.S.C. 215(a)(3), 216(b)(2). For the reasons described in the preamble to subpart A, the Department believes that such a provision will promote compliance with the Executive Order, and has accordingly retained the provision as proposed.

In the NPRM, § 10.44(c) provided that if the Administrator determined a contractor had disregarded its obligations to workers under the Executive Order or this part, a standard the Department derived from the DBA implementing regulations at 29 CFR 5.12(a)(2), the Secretary would order that the contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, would be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to three years from the date of publication of the name of the contractor or person(s) on the ineligible list. Proposed § 10.44(c) further provided that neither an order for debarment of any contractor or responsible officer from further Government contracts under this section nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors would be carried out without affording the contractor or responsible officers an opportunity for a hearing.

As the SCA and DBA contain debarment provisions, inclusion of a debarment provision reflects both the Executive Order's instruction that the Department incorporate remedies from the FLSA, SCA, and DBA to the extent practicable and the Executive Order's conferral of authority on the Secretary to adopt an enforcement scheme that will both remedy violations and obtain compliance with the Order. Debarment is a long-established remedy for a contractor's failure to fulfill its labor standard obligations under the SCA and the DBA. 41 U.S.C. 6706(b); 40 U.S.C. 3144(b); 29 CFR 4.188(a); 29 CFR 5.5(a)(7); 29 CFR 5.12(a)(2). The possibility that a contractor will be unable to obtain Government contracts for a fixed period of time due to debarment promotes contractor compliance with the SCA and DBA. Since the Government contract statutes whose remedies the Executive Order instructs the Department to incorporate include a debarment remedy to promote contractor compliance, the Department has also included debarment as a remedy for certain violations of the Executive Order by covered contractors.

NELP explicitly supported the NPRM's debarment provision. AGC recommended that the final rule include ''knowingly or recklessly'' in front of the term ''disregard'' throughout the section on debarment. The commenter expressed concern that otherwise the term ''disregarded'' could mandate a strict liability standard for violation of the Executive Order.

As the NPRM stated, the Department derived the disregard of obligations standard from the DBA's implementing regulations. The Administrative Review Board (ARB) interprets this standard to require a level of culpability beyond mere negligence in order to justify debarment. *See, e.g., Thermodyn Contractors, Inc.,* ARB Case No. 96–116, 1996 WL 697838, at *4 (ARB Oct. 25, 1996) (noting ''[v]iolations of the DBA do not per se constitute a disregard of obligations''). The Department intends for the same standard to apply under the Executive Order. The requirement to show some form of culpability beyond mere negligence confirms the Executive Order debarment standard is not one involving strict liability. However, a showing of ''knowing or reckless'' disregard of obligations is not necessary in order to justify a debarment. Adopting a ''knowing or reckless disregard'' standard would constitute a departure from the DBA's debarment standard and would therefore be inconsistent with the Executive Order's directive to adopt FLSA, SCA, and DBA remedies and enforcement processes to the extent practicable. The Department accordingly declines to adopt AGC's request to require a showing of ''knowing or reckless'' disregard to justify debarment under the Executive Order. The Department adopts proposed § 10.44(c) in this final rule without change.

ABC sought a ''safe harbor'' from debarment for contractors that comply with the DBA, SCA, and FLSA. Debarment, as discussed above, is an important remedy to obtain compliance with the Executive Order. The Department is accordingly unwilling to provide a waiver from a possible debarment remedy for violations of the Executive Order.

Proposed § 10.44(d), which the Department derived from the SCA, 41 U.S.C. § 6705(b)(2), would allow for initiation of an action, following a final order of the Secretary, against a contractor in any court of competent jurisdiction to collect underpayments

when the amounts withheld under § 10.11(c) are insufficient to reimburse workers' lost wages. Proposed § 10.44(d) would also authorize initiation of an action, following the final order of the Secretary, in any court of competent jurisdiction when there are no payments available to withhold. As the Department explained in the NPRM, the Executive Order covers concessions and other contracts under which the contractor may not receive payments from the Federal Government. As the proposed rule additionally noted, in some instances the Administrator may be unable to direct withholding of funds because at the time it discovers a contractor owes wages to workers no payments remain owing under the contract or another contract between the same contractor and the Federal Government. With respect to such contractors, there will be no funds to withhold. Proposed section § 10.44(d) accordingly provided that the Department may pursue an action in any court of competent jurisdiction to collect underpayments against such contractors. Proposed § 10.44(d) additionally provided that any sums the Department recovered would be paid to affected workers to the extent possible, but that sums not paid to workers because of an inability to do so within three years would be transferred into the Treasury of the United States. The Department received no comments on this section and it has therefore adopted the language as proposed.

In proposed § 10.44(e), the Department addressed what remedy would be available when a contracting agency failed to include the contract clause in a contract subject to the Executive Order. The section provided that the contracting agency would, on its own initiative or within 15 calendar days of notification by the Department, incorporate the clause retroactive to commencement of performance under the contract through the exercise of any and all authority necessary. As the NPRM stated, this incorporation would provide the Administrator authority to collect underpayments on behalf of affected workers on the applicable contract retroactive to commencement of performance under the contract. The NPRM noted the Administrator possesses comparable authority under the DBA, 29 CFR 1.6(f), and that the Department believed a similar mechanism for addressing a failure to include the contract clause in a contract subject to the Executive Order will further the interest in both remedying violations and obtaining compliance with the Executive Order.

The EEAC and NILG generally requested that the Department provide that if a contracting agency's failure to include the contract clause in a covered contract resulted in any changed cost of performance of the contract due to the Executive Order, then the contracting agency should bear the expense of the changed cost of performance. NILG specifically stated that the Department adopt the language from the SCA regulations, *see* 29 CFR 4.5(c), or the DBA regulations, *see* 29 CFR 1.6(f), to address this situation. Upon further consideration of this issue, the Department agrees that a contractor is entitled to an adjustment or to pay any necessary additional costs when a contracting agency initially omits and then subsequently includes the contract clause in a covered contract. This approach, which is consistent with the SCA's implementing regulations, *see* 29 CFR 4.5(c), is therefore reflected in revised § 10.44(e). The Department recognizes that the mechanics of effectuating such an adjustment may differ between covered procurement contracts and the non-procurement contracts that the Department's contract clause covers. With respect to covered non-procurement contracts, the Department believes that the authority conferred on agencies that enter into such contracts under section 4(b) of the Executive Order includes the authority to provide such an adjustment.

Several commenters, including Demos, NELP, and the NCLEJ, recommended that the Department include liquidated damages as a remedy for workers to whom a contractor failed to pay wages required by the Executive Order. Those commenters specifically directed the Department to section 216(b) of the FLSA, which makes employers who fail to pay the minimum wage or overtime to employees liable for not only the minimum wage and/or overtime amounts owed but also an additional, equal amount as liquidated damages. Writing in response to such comments, the EEAC urged the Department to refrain from including liquidated damages as a remedy under the final rule. Because the Department believes that the remedies it proposed in the NPRM and adopts here will be sufficient to obtain compliance with the Executive Order, and because the type of liquidated damages available under the FLSA is not available under the SCA or DBA, the Department has decided not to include a liquidated damages remedy in the final rule.

The AOA asked to what extent contractors covered by the Executive Order must enforce the Order's requirements on their subcontractors. Contractors are responsible for compliance by any covered lower-tier subcontractor(s) with the Executive Order minimum wage. In other words, a contractor's responsibility for compliance flows down to all covered lower-tier subcontractors. Thus, to the extent a lower-tier subcontractor fails to pay its workers the applicable Executive Order minimum wage even though its subcontract contains the required contract clause, an upper-tier contractor may still be responsible for any back wages owed to the workers. Similarly, a contractor's failure to fulfill its responsibility for compliance by covered lower-tier subcontractors may warrant debarment if the contractor's failure constituted a disregard of obligations to workers and/or subcontractors. The Department notes that its general practice under the SCA and DBA is to seek payment of back wages from the subcontractor that directly committed the violation before seeking payment from the prime contractor or any other upper-tier subcontractors. The Department intends to follow this general practice under the Executive Order.

The Department is not adopting the request from AGC to provide a ''safe harbor'' from flow-down liability to a contractor that includes the contract clause in its contracts with subcontractors. Neither the SCA nor DBA, both of which have long permitted the Department to hold a contractor responsible for compliance by any lower-tier contractor and to which the Executive Order directs the Department to look in adopting remedies, contains a safe harbor. In addition, a contractor's responsibility for the compliance of its lower-tier subcontractors enhances the Department's ability to obtain compliance with the Executive Order. Thus, the Department is not granting the commenter's request for a safe harbor.

AGC also sought clarification as to how ''far down the line'' a contractor's flow-down responsibility extends. As under the SCA and DBA, a contractor is responsible for compliance by all covered lower-tier subcontractors. This obligation applies regardless of the number of covered lower-tier subcontractors and regardless of how many levels of subcontractors separate the contractor from the subcontractor that failed to comply with the Executive Order.

The Department understands, as FortneyScott observed in its comment, that contractors would prefer not to be responsible for lower-tier subcontractors' compliance with the Executive Order. The Department's experience under the DBA and SCA,

however, has demonstrated that the flow-down model is an effective means to obtain compliance. As the Executive Order charges the Department with the obligation to adopt SCA and DBA (and/or FLSA) remedies and enforcement processes to obtain compliance with the Order, the final rule reflects the flow-down approach to compliance responsibility contained in the SCA and DBA.

The NDRN suggested the Department take advantage of the nationwide network of Protection and Advocacy (P&A) and Client Assistance Program (CAP) systems to help enforce the Executive Order's provisions. The commenter submits the P&A and CAP network is the largest provider of legally-based advocacy services for people with disabilities in the United States and requests that the Department contract with these entities to help investigate and monitor compliance with the Executive Order. While the Department appreciates the recommendation and welcomes input from the public on how to promote enforcement of the Executive Order and its implementing regulations, the Order authorizes the Department to enforce its provisions. Thus, the Department will be the entity enforcing the Executive Order and its implementing regulations.

The NDRN also suggested that the Department coordinate the enforcement and compliance assistance efforts of WHD, the Office of Disability Employment Policy (ODEP), and the Office of Federal Contract Compliance Programs (OFCCP). The Department appreciates this comment and notes that, when coordination advances the Department's enforcement efforts and is otherwise feasible, its agencies collaborate to ensure effective enforcement of and compliance with the law. The Department expects there may be instances where collaboration between the WHD, ODEP, and/or OFCCP will promote compliance with the Executive Order. Assuming collaboration in such instances is otherwise feasible, the Department anticipates the agencies will work together to ensure enforcement of and compliance with the Executive Order.

As previously mentioned with respect to contracting agency responsibilities, the FS sought confirmation that if it receives a complaint regarding payment of wages under the contract clause, it should refer that complaint to the Department. The Department confirms that contracting agencies must refer all complaints under the Executive Order to the Department in accordance with the procedures described in § 10.11(d). The Department will process the complaint received and will notify the contractor and the contracting agency should it be necessary for either or both to take corrective action.

Finally, as noted in the preamble to subpart A, the Executive Order covers certain non-procurement contracts. Because the FAR does not apply to all contracts covered by the Executive Order, there will be instances where, pursuant to section 4(b) of the Executive Order, a contracting agency takes steps to the extent permitted by law, including but not limited to insertion of the contract clause set forth in Appendix A, to exercise any applicable authority to ensure that covered contracts as described in section 7(d)(i)(C) and(D) of the Executive Order comply with the requirements set forth in sections 2 and 3 of the Executive Order, including payment of the Executive Order minimum wage. In such instances, the enforcement provisions contained in subpart D (as well as the remainder of this part) fully apply to the covered contract, consistent with the Secretary's authority under section 5 of the Executive Order to investigate potential violations of, and obtain compliance with, the Order.

Subpart E—Administrative Proceedings

Section 5 of Executive Order 13658, titled ''Enforcement,'' grants the Secretary ''authority for investigating potential violations of and obtaining compliance with th[e] order.'' 79 FR 9852. Section 4(c) of the Order directs that the regulations the Secretary issues should, to the extent practicable, incorporate existing procedures, remedies, and enforcement processes under the FLSA, SCA and DBA. *Id.*

Accordingly, subpart E of this part incorporates, to the extent practicable, the DBA and SCA administrative procedures necessary to remedy potential violations and ensure compliance with the Executive Order. The administrative procedures included in this subpart also closely adhere to existing procedures of the Office of Administrative Law Judges and the Administrative Review Board.

Section 10.51 Disputes Concerning Contractor Compliance

Proposed § 10.51, which the Department derived primarily from 29 CFR 5.11, addressed how the Administrator would process disputes regarding a contractor's compliance with this part. Proposed § 10.51(a) provided that the Administrator or a contractor may initiate a proceeding covered by § 10.51. Proposed § 10.51(b)(1) provided that when it appears that relevant facts are at issue in a dispute covered by § 10.51(a), the Administrator would notify the affected contractor (and the prime contractor, if different) of the investigation's findings by certified mail to the last known address. Pursuant to the NPRM, if the Administrator determined there were reasonable grounds to believe the contractor should be subject to debarment, the investigative findings letter would so indicate. The Department did not receive any comments on these proposed provisions. The final rule therefore adopts the provisions as proposed.

Proposed § 10.51(b)(2) provided that a contractor desiring a hearing concerning the investigative findings letter is required to request a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. It further required the request to set forth those findings which are in dispute with respect to the violation(s) and/or debarment, as appropriate, and to explain how such findings are in dispute, including by reference to any applicable affirmative defenses. The Department received no comments on proposed § 10.51(b)(2) and has adopted the language as proposed.

Proposed § 10.51(b)(3) provided that the Administrator, upon receipt of a timely request for hearing, will refer the matter to the Chief Administrative Law Judge (ALJ) by Order of Reference for designation of an ALJ to conduct such hearings as may be necessary to resolve the disputed matter in accordance with the procedures set forth in 29 CFR part 6. It also required the Administrator to attach a copy of the Administrator's letter, and the response thereto, to the Order of Reference that the Administrator sends to the Chief ALJ. No party submitted a comment related to proposed § 10.51(b)(3). The Department has adopted the language as proposed.

Proposed § 10.51(c)(1) would apply when it appears there are no relevant facts at issue and there was not at that time reasonable cause to institute debarment proceedings. It required the Administrator to notify the contractor, by certified mail to the last known address, of the investigative findings and to issue a ruling on any issues of law known to be in dispute. Proposed § 10.51(c)(2)(i) would apply when a contractor disagrees with the Administrator's factual findings or believes there are relevant facts in dispute. It allowed the contractor to advise the Administrator of such disagreement by letter postmarked within 30 calendar days of the date of the Administrator's letter, and required that the response explain in detail the

facts alleged to be in dispute and attach any supporting documentation. The Department did not receive any comments on this proposed provision. The final rule therefore adopts the provision as proposed.

Section 10.51(c)(2)(ii) of the NPRM required the Administrator to examine the information submitted in the response alleging the existence of a factual dispute. Where the Administrator determines there is a relevant issue of fact, the Administrator will refer the case to the Chief ALJ as under § 10.51(b)(3). If the Administrator determines there was no relevant issue of fact, the Administrator will so rule and advise the contractor(s) accordingly. The Department did not receive any comments on this proposed provision. The final rule adopts the provision as proposed, except that it clarifies that the information submitted in the response alleging the existence of a factual dispute must be timely submitted in order for the Administrator to examine such information.

Proposed § 10.51(d) provided that the Administrator's investigative findings letter becomes the final order of the Secretary if a timely response to the letter was not made or a timely petition for review was not filed. It additionally provided that if a timely response or a timely petition for review was filed, the investigative findings letter would be inoperative unless and until the decision is upheld by the ALJ or the ARB, or the letter otherwise became a final order of the Secretary. The Department received no comments on this provision and the final rule adopts the provision as proposed.

Section 10.52 Debarment Proceedings

Proposed § 10.52, which the Department primarily derived from 29 CFR 5.12, addressed debarment proceedings. Proposed § 10.52(a)(1) provided that whenever any contractor was found by the Administrator to have disregarded its obligations to workers or subcontractors under Executive Order 13658 or this part, such contractor and its responsible officers, and/or any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, would be ineligible for a period of up to three years to receive any contracts or subcontracts subject to the Executive Order from the date of publication of the name or names of the contractor or persons on the ineligible list.

Proposed § 10.52(b)(1) provided that where the Administrator found reasonable cause to believe a contractor had committed a violation of the Executive Order or this part that constituted a disregard of its obligations to its workers or subcontractors, the Administrator would notify by certified mail to the last known address the contractor and its responsible officers (and/or any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest) of the finding. Pursuant to proposed § 10.52(b)(1), the Administrator would additionally furnish those notified a summary of the investigative findings and afford them an opportunity for a hearing regarding the debarment issue. Those notified would have to request a hearing on the debarment issue, if desired, by letter to the Administrator postmarked within 30 calendar days of the date of the letter from the Administrator. The letter requesting a hearing would need to set forth any findings which were in dispute and the reasons therefore, including any affirmative defenses to be raised. Proposed § 10.52(b)(1) also required the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief ALJ by Order of Reference, to which would be attached a copy of the Administrator's investigative findings letter and the response thereto, for designation to an ALJ to conduct such hearings as may be necessary to determine the matters in dispute. Proposed § 10.52(b)(2) provided that hearings under § 10.52 would be conducted in accordance with 29 CFR part 6. If no timely request for hearing was received, the Administrator's findings would become the final order of the Secretary. The Department did not receive any comments on this proposed provision. The final rule adopts the provision as proposed.

Section 10.53 Referral to Chief Administrative Law Judge; Amendment of Pleadings

The Department derived proposed § 10.53 from the SCA and DBA rules of practice for administrative proceedings in 29 CFR part 6. Proposed § 10.53(a) provided that upon receipt of a timely request for a hearing under § 10.51 (where the Administrator has determined that relevant facts are in dispute) or § 10.52 (debarment), the Administrator would refer the case to the Chief ALJ by Order of Reference, to which would be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an ALJ to conduct such hearings as may be necessary to decide the disputed matters. It further provided that a copy of the Order of Reference and attachments thereto would be served upon the respondent and that the investigative findings letter and the response thereto would be given the effect of a complaint and answer, respectively, for purposes of the administrative proceeding.

Section 10.53(b) of the NPRM stated that at any time prior to the closing of the hearing record, the complaint or answer may be amended with permission of the ALJ upon such terms as he/she shall approve, and that for proceedings initiated pursuant to § 10.51, such an amendment could include a statement that debarment action was warranted under § 10.52. It further provided that such amendments would be allowed when justice and the presentation of the merits are served thereby, provided there was no prejudice to the objecting party's presentation on the merits. It additionally stated that when issues not raised by the pleadings were reasonably within the scope of the original complaint and were tried by express or implied consent of the parties, they would be treated as if they had been raised in the pleadings, and such amendments could be made as necessary to make them conform to the evidence. Proposed § 10.53(b) further provided that the presiding ALJ could, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which had happened since the date of the pleadings and which are relevant to any of the issues involved. It also authorized the ALJ to grant a continuance in the hearing, or leave the record open, to enable the new allegations to be addressed. The Department received no comments related to proposed § 10.53 and the final rule adopts the provision as proposed.

Section 10.54 Consent Findings and Order

Proposed § 10.54, which the Department derived from 29 CFR 6.18 and 6.32, provided a process whereby parties may at any time prior to the ALJ's receipt of evidence or, at the ALJ's discretion, at any time prior to issuance of a decision, agree to dispose of the matter, or any part thereof, by entering into consent findings and an order. Proposed § 10.54(b) identified four requirements of any agreement containing consent findings and an order. Proposed § 10.54(c) provided that within 30 calendar days of receipt of any proposed consent findings and order, the ALJ would accept the agreement by issuing a decision based on the agreed findings and order, provided the ALJ was satisfied with the proposed agreement's form and

substance. As the Department received no comments related to proposed § 10.54, the final rule adopts the provision as proposed.

Section 10.55 Proceedings of the Administrative Law Judge

Proposed § 10.55, which the Department primarily derived from 29 CFR 6.19 and 6.33, addressed the ALJ's proceedings and decision. Proposed § 10.55(a) provided that the Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's determinations issued under § 10.51 or § 10.52. It further provided that any party could, when requesting an appeal or during the pendency of a proceeding on appeal, timely move an ALJ to consolidate a proceeding initiated thereunder with a proceeding initiated under the SCA or DBA. The purpose of the proposed language was to allow the Office of Administrative Law Judges and interested parties to efficiently dispose of related proceedings arising out of the same contract with the Federal Government.

Proposed § 10.55(b) provided that each party may file with the ALJ proposed findings of fact, conclusions of law, and a proposed order, together with a brief, within 20 calendar days of filing of the transcript (or a longer period if the ALJ permitted). It also provided that each party would serve such proposals and brief on all other parties.

Proposed § 10.55(c)(1) required an ALJ to issue a decision within a reasonable period of time after receipt of the proposed findings of fact, conclusions of law, and order, or within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the matter in whole. It further provided that the decision would contain appropriate findings, conclusions of law, and an order and be served upon all parties to the proceeding. Proposed § 10.55(c)(2) provided that if the Administrator requested debarment, and the ALJ concluded the contractor has violated the Executive Order or this part, the ALJ would issue an order regarding whether the contractor is subject to the ineligible list that would include any findings related to the contractor's disregard of its obligations to workers or subcontractors under the Executive Order or this part.

Proposed § 10.55(d) provided that the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. 504, does not apply to proceedings under this part. In the NPRM, the Department explained that the proceedings proposed were not required by an underlying statute to be determined on the record after an opportunity for an agency hearing. Therefore, an ALJ would have no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the EAJA for any proceeding under this part.

Proposed § 10.55(e) provided that if the ALJ concluded a violation occurred, the final order would require action to correct the violation, including, but not limited to, monetary relief for unpaid wages. It also required an ALJ to determine whether an order imposing debarment was appropriate, if the Administrator had sought debarment. Proposed § 10.55(f) provided that the ALJ's decision would become the final order of the Secretary, provided a party did not timely appeal the matter to the ARB.

The Department received no comments related to proposed § 10.55. The final rule accordingly adopts the provision as proposed.

Section 10.56 Petition for Review

In the NPRM, the Department proposed § 10.56, which it derived from 29 CFR 6.20 and 6.34, as the process to apply to petitions for review to the ARB from ALJ decisions. Proposed § 10.56(a) provided that within 30 calendar days after the date of the decision of the ALJ, or such additional time as the ARB granted, any party aggrieved thereby who desired review would have to file a petition for review with supporting reasons in writing to the ARB with a copy thereof to the Chief ALJ. It further required the petition to refer to the specific findings of fact, conclusions of law, and order at issue and that a petition concerning a debarment decision state the disregard of obligations to workers and subcontractors, or lack thereof, as appropriate. It additionally required a party to serve the petition for review, and all briefs, on all parties and on the Chief ALJ. It also stated a party must timely serve copies of the petition and all briefs on the Administrator and the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor.

Proposed § 10.56(b) provided that if a party files a timely petition for review, the ALJ's decision would be inoperative unless and until the ARB issued an order affirming the letter or decision, or the letter or decision otherwise became a final order of the Secretary. It further provided that if a petition for review concerned only the imposition of debarment, the remainder of the decision would be effective immediately. Proposed § 10.56(b) additionally stated that judicial review would not be available unless a timely petition for review to the ARB was first filed. Failure of the aggrieved party to file a petition for review with the ARB within 30 calendar days of the ALJ decision would render the decision final, without further opportunity for appeal. The Department received no comments related to proposed § 10.56, the final rule adopts the provision as proposed.

Section 10.57 Administrative Review Board Proceedings

Proposed § 10.57, which the Department derived primarily from 29 CFR 9.35, outlined the ARB proceedings under the Executive Order. Proposed § 10.57(a)(1) stated the ARB has jurisdiction to hear and decide in its discretion appeals from the Administrator's investigative findings letters issued under § 10.51(c)(1) or § 10.51(c)(2), Administrator's rulings issued under § 10.58, and from ALJ decisions issued under § 10.55. It further provided that in considering the matters within its jurisdiction, the Board would be the Secretary's authorized representative and would act fully and finally on behalf of the Secretary. Proposed § 10.57(a)(2) identified the limitations on the ARB's scope of review, including a restriction on passing on the validity of any provision of this part, a general prohibition on receiving new evidence in the record (because the ARB is an appellate body and must decide cases before it based on substantial evidence in the existing record), and a bar on granting attorney's fees or other litigation expenses under the EAJA.

Proposed § 10.57(b) required the ARB to issue a final decision within a reasonable period of time following receipt of the petition for review and to serve the decision by mail on all parties at their last known address, and on the Chief ALJ, if the case involved an appeal from an ALJ's decision. Proposed § 10.57(c) required the ARB's order to mandate action to remedy the violation, including, but not limited to, providing monetary relief for unpaid wages, if the ARB concluded a violation occurred. If the Administrator had sought debarment, the ARB would determine whether a debarment remedy was appropriate. Finally, proposed § 10.57(d) provided the ARB's decision would become the Secretary's final order in the matter.

The Department received no comments related to proposed § 10.57. The final rule adopts the provision as proposed.

Section 10.58 Administrator Ruling

Proposed § 10.58 set forth a procedure for addressing questions regarding the application and interpretation of the rules contained in this part. Proposed § 10.58(a), which the Department derived primarily from 29 CFR 5.13, provided that such questions could be referred to the Administrator. It further provided that the Administrator would issue an appropriate ruling or interpretation related to the question. Requests for rulings under this section would need to be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210. Any interested party could, pursuant to § 10.58(b), appeal a final ruling of the Administrator issued pursuant to § 10.58(a) to the ARB. The Department received no comments on proposed § 10.58 and the final rule retains the proposed language.

Appendix A to Part 10 (Contract Clause)

This section discusses the comments received in response to the Department's proposed contract clause. Many of the issues raised here are discussed elsewhere in this preamble. The Department believes having the information in multiple places in this preamble aids stakeholders who may refer to this preamble in the future when seeking guidance. Such repetition allows stakeholders to more expeditiously find the information they seek.

Section 2 of Executive Order 13658 provides that executive departments and agencies must, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations include a clause, which the contractor and any subcontractors must incorporate into lower-tier subcontracts, specifying, as a condition of payment, the minimum wage to be paid to workers under the Order. 79 FR 9851. Section 4 of the Executive Order provides that the Secretary shall issue regulations by October 1, 2014, to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act, to implement the requirements of the Order. *Id.* at 9852. Section 4 of the Order also requires that, to the extent permitted by law, within 60 days of the Secretary issuing such regulations, the FARC shall issue regulations in the FAR to provide for inclusion of the contract clause in Federal procurement solicitations and contracts subject to the Executive Order. *Id.* The Order further specifies that any regulations issued pursuant to section 4 of the Order should, to the extent practicable and consistent with section 8 of the Order, incorporate existing definitions, procedures, remedies, and enforcement processes under the FLSA, SCA, and DBA. *Id.* Section 5 of the Order grants authority to the Secretary to investigate potential violations of and obtain compliance with the Order. *Id.* Because a contract clause is a requirement of the Order, the Department set forth the text of a proposed contract clause as Appendix A to the proposed rule. As required by the Order, the proposed contract clause specified the minimum wage to be paid to workers under the Order. Consistent with the Secretary's authority to obtain compliance with the Order, as well as the Secretary's responsibility to issue regulations implementing the requirements of the Order that incorporate, to the extent practicable, existing procedures, remedies, and enforcement processes under the FLSA, SCA, and DBA, the provisions of the contract clause were based on the statutory text or implementing regulations of the FLSA, SCA, and DBA.

The Department has made a technical change to the first sentence of the contract clause. The sentence, however, maintains the meaning of the first sentence as written in the NPRM. The sentence still requires that the contracting agency must include the Executive Order minimum wage contract clause set forth in Appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 10.3, except for procurement contracts subject to the FAR. It further stated that the required contract clause directs, as a condition of payment, that all workers performing on or in connection with covered contracts must be paid the applicable, currently effective minimum wage under Executive Order 13658 and § 10.5. It additionally provided that for procurement contracts subject to the FAR, contracting agencies shall use the clause set forth in the FAR developed to implement this rule and that such clause must both accomplish the same purposes as the clause set forth in Appendix A and be consistent with the requirements set forth in this rule.

The DoD requested that with respect to covered contracts not subject to the FAR the Department authorize the applicable contracting ''entity'' to adopt a contract clause that ''accomplishes the same purposes as the clause set forth in Appendix A'' and that ''shall be consistent with the requirements set forth'' in the Department's final rule. The Department anticipates that various Federal agencies will enter into non-procurement contracts that are covered by the Executive Order. Some commenters' submissions (*e.g.,* those from the AOA and O.A.R.S.) indicate that there will be contractors that enter into non-procurement contracts subject to the Executive Order with multiple Federal agencies. The Department believes requiring such contractors to become familiar with distinct Executive Order contract clauses, as opposed to the single, uniform clause proposed by the Department, imposes on them an unnecessary inconvenience and burden. The Department additionally believes that requiring such contractors to understand multiple contract clauses could result in confusion, potentially undercutting the Department's mandate under the Executive Order to adopt regulations that obtain compliance with the Order. The Department is accordingly declining the DoD's request to allow contracting agencies that enter into non-procurement contracts subject to the Executive Order to create their own contract clauses. Rather, it will be incumbent upon such contracting agencies to use the contract clause contained in Appendix A.

The DoD additionally suggested that it is often not clear whether there is an intent to include nonappropriated fund instrumentalities in laws or regulations. It accordingly requested that the Department use the term ''entity'' in lieu of ''agency'' throughout the final rule. The Department noted in the NPRM that, consistent with the SCA, the proposed definition of the term *Federal Government* includes nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies. *See* 29 CFR 4.107(a). Thus, the Executive Order covers contracts entered into with nonappropriated fund instrumentalities, provided the contract falls within one of the four specifically enumerated categories of contracts covered by the Order. Because the Department believes that this part clearly states the application of the Executive Order to nonappropriated fund instrumentalities, it is declining to adopt the commenter's request to substitute ''entity'' for ''agency'' throughout the final rule.

Paragraph (a) of the proposed contract clause set forth in Appendix A provided that the contract in which the clause is included is subject to Executive Order 13658, the regulations issued by the Secretary of Labor at 29 CFR part 10 to implement the Order's requirements, and all the provisions of the contract clause. The Department did not receive any comments on proposed paragraph (a) of the contract clause and thus implements the paragraph as proposed.

Paragraph (b) specified the contractor's minimum wage obligations to workers pursuant to the Executive Order. Paragraph (b)(1) stipulated that each worker employed in the performance of the contract by the prime contractor or any subcontractor, regardless of any contractual relationship that may be alleged to exist between the contractor and the worker, shall be paid not less than the Executive Order's applicable minimum wage. In both the NPRM and the final rule, the Department has been clear that the term *worker* includes any person engaged in performing work on or in connection with a contract covered by the Executive Order whose wages under such contract are governed by the FLSA, the SCA, or the DBA, regardless of the contractual relationship alleged to exist between the individual and the contractor. The Department has accordingly substituted as a technical correction ''engaged'' for ''employed'' in contract clause paragraph (b)(1) of the final rule in order to be consistent with the terminology used throughout the rule.

Paragraph (b)(2) provided that the minimum wage required to be paid to each worker performing work on or in connection with the contract between January 1, 2015, and December 31, 2015, is $10.10 per hour. It specified that the applicable minimum wage required to be paid to each worker performing work on or in connection with the contract should thereafter be adjusted each time the Secretary's annual determination of the applicable minimum wage under section 2(a)(ii) of the Executive Order results in a higher minimum wage. Section (b)(2) further provided that adjustments to the Executive Order minimum wage would be effective January 1st of the following year, and would be published in the **Federal Register** no later than 90 days before such wage is to take effect. It also provided the applicable minimum wage would be published on *www.wdol.gov* (or any successor Web site) and was incorporated by reference into the contract.

The effect of paragraphs (b)(1) and (b)(2) would be to require the contractor to adjust the minimum wage of workers performing work on or in connection with a contract subject to the Executive Order each time the Secretary's annual determination of the minimum wage results in a higher minimum wage than the previous year. For example, paragraph (b)(1) would require a contractor on a contract subject to the Executive Order in 2015 to pay covered workers at least $10.10 per hour for work performed on or in connection with the contract. If workers continued to perform work on or in connection with the covered contract in 2016 and the Secretary determined the applicable minimum wage to be effective January 1, 2016 was $10.20 per hour, sections (b)(1) and (b)(2) would require the contractor to pay covered workers $10.20 for work performed on or in connection with the contract beginning January 1, 2016, thereby raising the wages of any workers paid $10.10 per hour prior to January 1, 2016.

AGC and ABC requested that the final rule ''freeze'' Executive Order wage rates for the duration of covered contracts, as is done under contracts covered by the DBA. For example, if a contractor entered into a covered contract in 2015 scheduled to last five years, the commenters requested that $10.10 remain the minimum wage for the entire duration of the contract. ABC additionally sought a ''multi-year grace period'' prior to implementation of the final rule. The AOA identified a list of difficulties it claimed its members will experience based on annual adjustments in the Executive Order minimum wage. Similarly, CSCUSA and NSAA requested that the Department gradually increase the required minimum wage to covered workers over a three- or four-year period. Section 2 of the Executive Order, however, requires that covered contracts include a clause, which covered contractors must incorporate into contracts with lower-tier subcontractors, specifying that the minimum wage paid to workers on or in connection with the contract must be at least $10.10 per hour beginning on January 1, 2015, and a higher amount each January 1 thereafter to the extent the CPI–W increases. Since Section 2 of the Executive Order requires payment of the applicable minimum wage and there is no indication in the Order that the Department may provide relief from the operation of the minimum wage mandate in Section 2, the Department is not adopting the request to freeze rates for the duration of a contract, or to gradually increase the required minimum wage to covered workers over a three- or four-year period.

AGC suggested that a change in the applicable minimum wage ''late in the pre-award contracting process'' will present problems in the procurement process. The Department does not anticipate such a scenario will impose an unreasonable challenge to contracting agencies or contractors. All contractors bidding on a covered contract will be subject to the change in the minimum wage, ensuring equal treatment of competitive bidders. The Department further notes that both the DBA's and SCA's implementing regulations require incorporation of updated wage determinations into contracts covered by those statutes under shorter notice periods than provided for in the Executive Order. *See* 29 CFR 1.6(c)(3); 29 CFR 4.5. Moreover, both the contractors and contracting agencies should be aware of the timing of the Secretary's (possible) annual increase in the minimum wage, meaning that no unfair surprise should befall a contractor or contracting agency if a change in the minimum wage occurs late in the pre-award contracting process.

As discussed earlier in the preamble for § 10.22, the Department is adopting AGC's recommendation to include a provision in the contract clause that would require contracting agencies to ensure that contractors are compensated for any increase in labor costs resulting from the annual inflation increases in the Executive Order 13658 minimum wage beginning on January 1, 2016. The Department agrees that an adjustment of this type is warranted in this circumstance and has revised the contract clause accordingly. The Department notes, however, that such compensation is only warranted ''if appropriate.'' For example, if the contracting agency and contractor have already anticipated an increase in labor costs in pricing the applicable contract, it would not be appropriate for a contractor to receive compensation in addition to whatever consideration it has already received for any increase in labor costs in the applicable contract. The Department further notes that contractors shall be compensated ''only for'' increases in labor costs resulting from operation of the annual inflation increases. Thus, contractors are entitled to be compensated under the provision only for any increases in labor costs directly resulting from operation of the annual inflation increase. (For example, contractors are not entitled to be compensated for labor costs they allege they incurred related to non-covered workers due to operation of the annual inflation increase). Such compensation adjustments will necessarily be made on a contract-by-contract basis, and where any annual inflation increase does not increase labor costs (because, for example, of the efficiency and other benefits resulting from the increase), the contractor will not ultimately receive additional compensation as a result of the annual inflation increase.

The Department notes that this approach and the language it has added to the contract clause generally are consistent with the Class Deviation issued by the FARC in June, 2014. That Class Deviation requires contracting

officers on procurement contracts to ''adjust the contract price or contract unit price under this clause only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 13658 minimum wage beginning on January 1, 2016.'' The Department recognizes that the mechanics of providing an adjustment to the economic terms of a covered contract likely differ between covered procurement and non-procurement contracts. With respect to covered non-procurement contracts subject to the Department's contract clause, the Department believes that the authority conferred on agencies that enter into such contracts under section 4(b) of the Executive Order includes the authority to provide the type of adjustment contained in the Department's contract clause.

FortneyScott requested that the Department's final rule require publication of any annual increase in the minimum wage at least 180 days before the wage is to take effect. FortneyScott submits it will be difficult for contractors to modify wage rates in 90 days. The Department believes that a 90-day notice period, however, which is approximately three months, is sufficient time for a contractor to adjust its workers' wages and is consistent with the Executive Order, particularly since it will ensure that any adjustments to the Executive Order minimum wage are based on more current data. Thus, the Department is not adopting the commenter's request.

As discussed elsewhere in this preamble, the Department has decided to provide notice of the Executive Order minimum wage on SCA and DBA wage determinations to help inform contractors and workers of their rights and obligations under the Order. As discussed in more detail in the preamble to subpart C, the Department has also decided to develop a poster for contractors with FLSA-covered workers performing work on or in connection with a contract covered by the Executive Order.

The Department intended paragraph (b)(3), which it derived from the contract clauses applicable to contracts subject to the SCA and the DBA, *see* 29 CFR 4.6(h) (SCA), 29 CFR 5.5(a)(1) (DBA), to ensure full payment of the applicable Executive Order minimum wage to covered workers. Specifically, paragraph (b)(3) required the contractor to pay unconditionally to each covered worker all wages due free and clear and without deduction (except as otherwise provided by § 10.23), rebate or kickback on any account. Paragraph (b)(3) further required that wages shall be paid no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. Paragraph (b)(3) also required that a pay period under the Executive Order could not be of any duration longer than semi-monthly (a duration permitted under the SCA, *see* 29 CFR 4.165(b)). The Department did not receive any comments seeking to alter the language of paragraph (b)(3) of the required contract clause, and it has been adopted as originally proposed.

Paragraph (b)(4) of the proposed contract clause provided that the contractor and any subcontractor(s) responsible would be liable for unpaid wages in the event of any violation of the minimum wage obligation of these clauses. The Department has added language to paragraph (b)(4) in the final rule clarifying, as the NPRM had already specified at § 10.21, that the prime contractor and any upper-tier contractor will be responsible for the compliance by any subcontractor or lower-tier subcontractors with the Executive Order minimum wage requirements. AGC and FortneyScott suggested it is unreasonable to place on contractors the responsibility for lower-tier subcontractors' compliance, including liability for unpaid wages. AGC further sought a ''safe harbor'' from the compliance failures of lower-tier subcontractors for contractors that fulfill their duty to flow-down the contract clause into their own contracts with subcontractors. As the commenter itself noted, however, contractors on DBA-covered contracts are already responsible for lower-tier subcontractors' violations of the DBA contract clause. As discussed earlier, the Department has found this flow-down model of responsibility, which also applies in the SCA context, to be an effective method to obtain compliance with the DBA and SCA, and to ensure that covered workers receive the wages to which they are statutorily entitled even if, for example, the subcontractor that employed them is insolvent. The Department believes the flow-down model of responsibility will likewise prove an effective model to enforce the Executive Order's obligations and ensure payment of wages to covered workers, and it has accordingly retained the approach in the final rule.

In support of its request for a safe harbor from flow-down responsibility, AGC contends that contractors will be unable to identify the workers on covered construction (and service) contracts who are engaged in the performance of the applicable contract and whose wages are governed by the FLSA, not the SCA or DBA; such a concern, however, is not a reason to abandon the flow-down model. The Department expects the percentage of workers on SCA- and DBA-covered contracts who are covered by the SCA and/or DBA to greatly exceed those workers engaged in the performance of the contract whose wages are solely governed by the FLSA. Thus, the vast majority of covered workers on SCA- and DBA-covered contracts will almost certainly be workers covered by the DBA and/or SCA to which the contractor already has a flow-down obligation. To discard the flow-down model of liability because of perceived difficulties relating to the application of flow-down principles to a relatively small number of additional workers would unduly undercut the Department's ability to obtain compliance with the Order. The Department is accordingly retaining the flow-down model of contractor responsibility for compliance. The Department notes, however, that it has created a new exclusion in the final rule for workers performing in connection with covered contracts for less than 20 percent of their work hours in a given workweek. As explained in greater detail in subpart A, the Department expects that this exclusion will help to alleviate some of the concerns raised by contractors.

The Department received many comments, including those submitted by the National Down Syndrome Congress, the APSE, the Autism Society of America, and the World Institute on Disability, requesting that it include additional language in the contract clause set forth in Appendix A explicitly stating that workers with disabilities whose wages are calculated pursuant to special certificates issued under section 14(c) of the FLSA must be paid at least the Executive Order minimum wage (or the applicable commensurate wage rate under the certificate, if such rate is higher than the Executive Order minimum wage) for time spent performing work on or in connection with covered contracts. The Department agrees with this proposed addition to the contract clause because it helps to clarify the scope of the Executive Order's coverage and has added paragraph (b)(5) to the contract clause in Appendix A.

The Department derived proposed paragraphs (c) and (d) of the contract clause, which specified remedies in the event of a determination of a violation of Executive Order 13658 or this part, primarily from the contract clauses applicable to contracts subject to the SCA and the DBA, *see* 29 CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2), (7) (DBA).

Paragraph (c) provided that the contracting officer shall, upon its own action or upon written request of an authorized representative of the Department, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by the contract. Consistent with withholding procedures under the SCA and the DBA, paragraph (c) would allow the contracting agency and the Department to effect withholding of funds from the prime contractor on not only the contract covered by the Executive Order but also on any other contract that the prime contractor has entered into with the Federal Government.

Proposed paragraph (d) stated the circumstances under which the contracting agency and/or the Department could suspend, terminate, or debar a contractor for violations of the Executive Order. It provided that in the event of a failure to comply with any term or condition of the Executive Order or 29 CFR part 10, including failure to pay any worker all or part of the wages due under the Executive Order, the contracting agency could on its own action, or after authorization or by direction of the Department and written notification to the contractor, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Paragraph (d) additionally provided that any failure to comply with the contract clause could constitute grounds for termination of the right to proceed with the contract work and, in such event, for the Federal Government to enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. Paragraph (d) also provided that a breach of the contract clause could be grounds to debar the contractor as provided in 29 CFR part 10. The Department received no comments specifically related to operation of paragraphs (c) and (d) and accordingly retained the paragraphs in the final rule as proposed.

Proposed paragraph (e) provided that contractors could not discharge any portion of their minimum wage obligation under the contract by furnishing fringe benefits, or with respect to workers whose wages are governed by the SCA, the cash equivalent thereof. As noted earlier, Executive Order 13658 increases ''the hourly minimum wage'' paid by contractors with the Federal Government. 79 FR 9851. By repeatedly referencing that it is establishing a higher hourly minimum wage, without any reference to fringe benefits, the text of the Executive Order makes clear that a contractor cannot discharge its minimum wage obligation by furnishing fringe benefits. This interpretation is consistent with the SCA, which does not permit a contractor to meet its minimum wage obligation through the furnishing of fringe benefits, but rather imposes distinct ''minimum wage'' and ''fringe benefit'' obligations on contractors. 41 U.S.C. 6703(1)–(2). Similarly, the FLSA does not allow a contractor to meet its minimum wage obligation through the furnishing of fringe benefits. Although the DBA specifically includes fringe benefits within its definition of minimum wage, thereby allowing a contractor to meet its minimum wage obligation, in part, through the furnishing of fringe benefits, 40 U.S.C. 3141(2), Executive Order 13658 contains no similar provision expressly authorizing a contractor to discharge its Executive Order minimum wage obligation through the furnishing of fringe benefits. Consistent with the Executive Order, paragraph (e) would accordingly preclude a contractor from discharging its minimum wage obligation by furnishing fringe benefits.

Paragraph (e), as proposed, also prohibited a contractor from discharging its minimum wage obligation to workers whose wages are governed by the SCA by providing the cash equivalent of fringe benefits, including vacation and holidays. As discussed above, the SCA imposes distinct ''minimum wage'' and ''fringe benefit'' obligations on contractors. 41 U.S.C. 6703(1)–(2). A contractor cannot satisfy any portion of its SCA minimum wage obligation through the provision of fringe benefit payments or cash equivalents furnished or paid pursuant to 41 U.S.C. 6703(2). 29 CFR 4.177(a). Consistent with the treatment of fringe benefit payments or their cash equivalents under the SCA, proposed paragraph (e) would not allow contractors to discharge any portion of their minimum wage obligation under the Executive Order to workers whose wages are governed by the SCA through the provision of either fringe benefits or their cash equivalent.

ABC and the Association/IFA requested that the Department permit construction contractors to satisfy the Executive Order minimum wage obligation by paying any combination of wages and bona fide fringe benefits. As the Department stated in the NPRM, the DBA allows contractors to fulfill the statutory minimum wage obligation through such a combination. There is, however, a specific statutory allowance for meeting the DBA minimum wage obligation through a combination of wages and fringe benefits. 40 U.S.C. 3141(2). In contrast, there is no language in the Executive Order suggesting such a combination is a permissible method to satisfy the Order's minimum wage obligation. Absent such language, and given the FLSA and SCA's prohibition on satisfying their minimum wage obligation through the furnishing of fringe benefits, the Department has concluded that prohibiting all Executive Order covered contractors, including construction contractors, from satisfying the minimum wage obligation through the provision of fringe benefits most faithfully implements the Executive Order. Accordingly, the Department adopts paragraph (e) of the contract clause as proposed.

Paragraph (f), as proposed, provided that nothing in the contract clause would relieve the contractor from compliance with a higher wage obligation to workers under any other Federal, State, or local law, or under contract. This provision would implement section 2(c) of the Executive Order, which provides that nothing in the Order excuses noncompliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order. 79 FR 9851. For example, if a municipal law required a contractor to pay a worker $10.75 per hour on January 1, 2015, a contractor could not rely on the $10.10 Executive Order minimum wage to pay the worker less than $10.75 per hour.

The Building Trades requested inclusion of additional language in paragraph (f) specifying that an employer cannot rely on a published wage rate that is lower than the Executive Order minimum wage to pay less than $10.10 per hour (or the minimum wage as established annually beginning January 1, 2016). The language proposed by the commenter is consistent with the purpose of the Executive Order and with examples the Department included in the preamble to the NPRM and this final rule. The Department is adopting the commenter's suggested language and has amended the final rule accordingly. The Department otherwise adopts paragraph (f) of the contract clause as proposed in the NPRM.

As previously discussed, the Chamber/NFIB requested suspension of application of the Executive Order minimum wage to contractors that have negotiated a wage below the Order's

minimum wage in CBAs until the contractors' current collective bargaining agreement expires. SourceAmerica similarly sought guidance regarding the relationship between CBA rates and the Order's minimum wage requirement. The Chamber/NFIB submit that suspending application of the Executive Order in the manner they propose will preserve the terms bargained by the contractor with its workers' union and provide contractors with the wage certainty associated with a CBA.

In response to these comments, the Department notes that in the event that a collectively bargained wage rate is below the applicable DBA rate, a DBA-covered contractor must pay no less than the applicable DBA rate to covered workers on the project. While a predecessor CBA rate lower than the otherwise prevailing SCA rate can become the applicable SCA rate, the SCA itself contains a provision specifying the CBA rate becomes the applicable SCA rate. *See* 41 U.S.C. 6707(c); 29 CFR 4.1(b), 4.152. There is no indication in the Executive Order of an intent to permit a CBA rate lower than the minimum wage rate to govern the wages of workers covered by the Order. The Department accordingly concludes that permitting payment of CBA wage rates below the Executive Order minimum wage is inconsistent with the Executive Order and therefore declines to suspend application of the Executive Order minimum wage to contractors that have negotiated a CBA wage rate lower than the Order's minimum wage. The Department therefore adopts paragraph (f) of the contract clause as proposed in the NPRM.

Proposed paragraph (g) set forth recordkeeping and related obligations that were consistent with the Secretary's authority under section 5 of the Order to obtain compliance with the Order, and that the Department viewed as essential to determining whether the contractor had paid the Executive Order minimum wage to covered workers. The Department derived the obligations set forth in paragraph (g) from the FLSA, SCA, and DBA. Paragraph (g)(1) listed specific payroll records obligations of contractors performing work subject to the Executive Order, providing in particular that such contractors had to make and maintain for three years, work records containing the following information for each covered worker: Name, address, and social security number; the rate or rates paid to the worker; the number of daily and weekly hours worked by each worker; and any deductions made. The records required to be kept by contractors pursuant to proposed paragraph (g)(1) were coextensive with recordkeeping requirements that already exist under, and were consistent across, the FLSA, SCA, and DBA; as a result, compliance by a covered contractor with the proposed payroll records obligations would not impose any obligations to which the contractor is not already subject under the FLSA, SCA, or DBA. As discussed earlier in the preamble in relation to § 10.26(a), two additional recordkeeping requirements have been included in the final rule publication: The requirement to maintain records reflecting each worker's occupation(s) or classification(s) and the requirement to maintain records reflecting total wages paid. These two recordkeeping requirements derive from and are consistent across the FLSA, SCA, and DBA, just as with those records enumerated in the NPRM.

Paragraph (g)(1) further provided that the contractor performing work subject to the Executive Order would make such records available for inspection and transcription by authorized representatives of the WHD.

Proposed paragraph (g)(2) required the contractor to make available a copy of the contract for inspection or transcription by authorized representatives of the WHD. Paragraph (g)(3), as proposed, provided that failure to make and maintain, or to make available to the WHD for transcription and copying, the records identified in section (g)(1) would be a violation of the regulations implementing Executive Order 13658 and the contract. Paragraph (g)(3) additionally provided that in the case of a failure to produce such records, the contracting officer, upon direction of the Department and notification of the contractor, would take action to cause suspension of any further payment or advance of funds until such violation had ceased. Proposed paragraph (g)(4) required the contractor to permit authorized representatives of the WHD to conduct the investigation, including interviewing workers at the worksite during normal working hours. Paragraph (g)(5), as proposed, provided that nothing in the contract clause would limit or otherwise modify a contractor's recordkeeping obligations, if any, under the FLSA, SCA, and DBA, and their implementing regulations, respectively. Thus, for example, a contractor subject to both Executive Order 13658 and the DBA with respect to a particular project would be required to comply with all recordkeeping requirements under the DBA and its implementing regulations. The Department received no comments on paragraph (g) and has adopted the paragraph as proposed, except for adding the requirements discussed above.

Paragraph (h), as proposed, required the contractor to both insert the contract clause in all its subcontracts and to require its subcontractors to include the clause in any lower–tiered subcontracts. Paragraph (h) further made the prime contractor or upper-tier contractor responsible for the compliance by any subcontractor or lower tier subcontractor with the contract clause.

The EEAC requested the Department modify paragraph (h) to clarify that a contractor's obligation to insert the contract clause in subcontracts only applies to subcontracts covered by the Executive Order. The commenter's suggestion is consistent with the Department's interpretation of subcontract coverage as explained in subpart A and the Department has accordingly modified paragraph (h) in the final rule to clarify that a contractor's obligation to insert the contract clause in subcontracts only applies to subcontracts covered by the Executive Order. The Department has also added language to clarify, consistent with the approach contained in § 10.21 of the NPRM and the flow-down obligations described in the NPRM and the final rule, that ''any upper-tier contractor'' is responsible for the compliance by any subcontractor or lower-tier subcontractor with the contract clause. Except for these modifications, the Department implements paragraph (h) as proposed.

Proposed paragraph (i), which the Department derived from the SCA contract clause, 29 CFR 4.6(n), set forth the certifications of eligibility the contractor makes by entering into the contract. Paragraph (i)(1) stipulated that by entering into the contract, the contractor and its officials would be certifying that neither the contractor, the certifying officials, nor any person or firm with an interest in the contractor's firm was a person or firm ineligible to be awarded Federal contracts pursuant to section 5 of the SCA, section 3(a) of the DBA, or 29 CFR 5.12(a)(1). Paragraph (i)(2) constituted a certification that no part of the contract would be subcontracted to any person or firm ineligible to receive Federal contracts. Paragraph (i)(3) contained an acknowledgement by the contractor that the penalty for making false statements is prescribed in the U.S. Criminal Code at 18 U.S.C. 1001. The Department received no comments related to paragraph (i) and has adopted the provision's language as proposed.

The Department based paragraph (j) on section 3 of the Executive Order. It addressed the employer's ability to use a partial wage credit based on tips received by a tipped employee (tip credit) to satisfy the wage payment obligation under the Executive Order. The provision set the requirements an employer must meet in order to claim a tip credit. To the extent the Department received comments related to tipped employees, it has discussed them elsewhere in this preamble. The Department has retained paragraph (j) as proposed.

Paragraph (k), as proposed, established a prohibition on retaliation that the Department derived from the FLSA's antiretaliation provision that was consistent with the Secretary's authority under section 5 of the Order to obtain compliance with the Order. It prohibited any person from discharging or discriminating against a worker because such worker had filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or had testified or was about to testify in any such proceeding. The Department proposed to interpret the prohibition on retaliation in paragraph (k) in accordance with its interpretation of the analogous FLSA provision. Paragraph (k) of the final rule adopts the language of the proposed rule.

The Department based proposed paragraph (l) on section 5(b) of the Executive Order. It accordingly provided that disputes related to the application of the Executive Order to the contract would not be subject to the contract's general disputes clause. Instead, such disputes would be resolved in accordance with the dispute resolution process set forth in 29 CFR part 10. Paragraph (l) also provided that disputes within the meaning of the clause included disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the workers or their representatives.

The Department has added paragraph (m) to the contract clause in response to various comments it received related to providing notice to workers of the applicable Executive Order minimum wage. The methods of notice contained in paragraph (m) reflect those contained in § 10.29 of the final rule. A full discussion of the relevant comments, and the methods of notice contained in paragraph (m), can accordingly be found in the preamble describing the operation of § 10.29.

With respect to other issues pertaining to implementation of the proposed contract clause, the NILG and EEAC requested that the Department allow for incorporation of the contract clause by reference. The Department's analysis of these comments also is discussed in the preamble to § 10.11. In summary, including the full contract clause in a covered contract is an effective and practical means of ensuring that contractors receive notice of their obligations under the Executive Order and this final rule, and the Department therefore prefers that covered contracts include the contract clause in full At the same time, there will be instances in which a contracting agency or a contractor does not include the entire contract clause verbatim in a covered contract but the facts and circumstances establish that the contracting agency or contractor sufficiently apprised a prime or lower-tier contractor that the Executive Order and its requirements apply to the contract. In particular, the full contract clause will be deemed to have been incorporated by reference in a covered contract if the contract provides that ''Executive Order 13658—Establishing a Minimum Wage for Contractors, and its implementing regulations, including the applicable contract clause, are incorporated by reference into this contract as if fully set forth in this contract,'' with a citation to a Web page that contains the contract clause in full, to the provision of the Code of Federal Regulations containing the contract clause set forth at Appendix A of this part, or to the provision of the FAR containing the contract clause promulgated by the FARC to implement this rule.

The EEAC questioned how parties might include a contract clause in a verbal agreement. The Department anticipates that the vast majority of covered contracts will be written. However, the Department's decision to include verbal agreements as part of its definition of the term ''contract'' derives from the SCA's regulations. *See* 29 CFR 4.110. Under the SCA, a contract may be embodied in a verbal agreement, *see id.,* notwithstanding the regulatory obligation to ''include'' the SCA contract clause found at 29 CFR 4.6 ''in full'' in the contract. Similarly, it is possible that the facts and circumstances of the parties' relationship will render appropriate a finding of incorporation by reference of the contract clause in a verbal agreement. For example, a contracting agency and contractor might be parties to a written contract that includes the Executive Order contract clause and agree to renew the contract orally, rather than in writing. In such a circumstance, WHD likely would conclude that the parties' verbal agreement incorporated the contract clause by reference.

The purpose of including verbal agreements in the definition of contract and contract-like instrument is to ensure that the Executive Order's minimum wage protections apply in instances where the contracting parties, for whatever reason, rely on a verbal rather than written contract. As noted, such instances are likely to be exceedingly rare, but workers should not be deprived of the Executive Order's minimum wage because contracting parties neglected to memorialize their understanding in a written contract.

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, requires 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). The OMB has assigned control number 1235–0018 to the general recordkeeping provisions of various labor standards that the WHD administers and enforces and control number 1235–0021 to the information collection which gathers information from complainants alleging violations of such labor standards. In accordance with the PRA, the Department solicited public comments on the proposed changes to those information collections in the NPRM, as discussed below. *See* 79 FR 34568 (June 17, 2014). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the information collections in accordance with 44 U.S.C. 3507(d). On August 15, 2014, the OMB issued a notice that continued the previous approval of the information collections under the existing terms of clearance and asked the Department to resubmit the information collection requests upon promulgation of the final rule and after consideration of public comments received.

Circumstances Necessitating Collection: Executive Order 13658 provides that agencies must, to the extent permitted by law, ensure that new contracts, as described in section 7 of the Order, include a clause specifying, as a condition of payment, that the minimum wage to be paid to workers in the performance of the

contract shall be at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) an amount determined by the Secretary, beginning January 1, 2016, and annually thereafter. 79 FR 9851. Section 7(d) of the Executive Order establishes that this minimum wage requirement only applies to a new contract if: (i) (A) It is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Section 7(e) of the Order states that, for contracts covered by the SCA or the DBA, the Order applies only to contracts at the thresholds specified in those statutes. *Id.* It also specifies that, for procurement contracts where workers' wages are governed by the FLSA, the Order applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the Order pursuant to regulations or actions taken under section 4 of the Order. 79 FR 9853. The NPRM contained several provisions that could be considered to entail collections of information: The section 10.21 requirement for a contractor and its subcontractors to include the applicable Executive Order minimum wage contract clause in any covered subcontract, the section 10.26 recordkeeping requirements, the section 10.41 complaint process, and the subpart E administrative proceedings.

Proposed subpart C stated the contractor's requirements in complying with the Executive Order. Proposed § 10.21 stated that the contractor and any subcontractor, as a condition of payment, must abide by the Executive Order minimum wage contract clause and must include in any covered subcontracts the minimum wage contract clause in any lower-tier subcontracts.

The Department noted that the proposed rule did not require contractors to comply with an employee notice requirement. However, in response to commenter concerns, the Department has added an employee notice requirement to this final rule at § 10.29. Disclosure of information originally supplied by the Federal Government for the purpose of disclosure is not included within the definition of a collection of information subject to the PRA. *See* 5 CFR 1320.3(c)(2). The Department has thus determined that § 10.29 does not include an information collection subject to the PRA. The Department also notes that the recordkeeping requirements in the final rule are requirements that contractors must already comply with under the FLSA, SCA, or DBA under an OMB approved collection of information (OMB control number 1235–0018). In the NPRM, the Department indicated that the proposed rule did not impose any additional notice or recordkeeping requirements on contractors for PRA purposes and therefore, the burden for complying with the recordkeeping requirements in this proposed rule was subsumed under the current approval. An information collection request (ICR), however, was submitted to the OMB that would revise the existing PRA authorization for control number 1235–0018 to incorporate the recordkeeping regulatory citations in the proposed rule.

The WHD obtains PRA clearance under control number 1235–0021 for an information collection covering complaints alleging violations of various labor standards that the agency administers and enforces. An ICR was submitted to OMB to revise the approval to incorporate the regulatory citations in the proposed rule applicable to complaints and adjust burden estimates to reflect any increase in the number of complaints filed against contractors who fail to comply with the minimum wage requirement.

Proposed Subpart E established administrative proceedings to resolve investigation findings. Particularly with respect to hearings, the proposed rule imposed information collection requirements. The Department notes that information exchanged between the target of a civil or an administrative action and the agency in order to resolve the action would be exempt from PRA requirements. *See* 44 U.S.C. 3518(c)(1)(B); 5 CFR 1320.4(a)(2). This exemption applies throughout the civil or administrative action (such as an investigation and any related administrative hearings); therefore, the Department determined the administrative requirements contained in subpart E of this rule are exempt from needing OMB approval under the PRA.

Information and technology: There is no particular order or form of records prescribed by the final rule. A contractor may meet the requirements of this rule using paper or electronic means. The WHD, in order to reduce burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing process that has complainants discuss their concerns with WHD professional staff. This process allows agency staff to refer complainants raising concerns that are not actionable under wage and hour laws and regulations to an agency that may be able to offer assistance.

Public comments: The Department sought public comments regarding the potential burdens imposed by information collections contained in the proposed rule which reflected a slight increase in paperwork burden associated with ICR 1235–0021 but did not create a paperwork burden on the regulated community of the information collection provisions contained in ICR 1235–0018. The Department received some comments with respect to the paperwork. The FS commented that ''it could be argued that inclusion of the minimum wage clause itself in instruments such as FS concession instruments that do not already contain a minimum wage provision constitutes a new information collection requirement.'' To address this concern, the FS suggested that the preamble to the final rule expressly state that ''inclusion of the minimum wage clause in contracts or contract-like instruments that do not already contain a minimum wage provision does not constitute a new information collection requirement'' since all the information collected under the clause is already being collected under existing federal law. The Department agrees that the information required to be collected pursuant to the contract clause set forth in Appendix A is already required to be collected under existing Federal law.

The Chamber/NFIB estimated that the Department's Paperwork Reduction Act burden estimate provided in the NPRM is low. They contended that the Department's assertion of only 35 additional complaints filed was not credible. They suggested that a more reasonable estimate of the number of complaints, given the large numbers of persons becoming entitled to this new wage level, would be in the thousands. Additionally, the commenter expressed their view that the employer burden under ICR 1235–0018 will also increase. They stated that employers will have to keep new records identifying separate wage rates to document both Federal and non-Federal contract projects. The AOA agreed that tracking different wage rates might be problematic, calling it ''cost prohibitive'' to track more than one wage rate for a worker. The Department disagrees that tracking the rate of pay for a worker is a new information collection requirement.

Rate of pay is already a required record under the FLSA, SCA and DBA. The Department further notes that in its experience many types of employers track different rates of pay for workers.

Other commenters expressed the view that their recordkeeping costs would increase without describing the underlying reasons for their view. For example, O.A.R.S. indicated that their ''recordkeeping and compliance costs for our seasonal business, which employs up to 250 seasonal staff members would be monumental.'' Still others referenced a general increase in burden but did not address the PRA burdens specifically or offer alternative methods for calculating burden.

The George Washington University Regulatory Studies Center suggested that the Department should identify or commit to collecting the information needed to measure the rule's success. They expressed their view that the Department should collect after the implementation of the minimum wage increase data on productivity of workers, morale of workers (if quantifiable), turnover reduction, turnover costs, and supervisory costs. They also suggested that the Department should collect data on employment levels, number of contracts, number of workers assigned to contracts, and hours of work performed on contracts by minimum wage/low-income laborers.

With respect to the potential increase to the number of complaints, the Department notes a partial error in the publication of the NPRM. In ICR 1235–0021, the currently approved responses for the Employment Information Form used to collect complainant information is 35,000 annually. The Department notes that in the NPRM, the number was increased to 35,350 (although it incorrectly identified only 35 new responses in the subsequent brackets to this rulemaking). The correct number is 35,350 which was listed in the NPRM but 350 of that amount is from this rulemaking. Some commenters thought this should be listed in the thousands. The Department does not agree with such an assessment. Of the millions of employees that are included in the FLSA information collection, the Department only receives about .06% in annual complaints. Of the 183,814 affected workers estimated in the NPRM, the Department estimates it will receive approximately 350 complaints (or .19%). This amount is approximately triple the percentage of complaints the Department currently receives for the FLSA, SCA, and DBA combined. As a result, the Department declines to incorporate the ''thousands'' of complaints suggested by some commenters into its burden estimates.

With respect to suggestions that the Department commit to collecting more information to evaluate the success of the rule, the Department notes that the weight of the comments were opposed to increasing burden. As a result, the Department declines to add additional burden and instead holds the burden increases to as little as possible to carry out Executive Order 13658 effectively.

With respect to the objections to the notice provisions in the NPRM, the Department has added § 10.29 to the final rule. Most workers will still be alerted to the Executive Order minimum wage rate by the posting of the wage determination as is currently required. However, for those workers who are not covered by the DBA or SCA but are covered by the Executive Order 13658, the Department will develop a poster and require that contractors or subcontractors who engage such workers post this notice developed by the Department. Electronic posting is allowed as long as it meets the requirement of the regulation.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department submitted the identified information collection contained in the proposed rule to OMB for review in accordance with the PRA under Control numbers 1235–0021 and 1235–0018. See 44 U.S.C. 3507(d); 5 CFR 1320.11. The Department has resubmitted the revised information collections to OMB for approval, and the Department intends to publish a notice announcing OMB's decision regarding this information collection request. A copy of the information collection request can be obtained by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Wage and Hour Division, Office of Management and Budget, Room 10235, Washington, DC 20503; Telephone: 202–395–7316/Fax: 202–395–6974 (these are not toll-free numbers). The OMB will consider all written comments that agency receives within 30 days of publication of this final rule.

The OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Total burden for the recordkeeping and complaint process information collections, including the burdens that will be unaffected by this proposed rule and any changes are summarized as follows:

Type of review: Revisions to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Employment Information Form.

OMB Control Number: 1235–0021.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 35,350 (350 from this rulemaking).

Estimated number of responses: 35,350 (350 from this rulemaking).

Frequency of response: On occasion.

Estimated annual burden hours: 11,783 (116 burden hours due to this rulemaking).

Estimated annual burden costs: $286,562.00.

Title: Records to be kept by Employers.

OMB Control Number: 1235–0018.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 3,911,600 (0 from this rulemaking).

Estimated number of responses: 40,998,533 (0 from this rulemaking).

Frequency of response: Weekly.

Estimated annual burden hours: 1,250,164 (0 from this rulemaking).

Estimated annual burden costs: 0.

IV. Executive Orders 12866 and 13563

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 achieving 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.

Under Executive Order 12866, the Department must determine whether a regulatory action is significant and therefore subject to the requirements of the Executive Order and to review by OMB. 58 FR 51735. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. *Id.*

The Department has determined that this final rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866 because it is economically significant based on the analysis set forth below. As a result, OMB has reviewed this final rule.

Executive Order 13658 requires an increase in the minimum wage to $10.10 for workers on covered Federal contracts where the solicitation for such contracts has been issued on or after January 1, 2015. Beginning January 1, 2016, and annually thereafter, the Secretary of Labor will determine the applicable minimum wage in accordance with section 2 of Executive Order 13658. Workers performing work on or in connection with covered contracts as described in the Executive Order and this rule are entitled to the minimum wage protections of this part. The Executive Order applies only to new contracts, which in accordance with § 10.2, are those that result from a solicitation issued on or after January 1, 2015, or those awarded outside the solicitation process on or after January 1, 2015.

In order to determine whether the proposed rule would have an annual effect on the economy of $100 million or more, it was necessary to determine how many workers on contracts covered by the Executive Order are earning below $10.10 (affected workers). Because no single source contained data reflecting how many Federal contract workers receive wages below $10.10, the Department relied on a variety of data sources to estimate the number of affected workers. First, the Department used the Principal North American Industry Classification System (NAICS) to identify the industries most likely to employ workers covered by the Executive Order. Second, the Department utilized the Current Population Survey (CPS) to estimate the number of workers within a state within the applicable NAICS category receiving less than $10.10 per hour. The Department then relied on ratios it derived from *USASpending.gov* and the Bureau of Labor Statistics Office of Employment and Unemployment Statistics (OEUS) data to determine what percentage of the applicable CPS workers receiving less than $10.10 per hour were working on Federal contracts. Finally, the Department relied on ratios again derived from *USAspending.gov* data to determine what percentage of workers receiving less than $10.10 per hour while working on Federal contracts were performing work on Federal contracts covered by the Executive Order. Using this methodology, the Department estimated in the NPRM that there are 183,814 affected workers.

It was additionally necessary in the NPRM to estimate both the average wage rate of affected workers and how many hours affected workers would spend on covered contracts. The Department estimated affected workers receive an average wage of $8.79, or $1.31 below the Executive Order minimum wage, and work 2,080 hours per year on Executive Order covered contracts. The Department further estimated that twenty percent (20%) of contracts extant in 2015 will qualify as ''new'' for purposes of the Executive Order and that approximately all contracts extant by 2019 will be ''new'' for purposes of the Executive Order. Based on these estimates, the Department anticipated that the annual effect of the rule in 2015 and 2019 would be approximately $100.2 million (183,814*$1.31*2080*.20 = $100.2 million) and $501 million (183,814*$1.31*2080), respectively.

In estimating the annual effect on the economy of this rule in the NPRM, the Department proceeded in steps. The first step was to estimate the number of affected workers who currently earn less than $10.10 per hour. The second step was to estimate the average wage increase for the affected workers. The average increase in wages will reflect the range of hourly wage rates of the affected workers currently earning between $7.25 and $10.10. In the third step, the Department calculated the total increase in hourly wages for the affected workers by multiplying the number of affected workers (Step 1) by the average increase in wages of the affected workers (Step 2) and the estimated number of work hours per year. Because this rule would apply only to new contracts as defined in § 10.2, the Department also needed to estimate in the proposed rule the percentage of extant contracts that would be ''new'' in the years covered by this analysis.

The Federal Government does not collect data that precisely quantifies the number of private sector workers performing work on Federal contracts. The Department accordingly used various methods based on the data sources available to derive an estimate of the number of affected workers. First, the Department gathered data on Federal contracts from *USAspending.gov,* which classifies government contract spending based on the products or services being purchased, to determine the types of Federal contracts covered by the Executive Order.[12] Specifically, the Department's estimate of spending on contracts that are covered by this Executive Order included contracts for work related to Research and Development (''A'' codes), Special Studies and Analyses—Not R&D (''B'' codes), Architect and Engineering—Construction (''C'' codes), Automatic Data Processing and Telecommunication (''D'' codes), Purchase of Structures and Facilities (''E'' codes), Natural Resources and Conservation (''F'' codes), Social Services (''G'' codes), Quality Control, Testing, and Inspection (''H'' codes), Maintenance, Repair, and Rebuilding of Equipment (''J'' codes), Modification of Equipment (''K'' codes), Technical Representative (''L'' codes), Operation of Government Owned Facilities (''M'' codes), Installation of Equipment (''N'' codes), Salvage Services (''P'' codes), Medical Services (''Q'' codes), Professional, Administrative and Management Support (''R'' codes), Utilities and Housekeeping Services (''S'' codes), Photographic, Mapping, Printing, and Publications (''T'' codes), Education and Training (''U'' codes),

[12] The Department excluded all contracts for products from its estimate because the Executive Order generally does not cover such contracts.

Transportation, Travel and Relocation (''V'' codes), Lease or Rental of Equipment (''W'' codes), Lease or Rental of Facilities (''X'' codes), Construction of Structures and Facilities (''Y'' codes), and Maintenance, Repair or Alteration of Real Property (''Z'' codes).

The Department focused in the NPRM on information found in the *USASpending.gov* Prime Award Spending database, which enabled it to discern how some Federal contracts are further redistributed to subcontractors. For example, a business performing a Professional, Administrative and Management Support contract may subcontract with other businesses to complete their work. *USASpending.gov* is not a perfect data source from which to estimate all the Federal contracts subject to the Executive Order because a portion of contracts in several of the product service codes may not be covered by this final rule. In addition, *USASpending.gov* does not capture some concessions contracts and contracts in connection with Federal property or lands related to offering services for Federal employees, their dependents or the general public that will be covered by this final rule. Therefore, the Department noted in the NPRM that its estimate of the number of affected workers may be somewhat imprecise. As the Department further noted, however, the inclusion of all contracts in the aforementioned product service codes and the exclusion of some concessions contracts and covered contracts in connection with Federal property or lands likely offset each other to at least some degree in calculating the total number of affected workers under this final rule.

Second, the Department utilized 2012 [13] OEUS data on total output and employment by industry in conjunction with the data on total spending on Federal contracts by industry from *USAspending.gov* to calculate the share of workers in each industry sector employed under Federal contracts. According to *USASpending.gov,* the Federal Government spent $461.48 billion on procurement contracts in 2013. Subtracting amounts spent on contract work performed outside of the United States that the Executive Order does not cover resulted in Federal Government spending on procurement contracts of approximately $407.68 billion in 2013. The Department illustrated its approach in the NPRM using the example of the information industry; OEUS data indicated that total output and total employment for the information industry (NAICS code: 51) in 2012 were $1.25 trillion and 2.74 million workers, respectively. Total Federal contract spending for the information industry according to *USASpending.gov* was $10.4 billion in 2013. The Department then divided the total Federal contract spending for the information industry by the total output for the information industry to derive a *share of industry output* in the information sector of .83 percent ($10.4 billion/$1.25 trillion). Using this method, the Department estimated the share for each industry sector from *USAspending.gov* that it identified as containing Federal contracts subject to the Executive Order (*see* Table A below).

In the proposed rule, the Department additionally augmented the national contracting data with information on state-based geographic differences in the minimum wage and contracting services purchased. By integrating state-level data, the Department captured some of the variation in the minimum wage level and contracting within states. The Department determined where Federal agencies were investing by the place of performance data associated with each entry in the *USASpending.gov* database, which is typically the zip code of the location where the contract work takes place. In order to avoid overstating the contracts covered by this final rule, the Department developed an estimate to measure the proportion of total Federal spending on services and products in a given state. To measure *the ratio of covered contracts,* the Department divided a state-industry pair's total Federal spending on contracts covered by Executive Order 13658 by the state-industry pair's total Federal spending on all contracts (including both services and products) in 2013. The Department defined the industries in the state-industry pairs using the principal NAICS of the contractor providing the service (*see* Table B). For simplicity, the Department chose to aggregate the data by two-digit NAICS industries. Affected workers were estimated based on contracts by industry two-digit NAICS level. The Department noted that its estimate included all industry classifications of contracts, and that this approach captured all vendors irrespective of industry whose contracts are covered by this final rule.

Third, the Department used wage and industry data from the CPS [14] to calculate the total number of workers in each state by two-digit NAICS level who earn less than $10.10 per hour.[15] The Department then applied the *share of industry output* ratios to this CPS data to estimate the total number of workers within an industry within a state who earn less than $10.10 per hour working on a Federal contract. Implicit in the Department's use of the *USASpending.gov* and CPS data in this manner was the Department's assumption that the industry distribution of Federal contractors was the same as that in the rest of the U.S. economy. For example, according to CPS data, there were 5,991 workers in the information industry in Maryland who earn less than $10.10 per hour, so applying the *share of industry output* ratio estimate of 0.83 percent indicated that there were 50 workers in the information industry who earned less than $10.10 and were performing work on a Federal contract in Maryland. The Department then accounted for those workers who were performing on a covered contract by employing the applicable *ratio of covered contracts.* By example, the Department noted the *ratio of covered contracts* in the information industry in Maryland was 67 percent. The Department accordingly calculated that the number of affected workers in the information industry in Maryland who earn less than $10.10 per hour is 33 (67% × 50). By following this procedure for each state-industry pair, the Department estimated that out of the 868,834 workers on covered Federal contract jobs, 183,814 (21 percent) were paid $10.10 per hour or less. *See* Table C for calculation of the number of affected workers.

The Department has closely reviewed the economic analysis it utilized in the NPRM, and carefully considered all the pertinent comments received. Based on its review and its consideration of the comments, the Department has concluded that the method it used to conduct the economic analysis in the NPRM reasonably estimated the annual effect of the proposed rule, based on the data sources available to the

[13] The total spending data on Federal contracts by industry in 2012 was similar to the total spending data on Federal contracts by industry in 2013. The Department accordingly concluded it was appropriate to compare the total spending data on Federal contracts from *USASpending.gov* in 2013 to the 2012 data on total output and employment from the OEUS.

[14] The CPS, sponsored jointly by the U.S. Census Bureau and the BLS, is the primary source of labor force statistics for the population of the United States. The CPS is the source of numerous high-profile economic statistics, including the national unemployment rate, and provides data on a wide range of issues relating to employment and earnings.

[15] While the ideal data set for the number of affected workers would be Federal procurement data that shows a wage distribution for all contract and subcontract workers, such a data set is not available.

Department. The Department is accordingly adopting the proposed rule's economic analysis for purposes of this final rule. As the Department's estimate of the annual effect of the rule exceeds $100 million, the Department has concluded its implementing regulations constitute a ''significant regulatory action'' under section 3(f) of Executive Order 12866.

Demos, the Chamber/NFIB, and Advocacy expressed their views on the Department's estimate of the number of affected workers subject to this Executive Order. Demos estimated the number of affected workers to be 350,721. It represented that it derived its estimate from use of the American Community Survey (ACS) and requested that the Department use ACS, rather than the CPS, to estimate the number of affected workers.

The Department understands that Demos derived its estimate of the number of affected workers by considering data that included workers performing work on all Federal procurement contracts, including contracts for products to which the Executive Order does not apply. Demos' estimate of workers receiving less than $10.10 accordingly includes workers the Executive Order does not cover. Because the Department concludes its exclusion of contracts for products more accurately identifies the number of affected workers than Demos' inclusion of contracts for products, it is not adopting Demos' estimate of the number of affected workers. The Department additionally notes that estimates of affected workers derived from CPS data are similar to the estimates derived from ACS data, provided one excludes from each estimate workers performing work on contracts for products.[16]

Demos also commented that low-wage workers at companies with federal concession agreements and private entities that lease space in federal buildings must be accounted for in the estimates of the number of affected workers. It further stated that, while there is little comprehensive data on these workers, there could be more than 10,000 low-wage workers at companies with federal concession agreements and private entities that lease space in Federal buildings. Advocacy similarly expressed concern that the Department's economic analysis in the NPRM does not consider the impact on small businesses that employ affected workers on federal concession agreements and contracts related to leases of space in Federal buildings.

The Department agrees that there are likely some affected workers working on or in connection with covered concession agreements or leases in federal buildings that its estimate may not include. The Department, however, has identified no data source that allows it to reasonably estimate the number of those affected workers. Indeed, as Demos itself notes, there is little comprehensive data on these workers. In this context, the Department has concluded it is not feasible to include such workers in its estimate. Moreover, the inclusion of all contracts in the product service codes and the exclusion of some concessions contracts and covered contracts in connection with Federal property or lands likely offset each other, to at least some degree, in calculating the total number of affected workers under this Executive Order.

The Chamber/NFIB asserted that there is no basis to support the Department's assumption that wages among Federal contract workers follow the same distribution in terms of below and above $10.10 per hour as the wider group of private sector wage earners for whom the data is available. The Chamber/NFIB added that much of the required data may already be available through information currently collected by the Department's Office of Federal Contract Compliance Programs (OFCCP) in relation to its enforcement of affirmative action/non-discrimination regulations. The commenter also said the Department should conduct a survey of contractors to obtain definitive data regarding the number of affected workers.

The Department disagrees with these comments. The Department used wage and industry data from the CPS to calculate the total number of affected workers assuming the industry and wage distribution is the same for federal contractors and those in the rest of the U.S. economy. The Department believes this assumption is reasonable because the wage rates workers receive under the Federal construction and service contracts within the CPS are frequently derived from the applicable SCA or DBA wage rates, both of which are derived from data the Department primarily collects from private sector employers. The Department further notes that CPS data includes both contractor and non-contractor firms, and that a data source reflecting only wages paid by Federal contractors is not available. In particular, the OFCCP does not collect or maintain a database of wages paid by all Federal contractors. Lastly, the Department did not conduct a survey of contractors to determine the number of affected workers because a reasonable estimate of the number of affected workers can be made by using CPS data.

This regulation affects only new contracts as that term is defined at § 10.2; it does not affect existing contracts. The Department, as explained in the NPRM, found no precise data with which to measure the number of construction and service contracts that are new each year. According to a 2012 Small Business Administration (SBA) study, between FY 2005 and FY 2009, an average of 17.6 percent of all Federal contracts with small businesses were awarded to small businesses that were new to Federal contracting (and thus must have been new contracts) based on data from the Federal Procurement Data System (FPDS).[17] In the economic analysis of the final rule of ''Nondisplacement of Qualified Workers Under Service Contracts,'' the Department assumed that slightly more than 20 percent of all SCA covered contracts would be successor contracts subject to the nondisplacement provisions.[18] After considering these factors, and recognizing in particular that some contracts covered by the Executive Order (including those exempted from SCA coverage under 29 CFR 4.133(b)) are for terms of more than five years, the Department conservatively assumed for purposes of this analysis that roughly 20 percent of Federal contracts are initiated each year; therefore, it will take at least five years for the final rule's impact to fully manifest itself.

Transfers From Federal Contractor Employers and Taxpayers to Workers

The most accurate way to measure the pay increase that affected workers can expect to receive as a result of the minimum wage increase would be to calculate the difference between $10.10 and the average wage rate currently paid to the affected workers. However, the Department was unable to find data reflecting the distribution of the wages currently paid to the affected workers who earn less than $10.10 per hour.

[16] If Demos had used the ACS after excluding workers performing work on contracts for products, the estimated number of affected workers would be approximately 176,025 with the percentage of affected workers at 20.26 percent of all workers on covered Federal contract jobs. The percentage of affected workers from CPS data was estimated at 21.16 percent, resulting in 183,814 affected workers.

[17] Small Business Administration, ''Characteristics of Recent Federal Small Business Contracting,'' May 2012, *http://www.sba.gov/sites/default/files/397tot.pdf.*

[18] Department of Labor, ''Nondisplacement of Qualified Workers Under Service Contracts,'' Final Rule, Wage and Hour Division, 2011, *https://www.federalregister.gov/articles/2011/08/29/2011-21261/nondisplacement-of-qualified-workers-under-service-contracts.*

Thus, it is not possible to directly calculate the average wage rate the affected workers are currently paid.

Given this data limitation, the Department used earnings data from the CPS to calculate the average wage rate for U.S. workers who earn less than $10.10 per hour in the construction and service industries. Assuming that the wage distribution of Federal contract workers in the construction and service industries is the same as that in the rest of the U.S. economy, the Department estimated that the average wage for the affected workers associated with this final rule is $8.79 per hour. The difference between the estimated average wage rate of $8.79 per hour and $10.10 is $1.31 per hour.

The Chamber/NFIB, the AOA, Anthony Pannone, and Advocacy stated the Department's estimate of the direct impact of the minimum wage increase mandate is incomplete because this rule would also increase payroll taxes and workers' compensation insurance premiums in addition to the increase in wage payments (*e.g.,* $1.31 per hour). The Department recognizes that it will be incumbent upon contractors to pay the applicable percentage increase in payroll and unemployment taxes and that it has not factored these costs into its analysis. Similarly, the Department is not including within the estimates of the costs imposed by the minimum wage increase costs that Advocacy, Ski New Hampshire, the AOA, Louise Tinkler, and the Chamber/NFIB assert they, or their members, will incur based on the asserted need to adjust upward the wages of workers not covered by the Order. While some contractors may choose to increase wages of workers who currently earn more than $10.10, the Department has not quantified this potential ancillary impact to contractors in the economic analysis of this rule.

The Association/IFA contended that there will be an increase in costs associated with the employment of tipped employees on a covered contract. The commenter said that on January 1, 2015, the minimum cash wage for tipped employees will more than double (*i.e.,* increase by $2.77 ($4.90–$2.13)) and that within three years after that date, the minimum cash wage for tipped employees will nearly quadruple. The commenter also said that the increased costs will mean that these contractors will need to either significantly increase their prices or fundamentally restructure the method of payment to these employees. The Association/IFA also contended that the Department failed to account for the increased direct wage payment to tipped employees in the NPRM.

There is no credible data source that allows the Department to estimate the number of tipped employees covered by this Executive Order. The Department expects, however, that the number of tipped employees covered by the Executive Order will be small because contractors on the most commonly occurring DBA- and SCA-covered contracts rarely engage tipped employees on or in connection with such contracts, and the Department has received no data from interested commenters, including the Association/IFA, indicating that there will be a significant number of tipped employees covered by the Executive Order. Moreover, the Association/IFA's comment fails to account for the benefits, discussed in greater detail below, that may accrue to its members in conjunction with the new Executive Order minimum wage, including anticipated increases in productivity, lower absenteeism, less turnover and reduced supervisory costs.

The Department then applied the estimated average $1.31 increase in the applicable minimum wage to the Federal contract workers who will be potentially affected by the change. The Department also needed to account for the fact that this rule applies only to new contracts. As noted, the Department estimated that about 20 percent of covered contracts are new each year.[19] To estimate the total wage increase per year, the Department needed to calculate the total work hours in a year. The Department assumed a forty hour workweek, and by multiplying 40 hours per week by 52 weeks in a year, concluded that affected workers work 2,080 hours in a year.

The Department calculated the total increase that Federal contractors will pay their employees by multiplying the number of affected workers by the average wage increase of $1.31 per hour and 2,080 work hours per year. Based on the assumption that only 20 percent of contracts in 2015 will be new, the total increase that Federal contractors will pay affected workers by the end of 2015 is estimated to be $100.20 million ($183{,}814 \times \$1.31 \times 2{,}080 \times 20\%$).[20] When this rule's impact is fully manifested by the end of 2019, the total increase in hourly wages for affected workers is expected to be $501 million (in 2014 dollars) ($100.20 million × 5 years).[21] There is however, a possibility that this estimate is overstated because the analysis does not account for changes in state and local minimum wages that will raise wages independently of this final rule.[22] An additional reason to believe the transfer may be overestimated is because firms may respond to minimum wage increases by cutting fringe benefits and overtime (as found by Fairris, Runstein, Briones, and Goodheart (2005) in their examination of the results of a living wage ordinance in Los Angeles).

This $501 million is the estimated transfer cost from employers and taxpayers to workers in 2019. The Department expects these transfers to be accompanied by workers' increased productivity, reduced turnover, and other benefits to employers and the Federal Government as discussed in the Benefits section. Overall, the Department believes that the combined benefits to employers and the Federal Government justify the costs that would be incurred.

NELP, Ski New Hampshire, the AOA, and the Chamber/NFIB expressed their views on the increased wage cost to contractors as a result of this rule. NELP commented that the Department overstated the increased cost to contractors because five states (Massachusetts, Vermont, Connecticut, Maryland, and Hawaii) have recently raised their minimum wage, and the minimum wage in California, the nation's largest state, will be only 10 cents less than $10.10 an hour. It additionally noted that if a contract is

[19] Because many of the affected permits and authorizations are issued for one-year terms, the rule's impact on concessionaires—which the Department has not quantified—will likely be experienced more immediately than the linear increase over five years estimated for other types of contractors.

[20] Because the rate is effective for contracts resulting from solicitations on or after January 1, 2015, it is likely that work on covered contracts will not commence until later in 2015. Therefore, our analysis overstates the cost estimate as we used 2,080 hours to reflect the full year for 2015.

[21] Beginning January 1, 2016, the minimum wage will be adjusted annually by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W). Accordingly, this will adjust upward our estimated wage increase in 2016 and after. However, our estimates of wage increases for the affected workers are measured in 2014 constant dollars and therefore remain unchanged.

[22] The estimate of rule-induced transfers is based on an assumption that the final rule would have no impact on employment. According to the Council of Economic Advisers, the bulk of the empirical literature shows that raising the minimum wage by a moderate amount has little or no negative effect on employment. The published literature has primarily studied the impact of minimum wages in the private sector and thus may be more directly predictive of rule-induced outcomes for concessionaires and lessees than for other contracting entities affected by the final rule. In the public sector, many of the same factors that affect private companies, like the impact on the productivity of workers, are relevant for considering any impact on employment. However, ultimately employment related to federal contracts will largely depend on the future decisions of policymakers, such as budget and procurement decisions.

covered by the SCA or the DBA, the wage rates under those statutes can be higher than the minimum wage established by the Executive Order.

The Department's analysis accounted for states with minimum wage rates higher than the Federal minimum wage rate. It also accounted for instances where SCA and DBA wage rates are higher than the current Federal minimum wage rate of $7.25. However, the Department's estimate of the wage increase does not reflect the minimum wage increase to $10.00 in California that is scheduled to take effect on January 1, 2016, or the minimum wage increase to $11.50 in the District of Columbia that is scheduled to take effect on July 1, 2016; therefore, there may be a very slight overestimate of the average wage increase for affected workers in 2016 and thereafter.

Ski New Hampshire contended that a $10.10 rate will represent a 40 percent differential in pay scales between New Hampshire ski areas operating on Federal lands and New Hampshire ski areas that do not. While $10.10 is approximately 40 percent greater than $7.25, the commenter submitted no data related to what its member ski resorts pay workers for work performed at ski resorts on private land. In addition, the Executive Order minimum wage requirements apply only to ''new contracts'' as defined in § 10.2. The Executive Order thus ensures that contracting agencies and contractors will generally have sufficient notice of any obligations under Executive Order 13658 and can take into account any potential economic impact of the Order on projected labor costs after January 1, 2015.

The Chamber/NFIB commented that indexing the minimum wage to inflation implies a permanence that may inspire firms to make deep cuts in labor costs. To the extent the commenter is asserting that cuts in labor costs will result from the Executive Order's minimum wage requirements, the Department believes that any downward pressure on hiring is likely to be mitigated by the impacts of higher wages on worker productivity, reduced turnover, lessened supervisory costs and other benefits. Moreover, the bulk of the empirical literature suggests that, on net, minimum wages have little to no adverse impact on employment. The Department additionally notes that the purpose of indexing the minimum wage to inflation is to approximately maintain the value of, not increase, the minimum wage after the initial increase. Indeed, the Executive Order's inflation index provides workers a wage that keeps pace with the rising costs of goods and services consistent with the manner in which the prices of goods and services provided by contractors generally increase in a manner commensurate with inflation. Therefore, the Department disagrees with the commenter that indexing the minimum wage to inflation would cause employers to make cuts in labor costs.

The Chamber/NFIB and HR Policy Association asserted that empirical literature and economic theory firmly indicate that across-the-board hikes in the minimum wage will directly benefit some workers but reduce overall employment. The George Washington Regulatory Studies Center asserted it is conceivable that the Executive Order minimum wage increase will result in a decrease in worker hours or the number of workers assigned to a contract. All three commenters cited the Congressional Budget Office's estimate that if such a wage increase to $10.10 were implemented nationally, it would reduce employment by 500,000 workers. The Mercatus Center at George Mason University similarly asserted that raising the minimum wage is an incentive for employers to lay off less productive workers.

The Department has carefully considered the comments, and closely scrutinized the potential effect on employment associated with the wage increase to the affected workers covered by federal contracts. For the following reasons, the Department disagrees with the suggestion that the Executive Order minimum wage increase will necessarily reduce overall employment. The CBO study estimated that increasing the minimum wage to $10.10 nationwide would reduce total employment by 0.3 percent (or 500,000 workers). The study also indicated that the total reduction in employment might be smaller in the long run because a higher minimum wage tends to increase the employment of higher-wage workers. Moreover, a higher minimum wage for low-wage workers, who tend to spend a larger fraction of their earnings, can increase demand for goods and services which, in turn, would boost employment and economic growth. Furthermore, empirical evidence shows that firms are able to respond to mandatory increases in minimum wages without significantly reducing employment.[23] A possible partial explanation for this result is that firms experience increased productivity of labor through better screening, training, and improved production practices, and that these measures help mitigate reductions in employment in response to wage increases (such as the increase mandated by the Executive Order). The Department accordingly expects that an increase in the minimum wage to $10.10 for workers on covered federal contracts would have, on net, little or no negative effect on employment.

Additional Compliance Costs

This rule requires executive departments and agencies to include a contract clause in any contract covered by the Executive Order. The clause describes the requirement to pay all workers performing work on or in connection with covered contracts at least the Executive Order minimum wage. Contractors and their subcontractors will need to incorporate the contract clause into covered lower-tier subcontracts. The Department believes that the compliance cost of incorporating the contract clause will be negligible for contractors and subcontractors.

The Department has drafted this final rule consistent with the directive in section 4(c) of the Executive Order that any regulations issued pursuant to the Order should, to the extent practicable, incorporate existing procedures from the FLSA, SCA and DBA. As a result, most contractors subject to this rule generally will not face any new requirements, other than payment of a wage no less than the minimum wage required by the Order. The final rule does not require contractors to make other changes to their business practices. Therefore, the Department posits that the only regulatory familiarization cost related to this final rule is the time necessary for contractors to read the contract clause, evaluate and adjust their pay rates to ensure workers on covered contracts receive a rate not less than the Executive Order minimum wage, and modify their contracts to include the required contract clause. For this activity, the Department estimates that contractors will spend one hour. The estimated cost of this burden is based on data from the Bureau of Labor Statistics in the publication ''Employer Costs for Employee Compensation'' (September 2013), which lists hourly compensation for the Management, Professional, and Related occupational group as $51.74. There are approximately 500,000 contractor firms registered in the General Services Administration's (GSA) System for Award Management (SAM). Therefore, the estimated hours for rule

[23] *See* Dale Belman and Paul J. Wolfson, ''The New Minimum Wage Research,'' UPJOHN Institute for Employment Research 21, no. 2 (2014), for a comprehensive review of the wage literature on the impact of minimum wage on employment, *http://research.upjohn.org/cgi/viewcontent.cgi?article=1220&context=empl_research.*

familiarization is 500,000 hours (500,000 contractor firms × 1 hour = 500,000 hours). The Department calculated the total estimated cost as $25.87 million (500,000 hours × $51.74/hour = $25,870,000).

Four commenters, the Association/IFA, the AOA, Advocacy, and the Chamber/NFIB, asserted the Department underestimated the ''additional compliance costs'' associated with this rule and that the Department's proposal to make contractors responsible for subcontractors' compliance would result in significant costs to contractors. The Department disagrees that the rule will result in significant compliance costs to contractors based on their responsibility for subcontractors' compliance. As discussed previously, contractors subject to the SCA and/or DBA have long had a comparable flow-down obligation by operation of the SCA and DBA. Thus, upper-tier contractors' flow-down responsibility, and lower-tier subcontractors' need to comply with prevailing wage-related legal requirements so that upper-tier contractors do not incur flow-down liability, are well understood concepts to SCA and DBA contractors. *See* 29 CFR 5.5(a)(6) and 4.114(b). While the flow-down structure may be less familiar to some sub-set of contractors subject to the Executive Order under sections 7(d)(i)(C) and (D), the fact that the SCA applies to many contracts that are covered by section 7(d)(i)(C) and (D) should substantially reduce the number of contractors with no familiarity with flow-down liability.

The Association/IFA and AOA asserted that the proposed contract clause must be read and understood by a prudent contractor, a task that would take more than an hour. The commenters said the idea that only one member of the contractor company management would be sufficient to read and implement the clause is not credible except for the smallest of contractors. For the typical contractor company with fifty to one hundred employees, the commenters contended a core management senior group of three to five executives, each of whom would need to read and understand the rule as well as their attorneys paid at higher hourly rates, would likely also need to be involved.

The Department expects the regulatory familiarization cost to vary by contractor. While some contractors may need more than one hour to become familiar with the regulations, others will likely need less than one hour. That this rule incorporates existing procedures from the FLSA, SCA, and DBA to the extent practicable should, however, simplify the familiarization process for contractors. Indeed, the Department anticipates most contractors subject to the rule, particularly contractors with experience complying with the FLSA, SCA and DBA, generally will not face significant new requirements, other than payment of a wage no less than the minimum wage required by this Order. Therefore, the Department adopts its estimation from the NPRM that contractors will spend one hour on average to read the contract clause and evaluate and adjust their pay rates to ensure affected workers on covered contracts receive a rate not less than the Executive Order minimum wage.

Seven commenters (Anthony Pannone, Advocacy, the AOA, CSCUSA, Ski New Hampshire, the Association/IFA, and the Chamber/NFIB) expressed their views on the increased cost burden to contractors with Federal concession agreements and lease contracts. Mr. Pannone contended that implementation of this rule will create an uneven playing field for small business concessions on military installations relative to their direct competitors off base because they do not receive money from the government contract; rather, they pay commissions to provide their services on base while absorbing additional costs not imposed on their competitors off base. Advocacy asserted that affected small businesses are concerned that they cannot pass on the costs of a higher minimum wage to the government or customers and that fast-food franchisees at Advocacy's roundtable expressed concern that the Department is imposing labor costs that are almost double inside the military base compared to outside the military base. The AOA asserted that many of its members compete with other recreational or experimental service providers that do not operate on Federal lands and, therefore, requiring outfitters and guides who operate on Federal lands to pay a higher minimum wage will place them at a serious competitive disadvantage relative to operators on non-Federal lands who will not be subject to similar increased costs unless the state in which they operate adopts a similar requirement. CSCUSA and Ski New Hampshire asserted that the Executive Order will increase the costs of ski resorts that operate on Federal lands and place their businesses in an uncompetitive position with similarly situated ski resorts that do not operate on Federal lands. The Association/NFIB represented that contractors with concession contracts and contracts in connection with Federal property or lands often are in direct competition with other businesses and that application of the Executive Order's minimum wage would put businesses operating on Federal property or lands at a significant competitive disadvantage. The Chamber/NFIB asserted that, unlike contractors who are reimbursed for costs by the government for their construction or operational services to the government, concessionaires on defense bases cannot raise their prices to mitigate increased costs. It further asserted that concessionaires (*e.g.,* restaurant franchise operators) on military base property are required by law to charge prices no higher than they charge at their civilian property locations in the same area.

In response to these comments, the Department acknowledges that concessionaires and lessees, selling goods and services directly to private consumers, experience different rule-induced economic consequences (including price consequences) than other contracting entities affected by this rule. However, the commenters do not account for a number of factors that the Department anticipates will substantially offset many potential adverse economic effects on their businesses. These commenters did not consider that increasing the minimum wage of their workers could help reduce absenteeism and turnover in the workplace, improve employee morale and productivity, reduce supervisory costs, and increase the quality of services provided to the Federal Government and the general public. These commenters similarly do not address the possibility that increased efficiency and quality of services will attract more customers and result in increased sales. Furthermore, these commenters do not consider the offsetting effect of contractors' ability to negotiate a lower percentage of sales paid as rent or royalty to the Federal Government in new contracts.[24]

Moreover, the Executive Order minimum wage requirements apply only to ''new contracts'' as defined at § 10.2. The Executive Order thus ensures that contracting agencies and contractors will have sufficient notice of any obligations under Executive Order 13658 and can take into account any potential economic impact of the Order on projected labor costs prior to negotiating ''new contracts'' after January 1, 2015.

[24] This ability to negotiate is not universal. For example, permits for ski areas, marinas, and organizational camps are subject to land use fees that are determined by federal statute or agency regulations or directives.

Benefits

As the Department noted in the NPRM, it expects that increasing the minimum wage of Federal contract workers would generate several important benefits, including reduced absenteeism and turnover in the workplace, improved employee morale and productivity, reduced supervisory costs, and increased quality of government services.

Research shows that absenteeism is negatively correlated with wages, meaning that better-paid workers are absent less frequently (Dionne and Dostie 2007; Pfeifer 2010).[25] Pfeifer (2010) finds that a one percent increase in wages is associated with a reduction in absenteeism of about one percent (but also notes that ''the costs of higher absenteeism of workers at the lower tail of the wage distribution are rather low''). According to a study by Fairris, Runstein, Briones, and Goodheart (2005)—which, unlike the rest of the cited absenteeism literature, has identified a causal relationship between wages and absenteeism, rather than just correlation between absenteeism and either wages or productivity—managers reported that absenteeism decreased following the passage of a living wage ordinance in Los Angeles because employees had more to lose if they did not show up for work, and employees placed greater value on their jobs because they knew they would receive a lower wage at other jobs.[26] When workers are paid higher wages, they are absent from work less often. Finally, according to studies by Allen (1983), Zhang, Sun, Woodcock, and Anis (2013), reduced absenteeism has been associated with higher productivity.[27]

A higher minimum wage is also associated with reduced worker turnover (Reich, Hall, and Jacobs 2003; Fairris, Runstein, Briones, and Goodheart 2005).[28] In a study of homecare workers in San Francisco, Howes (2005) found that the turnover rate fell by 57 percent following implementation of a living wage policy. Furthermore, Howes found that a $1.00 per hour raise from an $8.00 hourly wage increased the probability of a new worker remaining with his or her employer for one year by 17 percentage points.[29] In their study of the effects of the living wage in Baltimore, Niedt, Ruiters, Wise, and Schoenberger (1999) found that most workers who received a pay raise expressed an improved attitude toward their job, including greater pride in their work and an intention to stay on the job longer.[30]

Reduced worker turnover is also associated with lower costs to employers arising from recruiting and training replacement workers. Because seeking and training new workers is costly, reduced turnover leads to savings for employers. Research indicates that decreased turnover costs partially offset increased labor costs (Reich, Hall, and Jacobs 2003; Fairris, Runstein, Briones, and Goodheart 2005). Holzer (1990) finds that high-wage firms can partially offset their higher wage costs through improved productivity and lower hiring and turnover costs. More specifically, Holzer finds that firms with higher wages spend fewer hours on informal training, have longer job tenure, more years of previous job experience, higher performance ratings, lower vacancy rates, and greater perceived ease in hiring. Holzer concludes that firms respond to higher wage costs in a variety of ways that sometimes offset more than half those costs.[31]

A body of literature predicts that companies may pay higher wages to reduce the need for direct monitoring and related supervisory costs. Workers in higher-wage jobs exhibit greater self-policing in order to protect their higher-wage positions. Empirical studies show that higher wages are associated with less intensive supervision (Groshen and Krueger 1990; Osterman 1994; Rebitzer 1995; Georgiadis 2013).[32] Therefore, increasing the minimum wage of Federal contract workers may lead to a reduction in the costs associated with supervisory expenses. Higher wages can substitute for other costly forms of supervising workers, such as hiring additional managers or including more supervisory duties in senior employees' duties.

Higher wages can also boost employee morale, thereby leading to increased effort and greater productivity. Akerlof (1982, 1984) contends that higher wages increase employee morale, which raises employee productivity.[33] Furthermore, higher productivity can have a positive spillover effect, boosting the productivity of co-workers (Mas and Moretti 2009).[34] This means that raising the minimum wage of Federal contract workers may not only increase the productivity of Federal contract workers, but may also improve the productivity of Federal workers.

The Department also expects the quality of government services to improve when the minimum wage of Federal contract workers is raised. In some cases, higher-paying contractors may be able to attract better quality workers who are able to provide better quality services, thereby improving the experience of citizens who engage with these government contractors. For example, a study by Reich, Hall, and

[25] Dionne, Georges and Benoit Dostie, ''New Evidence on the Determinants of Absenteeism Using Linked Employer-Employee Data,'' *Industrial and Labor Relations Review,* Vol. 61, No. 1, 2007.

Pfeifer, Christian, ''Impact of Wages and Job Levels on Worker Absenteeism,'' *International Journal of Manpower,* Vol. 31, No. 1, pp 59–72, 2010.

[26] Fairris, David, David Runsten, Carolina Briones, and Jessica Goodheart, ''Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses,'' LAANE, 2005.

[27] Allen, Steven, ''How Much Does Absenteeism Cost?'' *Journal of Human Resources,* Vol. 18, No. 3, pp 379–393, 1983.

Mefford, Robert, ''The Effects of Unions on Productivity in a Multinational Manufacturing Firm,'' *Industrial and Labor Relations Review,* Vol. 40, No. 1, pp 105–114, 1986.

Zhang, Wei, Huiying Sun, Simon Woodcock, and Aslam Anis, ''Valuing Productivity Loss Due to Absenteeism: Firm-level Evidence from a Canadian Linked Employer-Employee Data,'' Canadian Health Economists' Study Group, The 12th Annual CHESG Meeting, Manitoba, Canada, May 2013.

[28] Reich, Michael, Peter Hall, and Ken Jacobs, ''Living Wages and Economic Performance: The San Francisco Airport Model,'' Institute of Industrial Relations, University of California, Berkeley, March 2003.

Dube, Arindrajit, T. William Lester, and Michael Reich, ''Minimum Wage Shocks, Employment Flows and Labor Market Frictions,'' UC Berkeley Institute for Research on Labor and Employment, Working Paper, July 20, 2013.

Brochu, Pierre and David Green, ''The Impact of Minimum Wages on Labor Market Transitions,'' *The Economic Journal,* Vol. 123, No. 573, pp 1203–1235, December 2013.

[29] Howes, Candace, ''Living Wages and Retention of Homecare Workers in San Francisco,'' *Industrial Relations,* Vol. 44, No. 1, pp 139–163, 2005.

[30] Niedt, Christopher, Greg Ruiters, Dana Wise, and Erica Schoenberger, ''The Effect of the Living Wage in Baltimore,'' Working Paper No. 119, Department of Geography and Environmental Engineering, Johns Hopkins University, 1999.

[31] Holzer, Harry, ''Wages, Employer Costs, and Employee Performance in the Firm,'' *Industrial and Labor Relations Review,* Vol. 43, No. 3, pp 147–164, 1990.

[32] Groshen, Erica L. and Alan B. Krueger, ''The Structure of Supervision and Pay in Hospitals,'' *Industrial and Labor Relations Review,* Vol. 43, No. 3, pp 134–146, 1990.

Osterman, Paul, ''Supervision, Discretion, and Work Organization,'' *The American Economic Review,* Vol. 84, No. 2, pp 380–84, 1994.

Rebitzer, James, ''Is There a Trade-Off Between Supervision and Wages? An Empirical Test of Efficiency Wage Theory,'' *Journal of Economic Behavior and Organization,* Vol. 28, No. 1, pp 107–129, 1995.

Georgiadis, Andreas, ''Efficiency Wages and the Economic Effects of the Minimum Wage: Evidence from a Low-Wage Labour Market,'' *Oxford Bulletin of Economics and Statistics,* Vol. 75, No. 6, pp 962–979, 2013.

[33] Akerlof, George, ''Labor Contracts as Partial Gift Exchange,'' *The Quarterly Journal of Economics,* Vol. 97, No. 4, pp 543–569, 1982.

Akerlof, George, ''Gift Exchange and Efficiency-Wage Theory: Four Views,'' *The American Economic Review,* Vol. 74, No. 2, pp 79–83, 1984.

[34] Mas, Alexandre and Enrico Moretti, ''Peers at Work,'' *American Economic Review,* Vol. 99, No. 1, pp 112–45, 2009.

Jacobs (2003) found that increased wages paid to workers at the San Francisco airport increased productivity and shortened airport lines. In addition, higher wages can be associated with a higher number of bidders for government contracts, which can be expected to generate greater competition and an improved pool of contractors. Multiple studies have shown that the bidding for municipal contracts remained competitive or even improved when living wage ordinances were implemented (Thompson and Chapman 2006).[35]

The Department expects the increase in the minimum wage for Federal contract workers to result in less absenteeism, reduced labor turnover, lower supervisory costs, and higher productivity. Moreover, higher-paid contract workers who demonstrate higher productivity may also boost the productivity of those around them, including Federal employees. Furthermore, the quality of government services may improve as contractors who raise the wage rates paid to their workers incur these benefits and attract better quality workers, thereby improving the experience of citizens who use government services.

The Chamber/NFIB, the HR Policy Association, and the George Washington Regulatory Studies Center stated that this rule cites studies demonstrating that higher minimum wages increase morale, productivity, and quality of work and reduce absenteeism, worker turnover, and the costs associated with supervisory expenses without providing a quantitative cost-benefit analysis of the specific wage increases for current and future beneficiaries of this rule. The HR Policy Association noted that the Department acknowledges that the evidence is based on analysis of firms that have voluntarily raised wages and that there may be differences between such firms and the contractors that would newly increase wages as a result of the NPRM.

The Department agrees that its expectation that the increase in the minimum wage for federal contract workers will result in less absenteeism, reduced labor turnover, lower supervisory costs, and higher productivity is based on a review of studies, many of which examined why firms voluntarily pay higher wages. Therefore, there may be differences between such firms and the federal contractors that would newly increase wages as a result of this final rule. The Department has not quantified the benefits it expects these regulations will engender because there is insufficient data to allow the Department to quantify the benefits of this rule. However, the Department believes the combined benefits to contractors and the Federal Government will justify the costs that will be incurred as a result of this final rule, leading to improved economy and efficiency in government procurement.[36]

The Mercatus Center at George Mason University stated that even if the cited studies in the NPRM suggest that increased wages lead to increased productivity, they do not indicate that the value of the increased productivity exceeds the cost of the increased wage. The Mercatus Center further stated that ''by not comparing the value of increased productivity with the cost of achieving the increased productivity, the DOL cannot say whether the rule will be net benefit or detriment to the economy at large.'' Therefore, the Mercatus Center contends, the cited studies fail to support the fundamental premise of the NPRM.

Although most of the cited studies do not quantitatively value productivity increases resulting particularly from the wage increase to $10.10 to workers covered by this final rule, the cited studies do support the conclusion that increased wages can enhance productivity. The Department expects this increase in productivity, coupled with the anticipated reductions in absenteeism and turnover, lowered supervisory costs, and increased quality of government services, to result in substantial offsetting of many of the costs to contractors of the increased wage.

The Mercatus Center additionally questioned the manner in which the Department's NPRM relied on economic studies, contending the Department misinterpreted research, inappropriately generalized results and failed to mention important caveats. The Department has carefully reviewed the economic studies it cited in the NPRM in light of the commenter's assertions. Finally, the George Washington Regulatory Studies Center's comment invoked the retrospective review process identified in Executive Order 13563, Improving Regulation and Regulatory Review. The Department appreciates the comment and notes that its Regulatory Agendas, which are published with the Unified Agenda of Federal Regulatory and Deregulatory Actions, *see, e.g.,* 79 FR 896, 1020, contain information on how the Department implements the retrospective review process contained in Executive Order 13563.

Discussion of Regulatory Alternatives

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. As discussed above, this rule has been designated an economically significant regulatory action under section 3(f)(1) of Executive Order 12866.

The Department notes that, as the E.O. 12866 analysis of the proposed rule explained, Executive Order 13658 delegates to the Secretary the authority only to issue regulations to ''implement the requirements of this order.'' Because the Executive Order itself establishes the basic coverage provisions and minimum wage requirements that the Department is responsible for implementing, many potential regulatory alternatives are beyond the scope of the Department's authority in issuing this final rule. For illustrative purposes only, however, this section presents immediately below two possible alternatives to the provisions set forth in this final rule. The Regulatory Flexibility Act section that follows also contains a discussion of regulatory alternatives, including an analysis of comments received.

Alternative 1: The Minimum Wage Increases by the Annual Percentage Increase in the Consumer Price Index for All Urban Consumers (CPI–U)

Executive Order 13658 directs the Secretary of Labor to determine the minimum wage beginning on January 1, 2016, by indexing future increases to the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W). *See* 79 FR 9851. The CPI–W is based on the expenditures of households in which more than 50 percent of household income comes from clerical or wage occupations. The CPI–W population represents about 32 percent of the total U.S. population and is a subset, or part, of the CPI–U population.

A broader CPI is the CPI–U, which covers all urban consumers, who represent about 88 percent of the total U.S. population. While the CPI–W is used to calculate Social Security cost-of-living adjustments (COLAs), most other COLAs cited in Federal legislation, such as the indexation of Federal income tax

[35] Thompson, Jeff and Jeff Chapman, ''The Economic Impact of Local Living Wages,'' Economic Policy Institute, Briefing Paper #170, 2006.

[36] The phrase ''economy and efficiency'' is used here only in the sense implied by the Federal Property and Administrative Services Act.

brackets, use the CPI–U. Under this alternative, the minimum wage increases by the annual percentage in the CPI–U. Table 1 below shows the annual percentage changes of the CPI–W and CPI–U for 2008–2013.

TABLE 1—THE CPI–W AND CPI–U FOR 2008–2013

Year	CPI–W (%)	CPI–U (%)
2008	4.1	3.8
2009	−0.7	−0.4
2010	2.1	1.6
2011	3.6	3.2
2012	2.1	2.1
2013	1.4	1.5

(Source: US DOL, BLS, All items (1982–84 = 100)

The CPI–U generally has lower annual percentage changes and therefore, the minimum wage increase by the annual percentage increase in the CPI–U would likely result in a slightly smaller impact of this final rule. The CPI–U is about 0.2 percent lower than the CPI–W per year on average. Thus, the annual impact of this rule, starting in the second year of the rule's implementation, would be approximately 0.2 percent smaller if the CPI–U were used rather than the CPI–W. The Department rejected this regulatory alternative because it was beyond the scope of the Department's authority in issuing this final rule. Executive Order 13658 specifically requires the Department to utilize the CPI–W in determining the Executive Order minimum wage beginning January 1, 2016, and annually thereafter. *See* 79 FR 9851.

Alternative 2: The Minimum Wage Increases by the Annual Percentage Increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) on a Quarterly Basis

Executive Order 13658 directs the Secretary of Labor, when calculating the annual percentage increase in the CPI–W, to compare the CPI–W for the most recent month, quarter, or year available with that for the same month, quarter, or year in the preceding year. *See* 79 FR 9851. As explained above, the Secretary has proposed to base such increases on the most recent year available.

Under this alternative, the annual percentage increase in the CPI–W is calculated only by comparing the CPI–W for the most recent quarter with the same quarter in the preceding year. The impact of this alternative will be either higher or lower than that of the final rule. However, the Department expects that the difference would be less than one per cent of the total impact of this final rule.

The Department rejected this regulatory alternative because utilizing the most recent year available, rather than the most recent month or quarter, minimizes the impact of seasonal fluctuations on the Executive Order minimum wage rate.

TABLE A—SHARES OF INDUSTRY OUTPUT BY INDUSTRY

Industry	NAICS code	Share of sector (%)
Total Wage and Salary		1.87
Mining	21	0.07
Oil and gas extraction	211	0.04
Mining, except oil and gas	212	0.12
Utilities	22	0.33
Construction	23	3.31
Manufacturing	31–33	4.10
Wholesale trade	42	1.31
Retail trade	44, 45	0.30
Transportation and warehousing	48, 492, 493	1.15
Information	51	0.83
Finance and insurance	52	0.62
Real estate, rental, and leasing	53	0.10
Professional, scientific, and technical services	54	8.74
Management of companies and enterprises	55	0.00
Administrative and support and waste management and remediation services	56	5.24
Administrative and support services	561	4.78
Waste management and remediation services	562	8.53
Education services	61	2.61
Health care and social assistance	62	0.42
Arts, entertainment, and recreation	71	0.03
Accommodation and food services	72	0.17
Accommodation	721	0.12
Food services and drinking places	722	0.19
Other services	81	0.59
Agriculture, forestry, fishing, and hunting	11	0.12

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Table B: Ratios of covered contracts by state and industry

State	Agricultural, forestry, fishing, and hunting	Mining	Construction	manufacturing	Wholesale trade	Retail trade	Transportation and warehousing	Utilities	Information	Finance and insurance	Real estate and rental and leasing	Professional and technical services	Management, administrative and waste management services	Educational services	Health care and social assistance	Arts, entertainment, and recreation	Accommodation and food services	Other services, except private households
AK	0.84	0	0.94	0.14	0.17	0.09	0.98	0.97	0.89	0.82	0.69	0.95	0.97	0.93	1	0.85	1	0.88
AL	0.63	0.62	0.96	0.13	0.12	0.21	0.91	0.98	0.49	0.84	0.68	0.94	0.96	0.93	0.88	0.93	0.92	0.85
AR	0.9	0	0.97	0.11	0.04	0.12	0.92	0.83	0.82	0.5	0.95	0.93	0.68	0.91	0.97	1	0.73	0.83
AZ	0.87	0.34	0.93	0.12	0.2	0.2	0.96	0.92	0.61	0.97	0.81	0.91	0.97	0.93	0.96	0.9	0.83	0.86
CA	0.78	0.2	0.95	0.11	0.03	0.06	0.93	0.85	0.62	0.95	0.82	0.91	0.97	0.85	0.95	0.89	0.69	0.75
CO	0.86	0.36	0.95	0.13	0.06	0.18	0.92	0.97	0.65	1	0.87	0.88	0.94	0.89	0.95	0.91	0.89	0.88
CT	0.47	0.13	0.96	0.04	0.05	0.12	0.92	0.98	0.65	0.87	0.86	0.84	0.96	0.95	0.93	0.92	0.25	0.83
DC	0.24	0.53	0.95	0.31	0.14	0.33	0.96	0.81	0.73	0.86	0.88	0.9	0.96	0.91	0.93	0.97	0.95	0.84
DE	1	0.93	0.13		0.18	0.81		0.96		1	0.88	0.92	0.94	0.97	0.93	0.91	0.79	0.87
FL	0.68	0.06	0.95	0.1	0.07	0.14	0.91	0.88	0.69	0.92	0.81	0.9	0.97	0.87	0.82	0.99	0.89	0.86
GA	0.61	0.48	0.95	0.1	0.06	0.17	0.93	0.93	0.63	0.99	0.87	0.92	0.96	0.8	0.82	0.91	0.89	0.82
HI	0.74	0.19	0.98	0.15	0.05	0.13	0.99	0.9	0.79	1	0.97	0.94	0.99	0.93	0.98	1	0.98	0.89
IA	0.2	0	0.97	0.08	0.08	0.07	0.73	0.95	0.77	1	0.63	0.9	0.96	0.93	0.97	0.83	0.73	0.91
ID	0.74	0.14	0.96	0.12	0.05	0.26	0.98	0.96	0.78	1	0.89	0.94	0.99	0.91	0.99	0.9	0.45	0.93
IL	0.7	0.11	0.93	0.07	0.01	0.08	0.9	0.95	0.42	0.89	0.86	0.87	0.93	0.97	0.95	0.67	0.98	0.82
IN	0.38	0.36	0.89	0.05	0.06	0.16	0.8	0.72	0.66	1	0.71	0.88	0.99	0.93	0.92	1	0.99	0.76
KS	0.83	0.06	0.96	0.1	0.1	0.18	0.91	0.96	0.63	0.97	0.79	0.93	0.99	0.93	1	0.96	0.98	0.88
KY	0.83	0.06	0.94	0.06	0.07	0.11	0.93	0.98	0.63	0.98	0.91	0.9	0.97	0.94	0.99	0.95	0.96	0.85
LA	0.8	0.44	0.96	0.09	0.05	0.2	0.98	0.94	0.61	0.93	0.9	0.95	0.94	0.93	0.98	0.97	0.94	0.77
MA	0.4	0.54	0.95	0.08	0.06	0.1	0.95	0.94	0.47	0.95	0.92	0.95	0.89	0.88	0.93	0.88	0.77	0.83
MD	0.25	0.28	0.94	0.16	0.12	0.25	0.92	0.93	0.67	0.89	0.89	0.92	0.95	0.94	0.93	0.9	0.96	0.83
ME	0.47	0	0.97	0.18	0.13	0.22	0.93	0.7	0.62	1	0.99	0.91	0.97	0.94	0.94	1	0.29	0.86
MI	0.96	0.41	0.9	0.04	0.05	0.11	0.94	0.94	0.62	0.34	0.8	0.91	0.98	0.83	0.89	0.88	0.87	0.91
MN	0.84	0	0.95	0.04	0.05	0.1	0.84	0.99	0.48	0.99	0.91	0.89	0.96	0.91	0.96	1	0.85	0.82
MO	0.68	0.36	0.95	0.08	0.02	0.21	0.95	0.94	0.37	0.96	0.77	0.79	0.98	0.93	0.97	0.9	0.98	0.85
MS	0.89	0.07	0.94	0.14	0.03	0.21	0.87	0.95	0.56	1	0.85	0.92	0.97	0.87	1	0.86	0.92	0.87
MT	0.91	0.54	0.95	0.08	0.06	0.1	0.98	0.94	0.83	1	0.96	0.93	0.97	0.86	0.96	1	0.83	0.87
NC	0.74	0.03	0.96	0.08	0.08	0.24	0.97	0.9	0.7	0.95	0.91	0.91	0.95	0.92	0.95	0.9	0.97	0.84
ND	0.6	0.14	0.97	0.13	0.03	0.03	0.95	0.99	0.89	1	0.77	0.94	0.98	0.98	0.95	0.8	0.9	0.96
NE	0.82	0.1	0.96	0.1	0.13	0.16	0.95	0.93	0.66	1	0.73	0.97	0.98	0.89	0.97	0.9	0.88	0.89
NH	0.89	0.15	0.95	0.1	0.13	0.1	0.93	0.97	0.52	0.98	0.84	0.63	0.98	0.86	0.94	1	0.97	0.7
NJ	0.7	0.28	0.95	0.05	0.01	0.08	0.91	0.88	0.64	0.88	0.91	0.93	0.95	0.93	0.99	0.96	0.7	0.8
NM	0.91	0.53	0.94	0.14	0.07	0.19	0.98	0.97	0.74	0.97	0.84	0.93	0.98	0.94	0.91	1	0.97	0.87
NV	0.86	0.3	0.95	0.19	0.06	0.11	0.98	0.91	0.57	1	0.96	0.91	0.98	0.96	0.98	0.97	0.91	0.84
NY	0.5	0.21	0.93	0.05	0.03	0.06	0.71	0.93	0.56	0.82	0.93	0.92	0.96	0.82	0.99	0.87	0.93	0.82
OH	0.42	0.11	0.96	0.06	0	0.15	0.94	0.91	0.62	1	0.9	0.96	0.99	0.94	0.97	0.77	0.92	0.88
OK	0.86	0.32	0.95	0.15	0.08	0.16	0.99	0.84	0.72	1	0.83	0.9	0.98	0.91	0.96	0.94	0.66	0.91
OR	0.93	0.44	0.93	0.13	0.08	0.1	0.92	0.92	0.59	0.86	0.96	0.96	0.94	0.9	0.99	0.88	0.82	0.84
PA	0.52	0.1	0.92	0.05	0	0.2	0.91	0.77	0.69	0.95	0.92	0.91	0.97	0.92	0.95	0.82	0.33	0.8
RI	0.5	1	0.03		0.15	0.37		0.96		0.5	0.98	0.9	0.91	0.94	0.9	0.95	0.9	0.85
SC	0.93	0.17	0.94	0.08	0.04	0.21	0.91	0.95	0.65	0.98	0.8	0.95	0.95	0.92	0.85	0.94	0.72	0.83
SD	0.94	0	0.98	0.11	0.14	0.2	1	0.98	0.87	0.95	0.76	0.96	0.93	0.98	0.98	0.91	0.96	0.89
TN	0.93	0.32	0.93	0.06	0.08	0.19	0.92	0.92	0.73	0.97	0.95	0.78	0.98	0.84	0.88	1	0.9	0.82
TX	0.52	0.16	0.9	0.1	0.08	0.24	0.91	0.92	0.53	0.88	0.88	0.91	0.94	0.94	0.98	0.88	0.88	0.83
UT	0.83	0.04	0.94	0.13	0.07	0.13	0.95	0.99	0.55	0.97	0.9	0.94	0.97	0.64	0.94	0.89	0.68	0.9
VA	0.32	0.07	0.93	0.2	0.05	0.3	0.93	0.91	0.72	0.96	0.92	0.89	0.96	0.87	0.96	0.92	0.93	0.74
VT	1	0	0.96	0.05	0.13	0.3	1	0.76	0.5	1	0.76	0.87	0.96	0.95	0.96	0.83	0.95	0.88
WA	0.73	0.13	0.95	0.11	0.09	0.13	0.91	0.96	0.69	0.9	0.94	0.95	0.98	0.9	0.97	0.91	0.97	0.9
WI	0.76	0.09	0.95	0.04	0.04	0.04	0.97	0.96	0.75	0.96	0.99	0.9	0.96	0.91	0.88	0.87	0.63	0.84
WV	0.84	0	0.93	0.11	0.09	0.15	0.97	0.94	0.7	1	0.9	0.86	0.96	0.96	0.98	0.73	0.94	0.84
WY	0.81	0.11	0.95	0.19	0.13	0.18	1	0.97	0.64	1	0.85	0.89	0.98	0.97	0.96	0.83	0.92	0.89

Table C: Number of affected workers by state and industry

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Number of workers paid hourly rates bewteen $7.25 and $10.09 by state and major industry, 2013 annual averages.

States	Total	Agricultural, forestry, fishing, and hunting	Mining	Construction	Durable goods manufacturing	Nondurable goods manufacturing	Wholesale trade	Retail trade	Transportation and warehousing	Utilities	Information
	183,814	345	6	21,333	2,835	2,729	239	2,338	6,800	108	1,299
AK	200	0.2	0.0	10.9	1.6	1.6	1.4	2.8	18.4	1.2	3.7
AL	2,784	0.8	0.0	407.7	187.1	83.3	9.9	56.9	113.9	3.9	7.4
AR	974	5.6	0.0	164.2	18.3	49.8	1.6	14.7	7.2	1.2	10.1
AZ	5,076	9.4	0.0	617.3	97.1	68.1	22.6	48.1	174.6	0.0	22.7
CA	23,362	149.2	0.3	2239.1	477.3	577.4	16.7	99.4	940.6	17.8	149.3
CO	3,026	1.5	0.4	271.9	45.2	31.9	2.3	37.2	69.0	4.3	28.2
CT	893	0.6	0.0	100.6	6.5	3.6	0.3	13.5	20.0	1.5	8.1
DC	166	0.0	0.0	21.9	0.0	1.8	0.2	4.2	2.1	0.0	1.2
DE	502	2.7	0.0	6.2	0.0	0.0	2.8	42.3	0.0	0.0	0.0
FL	11,261	5.6	0.0	1244.2	50.2	98.8	13.9	133.8	401.9	2.7	134.2
GA	7,229	4.9	0.0	821.8	138.9	122.4	11.9	83.0	316.0	10.9	21.4
HI	727	1.5	0.0	112.6	1.1	15.8	1.1	7.4	50.9	0.7	3.2
IA	2,103	1.2	0.0	176.9	32.2	52.0	3.3	14.1	27.5	1.4	36.3
ID	1,138	6.8	0.0	160.8	16.1	34.0	1.3	29.6	55.3	1.3	18.1
IL	6,560	6.1	0.1	567.9	139.1	79.1	1.7	46.8	396.5	0.0	45.3
IN	4,496	4.8	0.3	467.5	73.2	51.8	4.6	59.7	94.7	3.2	45.2
KS	2,327	0.8	0.0	231.0	52.6	31.3	3.3	27.5	42.1	0.0	13.4
KY	3,304	5.0	0.1	307.5	45.4	32.2	5.3	30.5	183.7	2.2	23.4
LA	2,490	2.8	1.3	631.8	39.9	8.4	4.5	62.5	99.5	8.4	11.4
MA	2,480	1.6	0.0	213.7	22.7	38.7	4.4	29.7	94.3	0.0	4.8
MD	3,312	0.6	0.0	294.5	22.6	69.1	4.8	71.9	43.1	0.0	33.3
ME	575	0.9	0.0	70.7	18.6	10.0	2.9	21.6	3.6	1.6	7.9
MI	5,443	19.9	0.0	418.2	76.1	39.2	7.5	56.9	150.2	4.0	62.1
MN	2,602	7.8	0.0	189.2	12.1	24.2	2.5	31.6	108.2	2.3	19.0
MO	2,841	8.2	0.2	232.5	37.3	41.5	1.0	63.9	125.3	5.3	4.4
MS	1,403	6.4	0.1	190.4	93.2	89.2	0.8	36.2	72.6	2.1	3.2
MT	437	1.6	0.1	34.6	4.3	4.3	0.2	4.3	17.9	0.6	5.6
NC	7,630	10.7	0.0	777.4	53.2	149.7	19.6	124.8	269.9	0.0	20.8
ND	328	1.2	0.1	11.4	10.2	6.0	0.1	1.3	14.7	0.5	8.3
NE	1,331	7.3	0.0	162.7	22.8	45.3	5.3	19.2	30.4	0.0	12.8
NH	660	1.2	0.0	68.4	11.6	5.8	2.0	8.8	18.2	0.4	4.5
NJ	3,753	1.1	0.0	471.7	21.2	34.5	1.3	25.5	143.2	1.7	8.3
NM	1,619	1.3	0.4	192.8	4.0	23.6	0.9	18.2	7.7	0.0	16.7
NV	1,609	1.0	0.1	106.3	21.3	13.9	2.2	14.1	89.4	0.0	14.0
NY	8,778	1.9	0.0	649.5	56.3	58.9	5.0	45.7	344.2	0.0	69.2
OH	5,483	4.9	0.0	352.5	85.8	75.5	0.0	70.0	217.1	2.2	40.0
OK	2,418	1.8	0.5	366.9	52.5	20.0	3.5	38.1	83.4	0.0	18.8
OR	1,000	5.0	0.0	94.3	21.7	26.6	1.9	10.0	43.3	0.0	8.7
PA	6,011	12.2	0.0	628.3	58.4	63.4	0.0	128.1	278.4	2.3	87.1
RI	377	0.1	0.0	0.8	0.0	0.0	1.1	16.3	0.0	0.0	0.0
SC	3,503	0.0	0.0	403.6	74.6	61.4	1.4	61.5	124.2	0.0	11.5
SD	470	2.4	0.0	42.3	7.5	8.6	1.2	11.3	8.2	0.0	3.7
TN	4,513	4.8	0.0	525.9	49.4	28.5	5.7	69.3	278.6	0.0	39.2
TX	22,416	11.5	2.3	4593.4	329.9	239.7	36.2	347.1	804.0	14.1	87.3
UT	2,348	1.6	0.0	338.7	63.5	40.9	2.0	25.0	84.9	1.5	16.8
VA	5,235	2.3	0.0	815.5	123.7	77.1	2.7	119.5	98.6	0.0	43.1
VT	165	1.0	0.0	12.2	1.2	1.9	0.8	5.7	5.8	0.0	2.3
WA	1,206	7.8	0.0	158.9	15.4	23.3	7.4	14.5	37.6	0.0	12.2
WI	3,934	6.4	0.0	173.2	34.3	45.5	3.0	13.6	123.8	6.5	41.6
WV	1,091	0.0	0.0	161.0	4.9	16.4	3.1	14.9	59.6	1.5	5.4
WY	227	0.7	0.1	20.4	3.0	3.3	0.3	5.8	6.3	0.3	3.8

Table C: Number of affected workers by state and industry

Number of workers paid hourly rates bewteen $7.25 and $10.09 by state and major industry, 2013 annual averages.

States	Total	Finance and insurance	Real estate and rental and leasing	Professional and technical services	Management, administrative and waste management services	Educational services	Health care and social assistance	Arts, enterainment, and recreation	Accommodation and food services	Other services, except private households
	183,814	1,803	254	27,865	69,505	25,168	10,244	229	6,411	4,302
AK	200	2.4	0.1	12.4	59.5	50.5	13.1	0.3	15.8	4.4
AL	2,784	12.1	3.3	301.2	832.2	383.5	146.7	3.8	121.5	109.0
AR	974	8.4	2.8	78.2	354.9	47.7	131.4	1.2	44.5	32.3
AZ	5,076	43.3	9.2	663.9	2083.4	774.0	244.1	7.0	134.8	56.7
CA	23,362	241.8	22.1	2979.2	10868.4	2374.9	994.5	30.0	700.9	482.8
CO	3,026	16.1	4.2	754.5	1089.8	393.3	77.2	2.9	119.0	76.9
CT	893	5.8	0.7	164.1	279.5	197.1	61.7	2.2	9.3	17.6
DC	166	1.8	0.0	12.6	62.3	33.0	9.6	0.2	9.6	5.0
DE	502	8.4	0.1	57.3	216.7	106.0	30.6	1.1	17.5	10.7
FL	11,261	95.7	19.7	1697.6	5161.2	1099.5	464.0	21.3	385.9	231.0
GA	7,229	63.0	6.0	786.3	3506.6	720.2	235.0	5.0	248.8	126.5
HI	727	6.3	1.0	67.4	244.8	114.9	29.0	0.9	49.3	18.8
IA	2,103	16.7	1.4	317.2	821.7	347.9	149.0	2.1	68.0	34.6
ID	1,138	16.4	1.5	140.4	385.7	177.6	59.1	1.4	19.4	13.0
IL	6,560	80.4	3.2	1201.0	2290.0	939.5	326.9	5.0	307.7	123.5
IN	4,496	26.1	2.4	285.3	2092.8	767.7	185.0	6.8	197.5	127.6
KS	2,327	17.6	2.9	419.8	708.2	484.8	138.7	3.2	93.4	56.0
KY	3,304	21.6	10.2	436.0	1233.1	554.7	213.6	1.8	120.3	77.8
LA	2,490	12.8	2.8	302.1	684.9	164.9	274.0	2.4	108.1	67.0
MA	2,480	15.1	4.6	365.4	1085.4	238.4	178.5	7.2	88.8	86.8
MD	3,312	15.8	3.7	863.1	1069.4	484.8	109.1	3.9	117.5	105.0
ME	575	10.3	1.0	47.2	158.3	129.7	66.3	1.5	11.0	12.2
MI	5,443	45.8	7.0	647.9	2115.7	1032.3	338.1	9.6	234.5	178.3
MN	2,602	28.6	1.8	359.2	1082.8	324.9	170.8	5.6	137.9	93.6
MO	2,841	36.9	4.1	316.4	873.8	636.8	273.0	6.0	126.5	48.1
MS	1,403	16.2	1.3	62.0	446.9	147.7	134.5	3.0	53.3	43.6
MT	437	14.4	0.5	17.6	156.6	96.2	40.3	0.5	29.4	8.1
NC	7,630	62.1	8.3	1055.1	3323.1	841.4	470.2	8.1	264.9	170.5
ND	328	3.2	0.5	87.2	62.0	72.3	26.7	0.7	14.7	6.9
NE	1,331	23.4	2.8	230.2	432.8	186.2	79.8	1.4	43.5	24.5
NH	660	2.0	0.2	89.5	240.2	135.3	31.1	1.1	30.7	9.3
NJ	3,753	30.5	8.5	599.7	1571.9	473.1	223.2	3.7	88.3	45.4
NM	1,619	3.8	1.0	476.2	302.1	387.9	110.3	3.0	46.2	23.0
NV	1,609	7.5	2.9	367.4	700.7	123.3	46.2	6.9	73.2	18.0
NY	8,778	90.7	22.1	2785.4	2299.3	1171.1	661.8	8.8	292.1	215.7
OH	5,483	87.2	12.1	663.4	2261.9	662.3	511.2	6.5	298.4	131.8
OK	2,418	53.1	5.0	122.3	711.8	681.0	148.3	3.9	69.3	37.6
OR	1,000	1.7	1.2	186.6	298.8	178.7	47.4	0.9	45.3	28.1
PA	6,011	114.6	8.0	702.6	1806.9	1365.1	470.2	9.2	104.3	171.3
RI	377	2.5	0.9	33.8	173.8	70.8	34.6	0.5	25.7	16.2
SC	3,503	28.8	8.0	755.4	1137.6	519.6	153.4	3.2	104.1	54.7
SD	470	10.4	0.0	53.7	108.2	127.0	45.7	1.1	27.4	11.7
TN	4,513	13.0	3.6	567.6	1799.9	561.5	275.6	6.3	155.8	128.1
TX	22,416	222.4	33.2	3465.0	6927.3	2936.7	1153.5	10.3	651.9	550.4
UT	2,348	30.4	1.3	784.3	486.4	269.2	92.7	2.2	52.7	54.0
VA	5,235	56.7	9.8	628.1	1931.1	823.1	177.7	4.6	192.5	128.4
VT	165	1.5	0.0	10.7	50.8	48.5	10.6	0.2	7.3	4.3
WA	1,206	5.1	2.0	128.3	427.6	176.9	62.1	2.6	82.9	41.9
WI	3,934	42.2	2.3	592.0	2027.7	366.1	188.2	6.0	108.1	153.7
WV	1,091	30.3	1.4	109.8	389.3	119.4	112.8	0.9	40.6	19.8
WY	227	0.0	0.8	15.7	69.2	48.9	17.0	0.6	20.5	10.3

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V. Regulatory Flexibility Act/Final Regulatory Flexibility Analysis

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 of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' Public Law 96–354. To achieve that objective, the Act requires agencies promulgating proposed or final rules to prepare a certification and a statement of the factual basis supporting the certification, when drafting regulations that will not have a significant economic impact on a substantial number of small entities. The Act requires the consideration of the impact of a regulation on a wide range of small entities, including small

businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine 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 determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear. *Id.*

As explained in the NPRM, the Department published an initial regulatory flexibility analysis to aid stakeholders in understanding the economic impact of the proposed rule upon small entities and to obtain additional information on any such impact. *See* 79 FR 34602. The Department requested comments on the initial regulatory flexibility analysis set forth in the NPRM, including information regarding the number of small entities affected by the minimum wage requirements of Executive Order 13658, compliance cost estimates for such entities, and whether regulatory alternatives exist that could reduce the burden on small entities while still remaining consistent with the objective of the Order. *See* 79 FR 34602–09. The Department received several comments on the initial regulatory flexibility analysis.

After careful consideration of the comments received and based on the analysis below, the Department believes that this final rule will not have an appreciable economic impact on the vast majority of small businesses subject to the Executive Order. However, in the interest of transparency, the Department has prepared the following Final Regulatory Flexibility Analysis (FRFA) to aid the public in understanding the small entity impacts of the final rule. The Department modified its analysis to some extent from the initial regulatory flexibility analysis based on comments received from the public; such changes will be discussed below.

Why the Department is Considering Action: The Department has published this final rule to implement the requirements of Executive Order 13658, ''Establishing a Minimum Wage for Contractors.'' The Executive Order grants responsibility for enforcement of the Order to the Secretary of Labor.

Objectives of and Legal Basis for Rule: This rule establishes requirements and provides guidance for contracting agencies, contractors, and workers regarding how to comply with Executive Order 13658 and how the Department intends to administer and enforce such requirements. Section 5(a) of the Executive Order grants authority to the Secretary to investigate potential violations of and obtain compliance with the Order. 79 FR 9852. Section 4(a) of the Executive Order directs the Secretary to issue regulations to implement the requirements of the Order. *Id.*

Compliance Requirements of the Final Rule Including Reporting and Recordkeeping: As explained in this final rule, Executive Order 13658 provides that agencies must, to the extent permitted by law, ensure that new contracts, as described in section 7 of the Order, include a clause specifying, as a condition of payment, that the minimum wage to be paid to workers in the performance of the contract shall be at least: (i) $10.10 per hour beginning January 1, 2015; and (ii) an amount determined by the Secretary, beginning January 1, 2016, and annually thereafter. 79 FR 9851. Section 7(d) of the Executive Order establishes that this minimum wage requirement only applies to a new contract if: (i)(A) It is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded from the SCA by the Department's regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 79 FR 9853. Section 7(e) of the Order states that, for contracts covered by the SCA or the DBA, the Order applies only to contracts at the thresholds specified in those statutes. *Id.* It also specifies that, for procurement contracts where workers' wages are governed by the FLSA, the Order applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the Order pursuant to regulations or actions taken under section 4 of the Order. 79 FR 9853.

This final rule, which implements the coverage provisions and minimum wage requirements of Executive Order 13658, contains several provisions that could be considered to impose compliance requirements on contractors. The general requirements with which contractors must comply are set forth in subpart C of this part. Contractors are obligated by Executive Order 13658 and this final rule to abide by the terms of the Executive Order minimum wage contract clause. Among other requirements set forth in the contract clause, contractors must pay no less than the applicable Executive Order minimum wage to workers for all hours worked on or in connection with a covered contract. Contractors must also include the Executive Order minimum wage contract clause in covered subcontracts and require covered subcontractors to include the clause in covered lower-tier contracts.

The final rule also requires contractors to make and maintain, for three years, records containing the information enumerated in § 10.26(a)(1)–(6) for each worker: Name, address, and Social Security number; the worker's occupation(s) or classification(s); the rate or rates of wages paid to the worker; the number of daily and weekly hours worked by each worker; any deductions made; and the total wages paid. However, the records required to be kept by contractors pursuant to this part are coextensive with recordkeeping requirements that already exist under, and are consistent across, the FLSA, SCA, and DBA; as a result, a contractor's compliance with these payroll records obligations will not impose any obligations to which the contractor is not already subject under the FLSA, SCA, or DBA. The final rule does not impose any reporting requirements on contractors.

Contractors are also obligated to cooperate with authorized representatives of the Department in the inspection of records, in interviews with workers, and in all aspects of investigations. The final rule and the Executive Order minimum wage contract clause set forth other contractor requirements pertaining to, inter alia, permissible deductions and frequency of pay, as well as prohibitions against taking kickbacks from wages paid on covered contracts and retaliating against workers because they have filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or have testified or are about to testify in any such proceeding.

All small entities subject to the minimum wage requirements of Executive Order 13658 and this final rule will be required to comply with all of the provisions of the final rule. Such

compliance requirements are more fully described above in other portions of this final rule. The following section analyzes the costs of complying with the Executive Order minimum wage requirement for small contractor firms.

Calculating the Impact of the Final Rule on Small Contractor Firms: The Department must determine the compliance cost of this final rule on small contractor firms (*i.e.,* small business firms that enter into covered contracts with the Federal Government), and whether these costs will be significant for a substantial number of small contractor firms. If the estimated compliance costs for affected small contractor firms are less than three percent of small contractor firms' revenues, the Department considers it appropriate to conclude that this final rule will not have a significant economic impact on small contractor firms.

As explained in the NPRM, the Department has chosen three percent as our significance criterion; however, using this benchmark as an indicator of significant impact may overstate the significance of such an impact, due to substantial offsetting of many of the costs to contractors associated with the Executive Order by the benefits of raising the minimum wage, which are difficult to quantify. The benefits, which include reduced absenteeism, reduced employee turnover, increased employee productivity, and improved employee morale, are discussed more fully in the Executive Order 12866 section of this final rule.

The Department received a few comments regarding the proposed significance criterion set forth in the NPRM. The Chamber/NFIB criticized the Department's use of three percent as the appropriate benchmark for testing impact significance, asserting that such a threshold is ''arbitrarily high.'' The commenter further stated that the Department offered no explanation or justification for selecting three percent of revenue as its significance test benchmark. The commenter did not provide its views on what it believes to be a reasonable threshold. The Chamber/NFIB also contended that DOL should have instead analyzed significance based on an examination of the relation of contractor profits to revenue and derived a cost-to-revenue impact test based on the implicit impact on profits.

In response to this comment, the Department notes that the Regulatory Flexibility Act (RFA) does not define ''significant.'' 5 U.S.C. 601. It is widely accepted, however, that ''[t]he agency is in the best position to gauge the small entity impacts of its regulations.'' SBA Office of Advocacy, ''A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,'' at 18 (May 2012), available at *http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf* (hereinafter, SBA Guide for Government Agencies). A threshold of three percent of revenues, not profits, has been used in prior rulemakings for the definition of significant economic impact. This threshold is consistent with that sometimes used by other agencies. *See, e.g.,* 79 FR 27106, 27151 (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 three percent annually are not economically significant). In light of such precedent and because the Department has received no indication that a three percent threshold constitutes an inappropriate significance criterion in this specific instance, the Department concludes that its use of a three percent of revenues significance criterion is appropriate. Moreover, as noted above, the Department's use of a three percent benchmark as an indicator of significant impact may *overstate* the significance of such an impact because the Department expects substantial offsetting of the cost increase to many contractors due to workers' increased productivity, reduced turnover, and other benefits as discussed in the Executive Order 12866 analysis.

The Chamber/NFIB also commented that the Department should have instead analyzed significance based on an examination of the relation of contractor profits to revenue and derived a cost-to-revenue impact test based on the implicit impact on profits. In response to this comment, the Department used revenue to estimate the cost-to-revenue impact in its analysis as the SBA Guide for Government Agencies explains that the percentage of revenue is one measure for determining economic impact. The Department found no reliable data source that allows the Department to obtain contractors' profit information to measure the impact as a percentage of their profit.

The data sources used in the analysis of small business impact are the Small Business Administration's (SBA) Table of Small Business Size Standards, the Current Population Survey (CPS), and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB). Because data limitations do not allow us to determine which small firms within each industry are Federal contractors, the Department assumed that these small firms are not significantly different from the small Federal contractors that will be directly affected by the final rule. In the NPRM, the Department focused its analysis on nine industries under which most Federal contractors covered by the Executive Order are classified: Construction (North American Industry Classification System (NAICS) code 23); transportation and warehousing (NAICS codes 48, 492, and 493); data processing, hosting, related services, and other information services (NAICS codes 518 and 519); administrative and support and waste management and remediation services (NAICS code 56); education services (NAICS code 61); health care and social assistance (NAICS code 62); accommodation and food services (NAICS code 72); other services (NAICS code 81); and agriculture, forestry, fishing, and hunting (NAICS code 11).

Two commenters, the AOA and Advocacy, asserted that the nine industrial classifications utilized by the Department did not include the recreation, outfitting and guiding industry under which some contractors covered by the Executive Order may be classified.

In response to this comment, the Department has revised its small business impact analysis to include nineteen industry sectors identified by two-digit NAICS level. The use of these nineteen industry sectors is consistent with the use of the same nineteen industry sectors set forth in Table A of the Department's Executive Order 12866 analysis in the NPRM and this final rule. The Department could not find industry data specific to the recreation, outfitting and guiding industry even at the six-digit NAICS level, but believes that contractors in this industry would be included within the broader industry sectors of agriculture, forestry, fishing, and hunting (NAICS code: 11); arts, entertainment, and recreation (NAICS code: 71); accommodation and food services (NAICS code: 72); and other services (NAICS code: 81). Of these four industry sectors, only the arts, entertainment, and recreation industry was not included in the Initial Regulatory Flexibility Analysis.

The Department used the following steps to estimate the cost of the final rule per small contractor firm as measured by the percentage of total annual receipts. First, the Department utilized 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 each of the nineteen industries set forth in Table A, as well as the total number of employees in small firms. Next, the Department calculated the average number of employees per small firm by dividing the total number of employees in small firms in each of the nineteen industries by the number of small firms.

However, since the Department knows that not all workers in small contractor firms earn less than $10.10 per hour, the Department next estimated how many employees of small firms earn less than $10.10 per hour. (These employees are referred to as ''affected workers'' in the text and summary tables below.) The Department used the same CPS data that is used in the Executive Order 12866 section of this final rule to ascertain the number of workers paid less than $10.10 per hour by industry. The data was then coupled with the employment levels for each industry to derive the percent of workers within an industry who will be affected by the minimum wage increase. The Department assumes that the wage distribution of contract workers covered by this final rule is the same as that of workers in the rest of the U.S. economy.

For each industry, to find the number of affected employees in small firms by revenue category, the Department multiplied the number of employees by the percent of employees earning less than $10.10 per hour in each industry derived from the CPS. The Department then calculated the average number of affected employees per small firm by dividing the total number of affected employees by the number of small firms.

Next, the Department calculated the annual cost of the increased minimum wage per small firm by multiplying the average number of affected workers per small firm by the average wage difference of $1.31 per hour ($10.10 minus the average wage of $8.79 per hour as explained in the economic analysis set forth in the Executive Order 12866 section of this final rule) and by the number of work hours per year (2,080 hours). Finally, the Department used receipts data from the SUSB to calculate the cost per small firm as a percent of total receipts by dividing the estimated annual cost per firm by the average annual receipts per firm. This methodology was applied to all nineteen industries (identified by two-digit NAICS level) and the results by industry are presented in the summary tables below (*see* Tables D–1 to D–19).

With respect to the Department's tables reflecting costs per small firm in each industry set forth in the NPRM, the Department received a comment from the FS recommending that the Department include additional thresholds below $2,500,000 in the table for the Other Services sector, under which the FS stated FS concessions contractors would be classified. The FS asserted that approximately 90 percent of permits for outfitting and guiding services involve annual revenue of less than $100,000 and that 9.5 percent of permits involve annual revenue between $100,000 and $2,500,000. The FS further estimated that only 0.5 percent of outfitting and guiding permits have annual revenue over $2,500,000.

In response to this comment, the Department added more revenue categories below $2,500,000 to account for the distribution of contractors in terms of their revenues for most of the nineteen industries. The added revenue categories include firms with sales/receipts/revenue that are: Below $100,000; from $100,000 to $499,999; from $500,000 to $999,999; and from $1,000,000 to $2,499,999. However, for four industries (mining, utilities, manufacturing, and wholesale trade), the size standard is based on the average number of employees, not on revenues, and therefore the Department's analysis based the distribution of contractors in those industries on their number of employees. The FS did not provide verifiable data on the number of small businesses by revenue category, their employment, or revenue for the Other Services industry sector that would be necessary for the Department to be able to analyze any specific impacts on this particular industry; Table D–19 below represents the Department's best estimate of the costs of the Executive Order minimum wage requirements per small firm in the Other Services industry.

Table D-1: Cost per small firm in the agriculture, forestry, fishing, and hunting industry

Agriculture, Forestry, Fishing, and Hunting Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm [1]	Total Number of Affected Employees [2]	Average Number of Affected Employees per Firm [3]	Annual Cost per Firm [4]	Annual Receipts	Average Receipts per Firm [5]	Annual Cost per Firm as Percent of Receipts [6]
Firms with sales/receipts/revenue below $100,000	5,086	N/A	N/A	N/A	N/A	N/A	$247,056,000	$48,576	N/A
Firms with sales/receipts/revenue of $100,000 to $499,999	8,939	21,523	2.4	4,343	0.5	$1,324	$2,231,355,000	$249,620	0.53%
Firms with sales/receipts/revenue of $500,000 to $999,999	3,670	19,631	5.3	3,962	1.1	$2,941	$2,620,344,000	$713,990	0.41%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	3,230	30,944	9.6	6,244	1.9	$5,268	$4,975,078,000	$1,540,272	0.34%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	1,117	20,049	17.9	4,046	3.6	$9,870	$3,811,000,000	$3,411,817	0.29%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	289	8,997	31.1	1,816	6.3	$17,118	$1,730,128,000	$5,986,602	0.29%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	165	7,588	46.0	1,531	9.3	$25,287	$1,340,763,000	$8,125,836	0.31%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	112	6,130	54.7	1,237	11.0	$30,095	$1,288,588,000	$11,505,250	0.26%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	55	4,042	73.5	816	14.8	$40,410	$874,841,000	$15,906,200	0.25%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	44	5,325	121.0	1,075	24.4	$66,546	$858,761,000	$19,517,295	0.34%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	26	2,800	107.7	565	21.7	$59,216	$595,387,000	$22,899,500	0.26%

N/A = not available, not disclosed

Note: The small business size standards for subsectors within the agriculture, forestry, fishing, and hunting industry range from $0.75 million to $27.5 million.

[1] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average number of employees per firm (2.4) was derived by dividing the total number of employees (21,523) by the number of firms (8,939).

[2] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the total number of affected employees (4,343) was derived by multiplying the total number of employees (21,523) by the estimated percent of employees earning less than $10.10 per hour (20.18%).

[3] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average number of affected employees per firm (0.5) was derived by dividing the total number of affected employees (4,343) by the number of firms (8,939).

[4] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the annual cost per firm ($1,324) was derived by multiplying the average number of affected employees per firm (0.5) by the average wage difference ($1.31 per hour) and by the number of working hours per year (2,080 hours).

[5] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average receipts per firm ($249,620) was derived by dividing the total annual receipts ($2,231,355,000) by the number of firms (8,939).

[6] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the annual cost per firm as a percent of receipts (0.53%) was derived by dividing the annual cost per firm ($1,324) by the average receipts per firm ($249,620).

Table D-2: Cost per small firm in the mining industry

Mining Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm [1]	Total Number of Affected Employees [2]	Average Number of Affected Employees per Firm [3]	Annual Cost per Firm [4]	Annual Receipts	Average Receipts per Firm [5]	Annual Cost per Firm as Percent of Receipts [6]
Firms with 0-4 employees	11,223	17,874	1.6	803	0.1	$195	$6,809,517,000	$606,747	0.03%
Firms with 5-9 employees	3,186	21,314	6.7	957	0.3	$818	$6,304,810,000	$1,978,911	0.04%
Firms with 10-19 employees	2,451	33,344	13.6	1,497	0.6	$1,664	$9,092,457,000	$3,709,693	0.04%
Firms with 20-99 employees	2,775	107,447	38.7	4,824	1.7	$4,737	$32,035,288,000	$11,544,248	0.04%
Firms with 100-499 employees	690	102,299	148.3	4,593	6.7	$18,139	$38,463,690,000	$55,744,478	0.03%

Note: The small business size standard for the mining industry is 500 employees.

[1] In the case of mining firms with 0-4 employees, the average number of employees per firm (1.6) was derived by dividing the total number of employees (17,874) by the number of firms (11,223).

[2] In the case of mining firms with 0-4 employees, the total number of affected employees (803) was derived by multiplying the total number of employees (17,874) by the estimated percent of employees earning less than $10.10 per hour (4.49%).

[3] In the case of mining firms with 0-4 employees, the average number of affected employees per firm (0.1) was derived by dividing the total number of affected employees (803) by the number of firms (11,223).

[4] In the case of mining firms with 0-4 employees, the annual cost per firm ($195) was derived by multiplying the average number of affected employees per firm (0.1) by the average wage difference ($1.31 per hour) and by the number of working hours per year (2,080 hours).

[5] In the case of mining firms with 0-4 employees, the average receipts per firm ($606,747) was derived by dividing the total annual receipts ($6,809,517,000) by the number of firms

[6] In the case of mining firms with 0-4 employees, the annual cost per firm as a percent of receipts (0.03%) was derived by dividing the annual cost per firm ($195) by the average receipts per firm ($606,747).

Table D-3: Cost per small firm in the utilities industry

Utilities Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	3,212	6,181	1.9	200	0.1	$170	$7,238,519,000	$2,253,586	0.01%
Firms with 5-9 employees	1,020	6,546	6.4	212	0.2	$567	$4,373,888,000	$4,288,125	0.01%
Firms with 10-19 employees	513	6,722	13.1	218	0.4	$1,157	$5,657,251,000	$11,027,780	0.01%
Firms with 20-99 employees	870	38,602	44.4	1,251	1.4	$3,917	$27,513,924,000	$31,625,200	0.01%
Firms with 100-499 employees	309	52,294	169.2	1,694	5.5	$14,941	$53,091,123,000	$171,815,932	0.01%
Firms with 500+ employees[2]	199	512,412	2,574.9	16,602	83.4	$227,324	$475,894,489,000	$2,391,429,593	0.01%

Note: The small business size standards for subsectors within the utilities industry range from 250 to 1,000 employees.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (3.24%).

[2] The small business size standard for several subsectors within the utilities industry is 750 or 1,000 employees; however, data are not disaggregated for firms with more than 500 employees.

Table D-4: Cost per small firm in the construction industry

Construction Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	151,986	N/A	N/A	N/A	N/A	N/A	$7,636,718,000	$50,246	N/A
Firms with sales/receipts/revenue of $100,000 to $499,999	316,475	776,806	2.5	62,067	0.2	$534	$81,110,428,000	$256,293	0.21%
Firms with sales/receipts/revenue of $500,000 to $999,999	124,214	642,823	5.2	51,362	0.4	$1,127	$88,028,843,000	$708,687	0.16%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	110,546	1,049,670	9.5	83,869	0.8	$2,067	$173,054,634,000	$1,565,454	0.13%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	47,962	864,701	18.0	69,090	1.4	$3,925	$167,758,626,000	$3,497,740	0.11%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	16,992	492,370	29.0	39,340	2.3	$6,309	$102,502,053,000	$6,032,371	0.10%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	7,801	308,512	39.5	24,650	3.2	$8,610	$66,977,650,000	$8,585,777	0.10%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	8,259	427,159	51.7	34,130	4.1	$11,260	$99,174,146,000	$12,008,009	0.09%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	4,354	289,441	66.5	23,126	5.3	$14,473	$73,881,089,000	$16,968,555	0.09%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	2,611	209,081	80.1	16,706	6.4	$17,434	$56,928,754,000	$21,803,429	0.08%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	1,621	150,754	93.0	12,045	7.4	$20,247	$43,119,720,000	$26,600,691	0.08%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,171	121,928	104.1	9,742	8.3	$22,669	$36,848,837,000	$31,467,837	0.07%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	831	94,903	114.2	7,583	9.1	$24,863	$30,307,198,000	$36,470,756	0.07%

N/A = not available, not disclosed

Note: The small business size standards for subsectors within the construction industry range from $15 million to $36.5 million.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (7.99%).

Table D-5: Cost per small firm in the manufacturing industry

Manufacturing Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	114,635	213,123	1.9	23,806	0.2	$566	$46,236,636,000	$403,338	0.14%
Firms with 5-9 employees	53,500	358,110	6.7	40,001	0.7	$2,037	$53,036,608,000	$991,338	0.21%
Firms with 10-19 employees	44,939	612,113	13.6	68,373	1.5	$4,146	$97,897,887,000	$2,178,462	0.19%
Firms with 20-99 employees	55,603	2,288,585	41.2	255,635	4.6	$12,527	$440,739,564,000	$7,926,543	0.16%
Firms with 100-499 employees	13,945	2,445,779	175.4	273,194	19.6	$53,381	$634,737,830,000	$45,517,234	0.12%
Firms with 500+ employees[2]	4,079	7,402,462	1,814.8	826,855	202.7	$552,345	$4,019,587,050,000	$985,434,432	0.06%

Note: The small business size standards for subsectors within the manufacturing industry range from 500 to 1,500 employees.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (11.17%).

[2] The small business size standard for many subsectors within the manufacturing industry is 750, 1,000, or 1,500 employees; however, data are not disaggregated for firms with more than 500 employees.

Table D-6: Cost per small firm in the wholesale trade industry

Wholesale Trade Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	190,153	325,412	1.7	31,955	0.2	$458	$297,267,502,000	$1,563,307	0.03%
Firms with 5-9 employees	57,366	377,841	6.6	37,104	0.6	$1,762	$249,842,292,000	$4,355,233	0.04%
Firms with 10-19 employees	39,354	525,216	13.3	51,576	1.3	$3,571	$325,243,478,000	$8,264,560	0.04%
Firms with 20-99 employees	36,783	1,365,914	37.1	134,133	3.6	$9,936	$899,443,843,000	$24,452,705	0.04%

Note: The small business size standard for the wholesale trade industry is 100 employees.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (9.82%).

Table D-7: Cost per small firm in the retail trade industry

Retail Trade Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	98,659	N/A	N/A	N/A	N/A	N/A	$5,008,702,000	$50,768	N/A
Firms with sales/receipts/revenue of $100,000 to $499,999	251,705	727,585	2.9	246,942	1.0	$2,673	$67,380,242,000	$267,695	1.00%
Firms with sales/receipts/revenue of $500,000 to $999,999	122,575	634,006	5.2	215,182	1.8	$4,783	$87,491,736,000	$713,781	0.67%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	120,985	1,019,672	8.4	346,077	2.9	$7,794	$190,373,341,000	$1,573,528	0.50%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	55,634	774,581	13.9	262,893	4.7	$12,876	$193,186,239,000	$3,472,449	0.37%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	19,594	418,263	21.3	141,958	7.2	$19,741	$117,223,823,000	$5,982,639	0.33%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	9,582	272,697	28.5	92,553	9.7	$26,319	$80,790,141,000	$8,431,449	0.31%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	9,824	366,889	37.3	124,522	12.7	$34,538	$115,236,313,000	$11,730,081	0.29%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	5,310	256,826	48.4	87,167	16.4	$44,729	$86,999,536,000	$16,384,093	0.27%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	3,498	201,289	57.5	68,317	19.5	$53,217	$72,964,681,000	$20,858,971	0.26%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	2,438	167,596	68.7	56,882	23.3	$63,574	$61,987,531,000	$25,425,566	0.25%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,835	144,987	79.0	49,209	26.8	$73,070	$55,162,317,000	$30,061,208	0.24%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	1,491	122,188	82.0	41,471	27.8	$75,787	$50,711,404,000	$34,011,673	0.22%

N/A = not available, not disclosed

Note: The small business size standards for subsectors within the retail trade industry range from $7.5 million to $38.5 million.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (33.94%).

Table D-8: Cost per small firm in the transportation and warehousing industry

Transportation and Warehousing Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	40,510	N/A	N/A	N/A	N/A	N/A	$1,939,749,000	$47,883	N/A
Firms with sales/receipts/revenue of $100,000 to $499,999	67,987	181,924	2.7	20,648	0.3	$828	$16,284,066,000	$239,517	0.35%
Firms with sales/receipts/revenue of $500,000 to $999,999	22,377	151,019	6.7	17,141	0.8	$2,087	$15,756,895,000	$704,156	0.30%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	20,915	271,012	13.0	30,760	1.5	$4,007	$32,305,484,000	$1,544,608	0.26%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,183	223,156	24.3	25,328	2.8	$7,515	$31,359,227,000	$3,414,922	0.22%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,550	136,436	38.4	15,485	4.4	$11,886	$20,463,648,000	$5,764,408	0.21%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,800	91,408	50.8	10,375	5.8	$15,705	$14,261,554,000	$7,923,086	0.20%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,840	123,966	67.4	14,070	7.6	$20,836	$19,933,921,000	$10,833,653	0.19%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	988	85,367	86.4	9,689	9.8	$26,722	$14,057,603,000	$14,228,343	0.19%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	621	68,836	110.8	7,813	12.6	$34,281	$11,060,118,000	$17,810,174	0.19%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	429	51,989	121.2	5,901	13.8	$37,479	$8,257,805,000	$19,248,963	0.19%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	311	45,274	145.6	5,139	16.5	$45,021	$7,184,425,000	$23,101,045	0.19%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	235	32,922	140.1	3,737	15.9	$43,326	$5,902,588,000	$25,117,396	0.17%

N/A = not available, not disclosed

Note: The small business size standards for subsectors within the transportation and warehousing industry range from $7.5 million to $38.5 million.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (11.35%).

Table D-9: Cost per small firm in the information industry

Information Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	15,960	N/A	N/A	N/A	N/A	N/A	$767,642,000	$48,098	N/A
Firms with sales/receipts/revenue of $100,000 to $499,999	27,678	80,336	2.9	7,407	0.3	$729	$6,876,130,000	$248,433	0.29%
Firms with sales/receipts/revenue of $500,000 to $999,999	10,311	67,954	6.6	6,265	0.6	$1,656	$7,260,927,000	$704,192	0.24%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	9,808	120,499	12.3	11,110	1.1	$3,087	$15,248,992,000	$1,554,750	0.20%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,508	100,331	22.3	9,251	2.1	$5,591	$15,472,313,000	$3,432,190	0.16%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,837	65,601	35.7	6,048	3.3	$8,972	$10,856,893,000	$5,910,121	0.15%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,018	46,846	46.0	4,319	4.2	$11,561	$8,447,070,000	$8,297,711	0.14%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,092	68,058	62.3	6,275	5.7	$15,657	$12,300,328,000	$11,264,037	0.14%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	601	49,812	82.9	4,593	7.6	$20,822	$9,293,544,000	$15,463,468	0.13%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	389	37,522	96.5	3,460	8.9	$24,233	$7,616,666,000	$19,580,118	0.12%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	270	30,523	113.0	2,814	10.4	$28,401	$6,512,265,000	$24,119,500	0.12%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	175	25,649	146.6	2,365	13.5	$36,821	$4,971,718,000	$28,409,817	0.13%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	136	21,553	158.5	1,987	14.6	$39,814	$4,082,897,000	$30,021,301	0.13%

N/A = not available, not disclosed

Note: The small business size standards for subsectors within the information industry range from $7.5 million to $38.5 million.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (9.22%).

Table D-10: Cost per small firm in the finance and insurance industry

Finance and Insurance Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	61,548	N/A	N/A	N/A	N/A	N/A	$2,931,522,000	$47,630	N/A
Firms with sales/receipts/revenue of $100,000 to $499,999	118,169	308,539	2.6	15,520	0.1	$358	$29,379,598,000	$248,624	0.14%
Firms with sales/receipts/revenue of $500,000 to $999,999	33,703	177,822	5.3	8,944	0.3	$723	$23,302,679,000	$691,413	0.10%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	23,023	222,822	9.7	11,208	0.5	$1,326	$35,135,972,000	$1,526,125	0.09%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,728	185,783	19.1	9,345	1.0	$2,617	$33,574,070,000	$3,451,282	0.08%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,108	118,100	28.7	5,940	1.4	$3,940	$24,483,200,000	$5,959,883	0.07%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,405	90,442	37.6	4,549	1.9	$5,154	$20,088,983,000	$8,353,007	0.06%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,820	148,252	52.6	7,457	2.6	$7,205	$33,267,079,000	$11,796,837	0.06%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,564	106,896	68.3	5,377	3.4	$9,368	$25,663,650,000	$16,408,983	0.06%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,028	87,611	85.2	4,407	4.3	$11,681	$21,843,640,000	$21,248,677	0.05%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	685	65,621	95.8	3,301	4.8	$13,130	$17,478,694,000	$25,516,342	0.05%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	515	58,481	113.6	2,942	5.7	$15,564	$15,619,023,000	$30,328,200	0.05%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	418	51,263	122.6	2,579	6.2	$16,809	$14,150,222,000	$33,852,206	0.05%

N/A = not available, not disclosed

Note: The small business size standards for subsectors within the finance and insurance industry range from $7.5 million to $38.5 million.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (5.03%).

Table D-11: Cost per small firm in the real estate and rental and leasing industry

Real Estate and Rental and Leasing Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	86,219	N/A	N/A	N/A	N/A	N/A	$4,165,673,000	$48,315	N/A
Firms with sales/receipts/revenue of $100,000 to $499,999	124,930	299,041	2.4	32,117	0.3	$700	$30,501,166,000	$244,146	0.29%
Firms with sales/receipts/revenue of $500,000 to $999,999	39,747	191,958	4.8	20,616	0.5	$1,413	$27,836,936,000	$700,353	0.20%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	29,717	269,366	9.1	28,930	1.0	$2,653	$45,164,417,000	$1,519,818	0.17%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	10,013	181,600	18.1	19,504	1.9	$5,308	$33,652,743,000	$3,360,905	0.16%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,288	95,418	29.0	10,248	3.1	$8,493	$18,788,566,000	$5,714,284	0.15%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,553	62,482	40.2	6,711	4.3	$11,774	$12,221,244,000	$7,869,442	0.15%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,518	81,675	53.8	8,772	5.8	$15,745	$16,329,830,000	$10,757,464	0.15%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	771	48,442	62.8	5,203	6.7	$18,387	$11,037,708,000	$14,316,093	0.13%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	464	36,318	78.3	3,901	8.4	$22,906	$8,012,159,000	$17,267,584	0.13%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	365	32,555	89.2	3,496	9.6	$26,101	$7,621,190,000	$20,879,973	0.13%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	228	25,638	112.4	2,754	12.1	$32,907	$5,610,499,000	$24,607,452	0.13%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	161	17,743	110.2	1,906	11.8	$32,251	$4,144,542,000	$25,742,497	0.13%

N/A = not available, not disclosed

Note: The small business size standards for subsectors within the real estate and rental and leasing industry range from $7.5 million to $38.5 million.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (10.74%).

Table D-12: Cost per small firm in the professional, scientific and technical services industry

Professional, Scientific and Technical Services Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	207,967	N/A	N/A	N/A	N/A	N/A	$9,968,674,000	$47,934	N/A
Firms with sales/receipts/revenue of $100,000 to $499,999	339,834	814,116	2.4	30,936	0.1	$248	$82,241,004,000	$242,003	0.10%
Firms with sales/receipts/revenue of $500,000 to $999,999	102,144	584,473	5.7	22,210	0.2	$592	$71,850,790,000	$703,426	0.08%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	78,520	870,369	11.1	33,074	0.4	$1,148	$120,442,007,000	$1,533,902	0.07%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	28,337	631,182	22.3	23,985	0.8	$2,306	$97,339,397,000	$3,435,064	0.07%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	9,714	355,210	36.6	13,498	1.4	$3,786	$57,721,674,000	$5,942,112	0.06%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	4,863	245,206	50.4	9,318	1.9	$5,221	$40,592,738,000	$8,347,263	0.06%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	4,658	313,530	67.3	11,914	2.6	$6,969	$53,578,044,000	$11,502,371	0.06%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,338	211,940	90.7	8,054	3.4	$9,386	$36,728,134,000	$15,709,210	0.06%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,381	147,737	107.0	5,614	4.1	$11,077	$27,448,191,000	$19,875,591	0.06%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	954	122,039	127.9	4,637	4.9	$13,246	$22,622,723,000	$23,713,546	0.06%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	603	91,258	151.3	3,468	5.8	$15,670	$15,961,413,000	$26,470,005	0.06%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	511	83,414	163.2	3,170	6.2	$16,902	$15,941,272,000	$31,196,227	0.05%

N/A = not available, not disclosed

Note: The small business size standards for subsectors within the professional, scientific and technical services industry range from $7.5 million to $38.5 million.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (3.8%).

Table D-13: Cost per small firm in the management of companies and enterprises industry

Management of Companies and Enterprises Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	1,895	11,318	6.0	2,536	1.3	$3,647	$44,606,000	$23,539	15.49%
Firms with sales/receipts/revenue of $100,000 to $499,999	1,387	4,529	3.3	1,015	0.7	$1,994	$293,971,000	$211,947	0.94%
Firms with sales/receipts/revenue of $500,000 to $999,999	964	5,082	5.3	1,139	1.2	$3,219	$373,917,000	$387,881	0.83%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	2,039	18,829	9.2	4,220	2.1	$5,639	$1,087,692,000	$533,444	1.06%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	2,242	26,723	11.9	5,989	2.7	$7,278	$1,698,014,000	$757,366	0.96%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,717	28,312	16.5	6,345	3.7	$10,069	$1,855,703,000	$1,080,782	0.93%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,258	22,469	17.9	5,035	4.0	$10,906	$1,711,464,000	$1,360,464	0.80%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,942	41,651	21.4	9,334	4.8	$13,096	$3,120,558,000	$1,606,878	0.82%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,423	34,363	24.1	7,701	5.4	$14,746	$2,997,064,000	$2,106,159	0.70%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,075	30,583	28.4	6,854	6.4	$17,372	$2,508,188,000	$2,333,198	0.74%

Note: The small business size standard for the management of companies and enterprises industry is $20.5 million.

[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (22.41%).

Table D-14: Cost per small firm in the administrative and support, waste management and remediation services industry

Administrative and Support, Waste Management and Remediation Services Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	99,021	139,832	1.4	31,113	0.3	$856	$4,500,981,000	$45,455	1.88%
Firms with sales/receipts/revenue of $100,000 to $499,999	129,948	513,457	4.0	114,244	0.9	$2,396	$31,661,803,000	$243,650	0.98%
Firms with sales/receipts/revenue of $500,000 to $999,999	40,405	409,563	10.1	91,128	2.3	$6,145	$28,444,220,000	$703,978	0.87%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	31,127	725,649	23.3	161,457	5.2	$14,134	$47,963,623,000	$1,540,901	0.92%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	12,294	678,340	55.2	150,931	12.3	$33,452	$42,093,718,000	$3,423,924	0.98%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,589	434,622	94.7	96,703	21.1	$57,419	$26,428,877,000	$5,759,180	1.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,411	311,321	129.1	69,269	28.7	$78,285	$19,304,673,000	$8,006,915	0.98%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,309	424,912	184.0	94,543	40.9	$111,568	$24,412,659,000	$10,572,828	1.06%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,266	292,501	231.0	65,081	51.4	$140,074	$17,408,483,000	$13,750,776	1.02%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	724	208,939	288.6	46,489	64.2	$174,963	$12,542,375,000	$17,323,722	1.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	528	174,359	330.2	38,795	73.5	$200,205	$10,341,768,000	$19,586,682	1.02%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	402	173,953	432.7	38,705	96.3	$262,344	$9,015,658,000	$22,427,010	1.17%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	267	122,013	457.0	27,148	101.7	$277,051	$6,382,657,000	$23,905,082	1.16%
Note: The small business size standards for subsectors within the administrative and support, waste management and remediation services industry range from $5.5 million to $38.5 million.									
[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (22.25%).									

Table D-15: Cost per small firm in the educational services industry

Educational Services Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	21,831	50,906	2.3	4,566	0.2	$570	$1,003,931,000	$45,986	1.24%
Firms with sales/receipts/revenue of $100,000 to $499,999	27,938	158,913	5.7	14,254	0.5	$1,390	$6,788,475,000	$242,984	0.57%
Firms with sales/receipts/revenue of $500,000 to $999,999	8,504	112,142	13.2	10,059	1.2	$3,223	$5,984,604,000	$703,740	0.46%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	8,465	213,786	25.3	19,177	2.3	$6,173	$13,376,338,000	$1,580,194	0.39%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,302	209,778	48.8	18,817	4.4	$11,918	$14,792,101,000	$3,438,424	0.35%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,588	117,648	74.1	10,553	6.6	$18,108	$9,314,307,000	$5,865,433	0.31%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	888	83,741	94.3	7,512	8.5	$23,049	$7,129,969,000	$8,029,244	0.29%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,003	127,781	127.4	11,462	11.4	$31,138	$11,306,008,000	$11,272,191	0.28%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	461	79,059	171.5	7,092	15.4	$41,916	$6,983,007,000	$15,147,521	0.28%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	355	73,045	205.8	6,552	18.5	$50,291	$6,992,060,000	$19,695,944	0.26%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	268	70,191	261.9	6,296	23.5	$64,014	$6,343,422,000	$23,669,485	0.27%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	172	60,202	350.0	5,400	31.4	$85,548	$5,119,182,000	$29,762,686	0.29%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	138	55,753	404.0	5,001	36.2	$98,745	$4,536,897,000	$32,876,065	0.30%
Note: The small business size standards for subsectors within the educational services industry range from $7.5 million to $38.5 million.									
[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (8.97%).									

Table D-16: Cost per small firm in the health care and social assistance industry

Health Care and Social Assistance Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	107,112	162,265	1.5	23,447	0.2	$596	$5,064,756,000	$47,285	1.26%
Firms with sales/receipts/revenue of $100,000 to $499,999	242,566	1,027,234	4.2	148,435	0.6	$1,667	$66,168,531,000	$272,786	0.61%
Firms with sales/receipts/revenue of $500,000 to $999,999	125,095	1,054,985	8.4	152,445	1.2	$3,321	$88,227,442,000	$705,284	0.47%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	84,361	1,466,391	17.4	211,893	2.5	$6,844	$126,989,626,000	$1,505,312	0.45%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	26,466	1,107,445	41.8	160,026	6.0	$16,475	$91,034,690,000	$3,439,685	0.48%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	9,453	712,840	75.4	103,005	10.9	$29,691	$56,541,818,000	$5,981,362	0.50%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	4,867	501,258	103.0	72,432	14.9	$40,551	$41,063,966,000	$8,437,223	0.48%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	5,198	760,603	146.3	109,907	21.1	$57,613	$61,116,459,000	$11,757,687	0.49%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,468	497,184	201.5	71,843	29.1	$79,318	$40,851,963,000	$16,552,659	0.48%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,374	347,358	252.8	50,193	36.5	$99,539	$29,140,498,000	$21,208,514	0.47%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	978	284,827	291.2	41,158	42.1	$114,669	$25,026,728,000	$25,589,701	0.45%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	665	230,360	346.4	33,287	50.1	$136,392	$20,167,268,000	$30,326,719	0.45%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	485	185,982	383.5	26,874	55.4	$150,984	$16,744,181,000	$34,524,085	0.44%
Note: The small business size standards for subsectors within the health care and social assistance industry range from $7.5 million to $38.5 million.									
[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (14.45%).									

Table D-17: Cost per small firm in the arts, entertainment, and recreation industry

Arts, Entertainment, and Recreation Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	33,186	53,994	1.6	14,341	0.4	$1,177	$1,569,733,000	$47,301	2.49%
Firms with sales/receipts/revenue of $100,000 to $499,999	46,210	199,647	4.3	53,026	1.1	$3,127	$11,295,277,000	$244,434	1.28%
Firms with sales/receipts/revenue of $500,000 to $999,999	15,493	162,642	10.5	43,198	2.8	$7,597	$10,894,947,000	$703,217	1.08%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	12,148	259,480	21.4	68,918	5.7	$15,458	$18,531,141,000	$1,525,448	1.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,674	209,762	44.9	55,713	11.9	$32,479	$16,040,448,000	$3,431,846	0.95%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,718	120,586	70.2	32,028	18.6	$50,797	$9,983,571,000	$5,811,159	0.87%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	806	74,628	92.6	19,821	24.6	$67,008	$6,466,756,000	$8,023,270	0.84%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	660	77,131	116.9	20,486	31.0	$84,576	$7,102,423,000	$10,761,247	0.79%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	344	49,061	142.6	13,031	37.9	$103,214	$4,965,644,000	$14,435,012	0.72%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	224	40,309	180.0	10,706	47.8	$130,232	$4,136,002,000	$18,464,295	0.71%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	155	33,220	214.3	8,823	56.9	$155,107	$3,428,904,000	$22,121,961	0.70%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	115	28,855	250.9	7,664	66.6	$181,587	$2,873,044,000	$24,982,991	0.73%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	84	25,163	299.6	6,683	79.6	$216,793	$2,569,574,000	$30,590,167	0.71%
Note: The small business size standards for subsectors within the arts, entertainment, and recreation industry range from $7.5 million to $38.5 million.									
[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (26.56%).									

Table D-18: Cost per small firm in the accommodation and food services industry

Accommodation and Food Services Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	99,592	207,093	2.1	97,437	1.0	$2,666	$4,845,922,000	$48,658	5.48%
Firms with sales/receipts/revenue of $100,000 to $499,999	216,446	1,349,187	6.2	634,792	2.9	$7,991	$55,536,558,000	$256,584	3.11%
Firms with sales/receipts/revenue of $500,000 to $999,999	79,875	1,260,097	15.8	592,876	7.4	$20,225	$55,913,962,000	$700,018	2.89%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	56,476	1,777,649	31.5	836,384	14.8	$40,353	$84,117,236,000	$1,489,433	2.71%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	14,095	896,373	63.6	421,743	29.9	$81,530	$46,231,300,000	$3,279,979	2.49%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,720	403,866	108.6	190,019	51.1	$139,184	$21,249,810,000	$5,712,315	2.44%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,621	244,772	151.0	115,165	71.0	$193,586	$12,835,230,000	$7,918,094	2.44%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,628	340,741	209.3	160,319	98.5	$268,327	$17,984,834,000	$11,047,195	2.43%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	859	252,279	293.7	118,697	138.2	$376,515	$13,054,878,000	$15,197,763	2.48%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	446	170,201	381.6	80,080	179.6	$489,239	$8,420,579,000	$18,880,222	2.59%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	363	153,594	423.1	72,266	199.1	$542,453	$7,987,110,000	$22,003,058	2.47%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	241	115,452	479.1	54,320	225.4	$614,156	$6,405,041,000	$26,576,934	2.31%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	170	90,301	531.2	42,487	249.9	$680,986	$4,832,335,000	$28,425,500	2.40%
Note: The small business size standards for subsectors within the accommodation and food services industry range from $7.5 million to $38.5 million.									
[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (47.05%).									

Table D-19: Cost per small firm in the other services industry

Other Services Industry									
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Total Number of Affected Employees[1]	Average Number of Affected Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	195,234	322,002	1.6	48,300	0.2	$674	$9,308,948,000	$47,681	1.41%
Firms with sales/receipts/revenue of $100,000 to $499,999	307,613	1,225,144	4.0	183,772	0.6	$1,628	$75,113,021,000	$244,180	0.67%
Firms with sales/receipts/revenue of $500,000 to $999,999	87,833	756,186	8.6	113,428	1.3	$3,519	$61,131,552,000	$695,998	0.51%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	55,883	926,035	16.6	138,905	2.5	$6,773	$84,065,314,000	$1,504,309	0.45%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	16,522	531,104	32.1	79,666	4.8	$13,138	$55,620,907,000	$3,366,475	0.39%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,967	252,838	50.9	37,926	7.6	$20,805	$28,838,406,000	$5,806,001	0.36%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,326	151,376	65.1	22,706	9.8	$26,599	$18,502,407,000	$7,954,603	0.33%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,114	173,393	82.0	26,009	12.3	$33,524	$23,140,184,000	$10,946,161	0.31%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,005	104,997	104.5	15,750	15.7	$42,701	$14,696,909,000	$14,623,790	0.29%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	620	73,209	118.1	10,981	17.7	$48,261	$11,076,548,000	$17,865,400	0.27%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	405	50,974	125.9	7,646	18.9	$51,442	$8,159,095,000	$20,145,914	0.26%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	274	42,041	153.4	6,306	23.0	$62,712	$6,643,223,000	$24,245,339	0.26%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	227	37,259	164.1	5,589	24.6	$67,086	$5,392,740,000	$23,756,564	0.28%
Note: The small business size standards for subsectors within the other services industry range from $5.5 million to $38.5 million.									
[1] The total number of affected employees was derived by multiplying the total number of employees by the estimated percent of employees earning less than $10.10 per hour (15.0%).									

In general, the increased wage cost resulting from the rule is expected to be insignificant relative to the revenue of small firms. For seventeen of the nineteen industries, the economic impact of the rule is expected to be less than 3 percent of small firms' revenue, meaning that the final rule is not expected to have a significant impact on

small businesses in seventeen of the nineteen industries.

Based on the above data and analysis, the final rule is expected to have a significant impact (more than 3 percent of revenue) on the smallest businesses in two industries: 1) the management of companies and enterprises industry, and 2) the accommodation and food services industry. For the management of companies and enterprises industry, the economic impact on small firms earning more than $100,000 per year is expected to be well below the 3 percent threshold. However, for firms with less than $100,000 in revenue, the annual cost per firm is expected to be 15.49 percent of revenue. In the accommodation and food services industry, the economic impact on small firms earning more than $500,000 per year is expected to be below the 3 percent threshold. However, for small firms earning less than $100,000 per year, the annual cost per firm is expected to be 5.48 percent of revenue, and for small firms earning between $100,000 and $499,999, the annual cost per firm is expected to be 3.11 percent of revenue.

The next question to address is whether a substantial number (more than 15 percent) of small firms in the management of companies and enterprises industry and in the accommodation and food services industry will experience a significant economic impact.[37] As shown in Table E, this rule is expected to have a significant impact on 11.89 percent of small businesses in the management of companies and enterprises industry, falling below the 15 percent threshold. As discussed earlier in this preamble in response to comments on the impact to restaurant franchises on military bases, the economic impact on the accommodation and food services industry arising from the Executive Order may be addressed through the offsetting effects of productivity and contractors' ability to negotiate a lower percentage of sales paid as rent or royalty to the Federal Government in new contracts. As shown in Table F, in connection with firms with annual revenue below $100,000, this rule is expected to have a significant impact on 20.94 percent of small businesses in the accommodation and food services industry. As shown in Table F in connection with firms with annual revenue between $100,000 and $499,999, this rule is expected to have a significant impact on 45.52 percent of small businesses.

TABLE E—PERCENT OF SMALL FIRMS WITH SALES/RECEIPTS/REVENUE BELOW $100,000 WITH A SIGNIFICANT ECONOMIC IMPACT IN THE MANAGEMENT OF COMPANIES AND ENTERPRISES INDUSTRY

Management of Companies and Enterprises Industry				
	Annual cost per firm as percent of receipts (%)	Number of firms	Total number of small firms in industry	Number of firms as percent of small firms in industry (%)
Firms with sales/receipts/revenue below $100,000	15.49	1,895	15,942	11.9

TABLE F—PERCENT OF SMALL FIRMS WITH SALES/RECEIPTS/REVENUE BELOW $500,000 WITH A SIGNIFICANT ECONOMIC IMPACT IN THE ACCOMMODATION AND FOOD SERVICES INDUSTRY

Accommodation and Food Services Industry				
	Annual cost per firm as percent of receipts (%)	Number of firms	Total number of small firms in industry	Number of firms as percent of small firms in industry (%)
Firms with sales/receipts/revenue below $100,000	5.48	99,592	475,532	20.9
Firms with sales/receipts/revenue of $100,000 to $499,999	3.11	216,446	475,532	45.5

In conclusion, as stated above, the Department defines significant economic impact to be having an effect of more than 3% of a firm's annual revenue. Our analysis has shown that for seventeen of the nineteen industries covered by the Executive Order, this final rule is not expected to have a significant impact on small business annual revenue.

Estimating the Number of Small Contractor Firms Affected by the Rule

The Department now sets forth its estimate of the number of small contractor firms actually affected by the final rule. Definitive information on the exact number of affected small contractor firms is not available. The best source to estimate the number of small contractor firms that are affected by this final rule is GSA's System for Award Management (SAM). The Department notes, however, that Federal contractor status cannot be discerned from the SBA firm size data: SAM can only be used to estimate the number of small firms, not the number of small contractor firms. The Department accordingly used the SBA data to estimate the impact of the regulation on a 'typical' or 'average' small firm in each of the nineteen industries (identified by the two-digit NAICS level). The Department then assumed that a typical small firm is similar to a small contractor firm.

Based on the most current SAM data available, if the Department defined ''small'' as fewer than 500 employees, then there are 328,552 small contractor firms. If the Department defined ''small'' as firms with less than $35.5 million in revenues, then there are 315,902 small contractor firms. Thus, the Department

[37] The RFA does not define the term ''substantial'' or provide any specific thresholds for determining a substantial number of small entities affected. 5 U.S.C. 601; *see* SBA Guide for Government Agencies at 18. The determination of what constitutes a ''substantial'' number of small entities may be industry or rule-specific. The Department has chosen fifteen percent as its criterion for determining substantiality for purposes of this final rule because that threshold is in accord with the threshold other Federal agencies have used in conducting their regulatory flexibility analyses.

established the range 315,902 to 328,552 as the total number of small contractor firms. Of course, not all of these contractor firms will be impacted by the final rule; only those contractors that are paying less than $10.10 per hour to any of their workers performing on or in connection with covered contracts will be affected. Thus, this range is likely an overestimate of the number of firms affected by the final rule because some of those small contractor firms may pay all of their workers more than $10.10 per hour.

Advocacy commented that the Department's initial regulatory flexibility analysis did not estimate the number of subcontractors affected by the rule. Advocacy stated that the Department utilized SAM data to estimate there are 328,552 small contractor firms that could be affected by this rule, but asserted that subcontractors are not required to be in SAM, particularly if they are not paid directly by the Federal Government.

The Department used SAM data because it was the best source available to estimate the number of affected small contractor firms. SAM includes all prime contractors and some subcontractors.[38] Moreover, as discussed above, the number of affected small contractor firms included in the initial regulatory flexibility analysis and in the analysis set forth in this final rule likely overestimates the actual number of small contractors affected by this Executive Order. Thus, the likely overestimate of affected small contractor firms should offset to some degree any affected subcontractors that may not be registered in SAM. The Department notes that this regulation applies only to new contracts. As explained in the Executive Order 12866 economic analysis, based on the 2012 SBA study, the Department assumed that roughly 18 percent of small contractors are new contractors each year. Assuming that this final rule will impact only 18 percent[39] of the small contractor firms performing Federal contracts in the first year, 59,139 small businesses will be subject to the Executive Order in 2015. When this rule's impact is fully manifested by the end of 2019, all covered Federal contracts held by small firms with workers earning less than $10.10 per hour will be impacted.

Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Rule: Section 4(a) of the Executive Order requires the FARC to issue regulations to provide for inclusion of the applicable contract clause in Federal procurement solicitations and contracts subject to the Order; thus, the contract clause and some requirements applicable to contracting agencies will appear in both this part and in the FARC regulations. The Department is not aware of any relevant Federal rules that conflict with this final rule.

Differing Compliance and Reporting Requirements for Small Entities: This final rule provides for no differing compliance requirements and reporting requirements for small entities. The Department has strived to have this rule implement the minimum wage requirements of Executive Order 13658 with the least possible burden for small entities. The final rule provides a number of efficient and informal alternative dispute mechanisms to resolve concerns about contractor compliance, including having the contracting agency provide compliance assistance to the contractor about the minimum wage requirements, and allowing for the Department to attempt an informal conciliation of complaints instead of engaging in extensive investigations. These tools will provide contractors with an opportunity to resolve inadvertent errors rapidly and before significant liabilities develop.

Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities: This final rule was drafted to clearly state the compliance requirements for all contractors subject to Executive Order 13658. The final rule does not contain any reporting requirements. The recordkeeping requirements imposed by this final rule are necessary for contractors to determine their compliance with the rule as well as for the Department and workers to determine the contractor's compliance with the law. The rule's recordkeeping provisions apply generally to all businesses—large and small—covered by the Executive Order; no reasonable basis exists for creating an exemption from compliance and recordkeeping requirements for small businesses. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

Use of Performance Rather Than Design Standards: This final rule was written to provide clear guidelines to ensure compliance with the Executive Order minimum wage requirements. Under the final rule, contractors may achieve compliance through a variety of means. The Department makes available a variety of resources to contractors for understanding their obligations and achieving compliance.

Exemption from Coverage of the Rule for Small Entities: Executive Order 13658 establishes its own coverage and exemption requirements; therefore, the Department has not exempted small businesses from the minimum wage requirements of the Order.

Discussion of Regulatory Alternatives: In the NPRM, the Department invited commenters to identify alternatives to the proposed rule that would minimize any significant economic impact on small entities while still ensuring the rule accomplished the stated objectives of the Executive Order. In its comment submitted on the NPRM, Advocacy suggested that the Department should include a description of any significant regulatory alternatives to this final rule that accomplish the Executive Order's stated objectives and minimize any significant economic impact of this final rule on small entities. Advocacy further stated the Department should consider any alternatives provided in the comment period that minimize the impact of the rule on small businesses while accomplishing the rule's objectives. As evidenced throughout the analysis contained in the preamble to this part, the Department has adopted Advocacy's request to consider regulatory alternatives suggested by commenters that might minimize any economic impacts of the final rule on contractors, including small entities.

ABC suggested that the Department could exercise authority under section 4 of the Executive Order to provide exclusions from the Order's requirements as a regulatory alternative. The Department has previously responded in the preamble to specific requests for exclusions from the Executive Order's requirements. As explained in the preamble section above, the Department declined to adopt the specific exclusion proposed by ABC whereby DBA- and SCA-covered workers would be excluded from coverage under the Executive Order. However, the Department has exercised its authority under the Order to provide certain other limited exclusions from coverage as set forth in § 10.4 and discussed in the preamble for that

[38] The agency with which a subcontractor works determines whether that subcontractor must register in SAM. SAM itself, however, does not indicate if an entity registered in its database is a prime contractor or a subcontractor.

[39] The Department assumed 18 percent of small contractors are new to Federal contracting each year based on the 2012 SBA study (Small Business Administration, ''Characteristics of Recent Federal Small Business Contracting,'' May, 2012). The 2012 SBA study shows that 17.65 percent of small businesses were new to Federal contracting each year between FY 2005 and FY 2009, and the Department rounded it up to 18 percent in this analysis. This 18 percent is separate and distinct from the Department's use of 20 percent as the number of Federal contracts that are initiated each year, which is used in the Executive Order 12866 economic analysis.

section. For example, in response to comments received, the Department has created an exclusion pursuant to which FLSA-covered workers performing in connection with covered contracts are excluded from coverage of the rule if they spend less than 20 percent of their hours worked in a given workweek performing in connection with covered contracts.

With respect to other commenters' suggestions for regulatory alternatives that could potentially mitigate any economic impacts of the rule on small entities and other contractors, the HR Policy Association suggested that the Department consider leaving the minimum wage at its current level as an alternative. CSCUSA suggested that the Department consider phasing in the minimum wage increase over the next three years to moderate the rule's impact on small businesses. Executive Order 13658 delegates to the Secretary the authority only to issue regulations to ''implement the requirements of this order.'' Because the Executive Order itself establishes the basic coverage provisions, sets the minimum wage and establishes the timeframe when the minimum wage rate becomes effective, the Department is unable to adopt this regulatory alternative suggested by the commenters in the final rule.

The Department also considered, for example, AGC's and ABC's request that the applicable minimum wage rate under the Executive Order should remain frozen for the duration of covered multi-year contracts. The Department similarly considered AGC's request for a safe harbor from contractor flow-down responsibility where a contractor included the contract clause in its subcontracts. While the Department declined to adopt these regulatory alternatives for the reasons explained earlier in the preamble to this final rule, the Department notes that it has made several modifications in this final rule that are responsive to the concerns raised by such commenters. For example, the Department has included a provision whereby a contractor is entitled to an adjustment where necessary to pay any necessary additional costs when a contracting agency initially omits and then subsequently includes the contract clause in a covered contract. The Department has also provided that a contractor is entitled to be compensated, if appropriate, for the increase in labor costs resulting from the annual inflation increases in the Executive Order minimum wage beginning on January 1, 2016.

VI. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires that agencies prepare a written statement, which includes an assessment of the Federal mandate's anticipated costs and benefits, before promulgating a final rule that includes any Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate or by the private sector. The current threshold after adjustment for inflation is $141 million, using the 2012 Implicit Price Deflator for the Gross Domestic Product.

As explained in the economic analysis set forth in the section discussing Executive Orders 12866 and 13563 above, the Department estimates that the final rule may result in transfers of up to $500 million per year (beginning in 2019, with steady increases up to that level over the intervening years). Because this final rule applies only to new contracts, contractors would have the information necessary to factor into their bids the labor costs resulting from the required minimum wage, and thus it may be likely that the Federal Government would bear the burden of the transfers. However, most contracts covered by this final rule are paid through appropriated funds, and how Congress and agencies respond to rising bids is subject to political processes whose unpredictability limits the Department's ability to project rule-induced outcomes. The Department therefore acknowledges that this final rule may yield effects that make it subject to UMRA requirements. The Department carried out the requisite cost-benefit analysis in preceding sections of this document.

The Chamber/NFIB asserted that the Department's analysis in the NPRM under the UMRA was inadequate, contending that the Department must separately assess the effects of the rule on State, local and tribal governments, which the Chamber/NFIB asserts will be substantial. In the Department's experience, however, State and local governments are parties to a relatively small number of SCA- and DBA-covered contracts. The Department also notes that no State or local government submitted a comment expressing concern regarding the cost of compliance with the Executive Order's requirements; in fact, the one comment the Department received from a state agency (Alaska's Department of Health and Human Services) supported the Department's NPRM. In addition, the Executive Order does not apply to contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act. 79 FR 9853. For these reasons, the Department does not expect that the promulgation of this final rule will result in the expenditure by State, local and tribal governments, in the aggregate, of $141 million per year.

VII. Executive Order 13132, Federalism

The Department has (1) reviewed this rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The final rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

VIII. Executive Order 13175, Indian Tribal Governments

This final rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The 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.

IX. Effects on Families

The undersigned hereby certifies that the final rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

X. Executive Order 13045, Protection of Children

This final rule would have no environmental health risk or safety risk that may disproportionately affect children.

XI. Environmental Impact Assessment

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

XII. Executive Order 13211, Energy Supply

This final rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

XIII. Executive Order 12630, Constitutionally Protected Property Rights

This final rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

XIV. Executive Order 12988, Civil Justice Reform Analysis

This final rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The final rule was: (1) reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 10

Administrative practice and procedure, Construction, Government contracts, Law enforcement, Minimum wages, Reporting and recordkeeping requirements, Wages.

Signed at Washington, DC this 29th day of September, 2014.

David Weil,

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 by adding part 10 to read as follows:

PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

Subpart A—General

Sec.
10.1 Purpose and scope.
10.2 Definitions.
10.3 Coverage.
10.4 Exclusions.
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Subpart B—Federal Government Requirements

10.11 Contracting agency requirements.
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Subpart C—Contractor Requirements

10.21 Contract clause.
10.22 Rate of pay.
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Subpart D—Enforcement

10.41 Complaints.
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10.51 Disputes concerning contractor compliance.
10.52 Debarment proceedings.
10.53 Referral to Chief Administrative Law Judge; amendment of pleadings.
10.54 Consent findings and order.
10.55 Proceedings of the Administrative Law Judge.
10.56 Petition for review.
10.57 Administrative Review Board proceedings.
10.58 Administrator ruling.

Appendix A to Part 10—Contract Clause

Authority: 4 U.S.C. 301; section 4, E.O. 13658, 79 FR 9851; Secretary's Order 5—2010, 75 FR 55352.

Subpart A—General

§ 10.1 Purpose and scope.

(a) *Purpose.* This part contains the Department of Labor's rules relating to the administration of Executive Order 13658 (Executive Order or the Order), ''Establishing a Minimum Wage for Contractors,'' and implements the enforcement provisions of the Executive Order. The Executive Order assigns responsibility for investigating potential violations of and obtaining compliance with the Executive Order to the Department of Labor. The Executive Order states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. There is evidence that raising the pay of low-wage workers can increase their morale and productivity and the quality of their work, lower turnover and its accompanying costs, and reduce supervisory costs. The Executive Order thus states that cost savings and quality improvements in the work performed by parties who contract with the Federal Government will lead to improved economy and efficiency in Government procurement. Executive Order 13658 therefore generally requires that the hourly minimum wage paid by contractors to workers performing on or in connection with covered contracts with the Federal Government shall be at least:

(1) $10.10 per hour, beginning January 1, 2015; and

(2) An amount determined by the Secretary of Labor, beginning January 1, 2016, and annually thereafter.

(b) *Policy.* Executive Order 13658 sets forth a general position of the Federal Government that increasing the hourly minimum wage paid by Federal contractors to $10.10 will increase efficiency and cost savings for the Federal Government. The Executive Order therefore establishes a minimum wage requirement for Federal contractors and subcontractors. The Order provides that executive departments and agencies shall, to the extent permitted by law, ensure that new covered contracts, contract-like instruments, and solicitations (collectively referred to as ''contracts'') include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), in the performance of the contract or any subcontract thereunder, shall be at least:

(1) $10.10 per hour beginning January 1, 2015; and

(2) Beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to the Order. Nothing in Executive Order 13658 or this part shall excuse noncompliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order.

(c) *Scope.* Neither Executive Order 13658 nor this part creates or changes any rights under the Contract Disputes Act or any private right of action. The Executive Order provides that disputes regarding whether a contractor has paid the minimum wages prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Order. However, nothing in the Order or this part is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. The Order similarly does not preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

§ 10.2 Definitions.

For purposes of this part:

Administrative Review Board (ARB or Board) means the Administrative Review Board, U.S. Department of Labor.

Administrator means the Administrator of the Wage and Hour Division and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

Agency head means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency or any persons authorized to act on behalf of the agency head.

Concessions contract or *contract for concessions* means a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The term *concessions contract* includes but is not limited to a contract the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public.

Contract or *contract-like instrument* means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term *contract* includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term *contract* shall be interpreted broadly as to include, but not be limited to, any contract that may be consistent with the definition provided in the Federal Acquisition Regulation (FAR) or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The term *contract* includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

Contracting officer means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. This term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

Contractor means any individual or other legal entity that is awarded a Federal Government contract or subcontract under a Federal Government contract. The term *contractor* refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. The term *contractor* includes lessors and lessees, as well as employers of workers performing on covered Federal contracts whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c). The term *employer* is used interchangeably with the terms *contractor* and *subcontractor* in various sections of this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive Order.

Davis-Bacon Act means the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 *et seq.,* and its implementing regulations.

Executive departments and agencies means executive departments, military departments, or any independent establishments within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

Executive Order minimum wage means, for purposes of Executive Order 13658, a wage that is at least:

(1) $10.10 per hour beginning January 1, 2015; and

(2) Beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of the Executive Order.

Fair Labor Standards Act (FLSA) means the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.,* and its implementing regulations.

Federal Government means an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. For purposes of the Executive Order and this part, this definition does not include the District of Columbia, any Territory or possession of the United States, or any independent regulatory agency within the meaning of 44 U.S.C. 3502(5).

Independent agencies means independent regulatory agencies within the meaning of 44 U.S.C. 3502(5).

New contract means a contract that results from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015. This term includes both new contracts and replacements for expiring contracts. It does not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. For purposes of the Executive Order, a contract that is entered into prior to January 1, 2015 will constitute a *new contract* if, through bilateral negotiation, on or after January 1, 2015:

(1) The contract is renewed;

(2) The contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2014 providing for a short-term limited extension; or

(3) The contract is amended pursuant to a modification that is outside the scope of the contract.

Office of Administrative Law Judges means the Office of Administrative Law Judges, U.S. Department of Labor.

Option means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

Procurement contract for construction means a procurement contract for the construction, alteration, or repair (including painting and decorating) of public buildings or public works and which requires or involves the employment of mechanics or laborers, and any subcontract of any tier thereunder. The term *procurement contract for construction* includes any contract subject to the provisions of the Davis-Bacon Act, as amended, and its implementing regulations.

Procurement contract for services means a procurement contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder. The term *procurement contract for services* includes any contract subject to the provisions of the Service Contract Act, as amended, and its implementing regulations.

Service Contract Act means the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.,* and its implementing regulations.

Solicitation means any request to submit offers, bids, or quotations to the Federal Government.

Tipped employee means any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips. For purposes of the Executive Order, a worker performing on or in connection with a contract covered by the Executive Order who meets this definition is a tipped employee.

United States means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities. When used in a geographic sense, the *United States* means the 50 States and the District of Columbia.

Wage and Hour Division means the Wage and Hour Division, U.S. Department of Labor.

Wage determination includes any determination of minimum hourly wage rates or fringe benefits made by the Secretary of Labor pursuant to the provisions of the Service Contract Act or the Davis-Bacon Act. This term includes the original determination and any subsequent determinations modifying, superseding, correcting, or otherwise changing the provisions of the original determination.

Worker means any person engaged in performing work on or in connection with a contract covered by the Executive Order, and whose wages under such contract are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act, other than individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, regardless of the contractual relationship alleged to exist between the individual and the employer. The term *worker* includes workers performing on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), as well as any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the U.S. Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

§ 10.3 Coverage.

(a) This part applies to any new contract with the Federal Government, unless excluded by § 10.4, provided that:

(1)(i) It is a procurement contract for construction covered by the Davis-Bacon Act;

(ii) It is a contract for services covered by the Service Contract Act;

(iii) It is a contract for concessions, including any concessions contract excluded from coverage under the Service Contract Act by Department of Labor regulations at 29 CFR 4.133(b); or

(iv) It is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(2) The wages of workers under such contract are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

(b) For contracts covered by the Service Contract Act or the Davis-Bacon Act, this part applies to prime contracts only at the thresholds specified in those statutes. For procurement contracts where workers' wages are governed by the Fair Labor Standards Act, this part applies when the prime contract exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a).

(c) This part only applies to contracts with the Federal Government requiring performance in whole or in part within the United States. If a contract with the Federal Government is to be performed in part within and in part outside the United States and is otherwise covered by the Executive Order and this part, the minimum wage requirements of the Order and this part would apply with respect to that part of the contract that is performed within the United States.

(d) This part does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government that are subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*

§ 10.4 Exclusions.

(a) *Grants.* The requirements of this part do not apply to grants within the meaning of the Federal Grant and Cooperative Agreement Act, as amended, 31 U.S.C. 6301 *et seq.*

(b) *Contracts and agreements with and grants to Indian Tribes.* This part does not apply to contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450 *et seq.*

(c) *Procurement contracts for construction that are excluded from coverage of the Davis-Bacon Act.* Procurement contracts for construction that are not covered by the Davis-Bacon Act are not subject to this part.

(d) *Contracts for services that are exempted from coverage under the Service Contract Act.* Service contracts, except for those expressly covered by § 10.3(a)(1)(iii) or (iv), that are exempt from coverage of the Service Contract Act pursuant to its statutory language at 41 U.S.C. 6702(b) or its implementing regulations, including those at 29 CFR 4.115 through 4.122 and 29 CFR 4.123(d) and(e), are not subject to this part.

(e) *Employees who are exempt from the minimum wage requirements of the Fair Labor Standards Act under 29 U.S.C. 213(a) and 214(a)–(b).* Except for workers who are otherwise covered by the Davis-Bacon Act or the Service Contract Act, this part does not apply to employees who are not entitled to the minimum wage set forth at 29 U.S.C. 206(a)(1) of the Fair Labor Standards Act pursuant to 29 U.S.C. 213(a) and 214(a)–(b). Pursuant to this exclusion, individuals that are not subject to the requirements of this part include but are not limited to:

(1) *Learners, apprentices, or messengers.* This part does not apply to learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a).

(2) *Students.* This part does not apply to student workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b).

(3) *Individuals employed in a bona fide executive, administrative, or professional capacity.* This part does not apply to workers who are employed by Federal contractors in a bona fide executive, administrative, or professional capacity, as those terms are

defined and delimited in 29 CFR part 541.

(f) *FLSA-covered workers performing in connection with covered contracts for less than 20 percent of their work hours in a given workweek.* This part does not apply to FLSA-covered workers performing in connection with covered contracts, *i.e.,* those workers who perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract, that spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts. This exclusion is inapplicable to covered workers performing on covered contracts, *i.e.,* those workers directly engaged in performing the specific work called for by the contract.

§ 10.5 Minimum wage for Federal contractors and subcontractors.

(a) *General.* Pursuant to Executive Order 13658, the minimum hourly wage rate required to be paid to workers performing on or in connection with covered contracts with the Federal Government is at least:

(1) $10.10 per hour beginning January 1, 2015; and

(2) Beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of Executive Order 13658. In accordance with section 2 of the Order, the Secretary will determine the applicable minimum wage rate to be paid to workers on covered contracts on an annual basis beginning at least 90 days before any new minimum wage is to take effect.

(b) *Method for determining the applicable Executive Order minimum wage for workers.* The minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), in the performance of a covered contract shall be at least:

(1) $10.10 per hour beginning January 1, 2015; and

(2) An amount determined by the Secretary, beginning January 1, 2016, and annually thereafter. The applicable minimum wage determined for each calendar year by the Secretary shall be:

(i) Not less than the amount in effect on the date of such determination;

(ii) Increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and

(iii) Rounded to the nearest multiple of $0.05. In calculating the annual percentage increase in the Consumer Price Index for purposes of this section, the Secretary shall compare such Consumer Price Index for the most recent year available with the Consumer Price Index for the preceding year.

(c) *Relation to other laws.* Nothing in the Executive Order or this part shall excuse noncompliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Executive Order and this part.

§ 10.6 Antiretaliation.

It shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or this part, or has testified or is about to testify in any such proceeding.

§ 10.7 Waiver of rights.

Workers cannot waive, nor may contractors induce workers to waive, their rights under Executive Order 13658 or this part.

Subpart B—Federal Government Requirements

§ 10.11 Contracting agency requirements.

(a) *Contract clause.* The contracting agency shall include the Executive Order minimum wage contract clause set forth in appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 10.3, except for procurement contracts subject to the FAR. The required contract clause directs, as a condition of payment, that all workers performing work on or in connection with covered contracts must be paid the applicable, currently effective minimum wage under Executive Order 13658 and § 10.5. For procurement contracts subject to the FAR, contracting agencies must use the clause set forth in the FAR developed to implement this rule. Such clause will accomplish the same purposes as the clause set forth in Appendix A and be consistent with the requirements set forth in this rule.

(b) *Failure to include the contract clause.* Where the Department or the contracting agency discovers or determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that Executive Order 13658 or this part did not apply to a particular contract and/or failed to include the applicable contract clause in a contract to which the Executive Order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation and termination).

(c) *Withholding.* A contracting officer shall upon his or her own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the prime contractor under the covered contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by the Executive Order. In the event of failure to pay any covered workers all or part of the wages due under Executive Order 13658, the agency may, after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with the requirements of Executive Order 13658 may be grounds for termination of the right to proceed with the contract work. In such event, the contracting agency may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

(d) *Actions on complaints*—(1) *Reporting*—(i) *Reporting time frame.* The contracting agency shall forward all information listed in paragraph (d)(1)(ii) of this section to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210 within 14 calendar days of receipt of a complaint alleging contractor noncompliance with the Executive Order or this part or within 14 calendar days of being contacted by the Wage and Hour Division regarding any such complaint.

(ii) *Report contents.* The contracting agency shall forward to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S.

Department of Labor, Washington, DC 20210 any:

(A) Complaint of contractor noncompliance with Executive Order 13658 or this part;

(B) Available statements by the worker, contractor, or any other person regarding the alleged violation;

(C) Evidence that the Executive Order minimum wage contract clause was included in the contract;

(D) Information concerning known settlement negotiations between the parties, if applicable; and

(E) Any other relevant facts known to the contracting agency or other information requested by the Wage and Hour Division.

(2) [Reserved]

§ 10.12 Department of Labor requirements.

(a) *In general.* The Executive Order minimum wage applicable from January 1, 2015 through December 31, 2015 is $10.10 per hour. The Secretary will determine the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts on an annual basis, beginning January 1, 2016.

(b) *Method for determining the applicable Executive Order minimum wage.* The Secretary will determine the applicable minimum wage under the Executive Order, beginning January 1, 2016, by using the methodology set forth in § 10.5(b).

(c) *Notice.* (1) The Administrator will notify the public of the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts on an annual basis at least 90 days before any new minimum wage is to take effect.

(2) *Method of notification*—(i) **Federal Register**. The Administrator will publish a notice in the **Federal Register** stating the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts on an annual basis at least 90 days before any new minimum wage is to take effect.

(ii) *Wage Determinations OnLine Web site.* The Administrator will publish and maintain on Wage Determinations OnLine (WDOL), *http://www.wdol.gov,* or any successor site, the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts.

(iii) *Wage Determinations.* The Administrator will publish a prominent general notice on all wage determinations issued under the Davis-Bacon Act and the Service Contract Act stating the Executive Order minimum wage and that the Executive Order minimum wage applies to all workers performing on or in connection with such contracts whose wages are governed by the Fair Labor Standards Act, the Davis-Bacon Act, and the Service Contract Act. The Administrator will update this general notice on all such wage determinations annually.

(iv) *Other means as appropriate.* The Administrator may publish the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts on an annual basis at least 90 days before any such new minimum wage is to take effect in any other media that the Administrator deems appropriate.

(d) *Notification to a contractor of the withholding of funds.* If the Administrator requests that a contracting agency withhold funds from a contractor pursuant to § 10.11(c), the Administrator and/or contracting agency shall notify the affected prime contractor of the Administrator's withholding request to the contracting agency.

Subpart C—Contractor Requirements

§ 10.21 Contract clause.

(a) *Contract clause.* The contractor, as a condition of payment, shall abide by the terms of the applicable Executive Order minimum wage contract clause referred to in § 10.11(a).

(b) The contractor and any subcontractors shall include in any covered subcontracts the Executive Order minimum wage contract clause referred to in § 10.11(a) and shall require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts. The prime contractor and any upper-tier contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract.

§ 10.22 Rate of pay.

(a) *General.* The contractor must pay each worker performing work on or in connection with a covered contract no less than the applicable Executive Order minimum wage for all hours worked on or in connection with the covered contract, unless such worker is exempt under § 10.4 of this part. In determining whether a worker is performing within the scope of a covered contract, all workers who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are thus subject to the Executive Order and this part unless a specific exemption is applicable. Nothing in the Executive Order or these regulations shall excuse noncompliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under Executive Order 13658.

(b) *Workers who receive fringe benefits.* The contractor may not discharge any part of its minimum wage obligation under the Executive Order by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, the cash equivalent thereof.

(c) *Tipped employees.* The contractor may satisfy the wage payment obligation to a tipped employee under the Executive Order through a combination of an hourly cash wage and a credit based on tips received by such employee pursuant to the provisions in § 10.28.

§ 10.23 Deductions.

The contractor may make deductions that reduce a worker's wages below the Executive Order minimum wage rate only if such deduction qualifies as a:

(a) Deduction required by Federal, State, or local law, such as Federal or State withholding of income taxes;

(b) Deduction for payments made to third parties pursuant to court order;

(c) Deduction directed by a voluntary assignment of the worker or his or her authorized representative; or

(d) Deduction for the reasonable cost or fair value, as determined by the Administrator, of furnishing such worker with ''board, lodging, or other facilities,'' as defined in 29 U.S.C. 203(m) and part 531 of this title.

§ 10.24 Overtime payments.

(a) *General.* The Fair Labor Standards Act and the Contract Work Hours and Safety Standards Act require overtime payment of not less than one and one-half times the regular rate of pay or basic rate of pay for all hours worked over 40 hours in a workweek to covered workers. The regular rate of pay under the Fair Labor Standards Act is generally determined by dividing the worker's total earnings in any workweek by the total number of hours actually worked by the worker in that workweek for which such compensation was paid.

(b) *Tipped employees.* When overtime is worked by tipped employees who are entitled to overtime pay under the Fair Labor Standards Act and/or the Contract Work Hours and Safety Standards Act, the employees' regular rate of pay

includes both the cash wages paid by the employer (*see* §§ 10.22(a) and 10.28(a)(1)) and the amount of any tip credit taken (*see* § 10.28(a)(2)). (*See* part 778 of this title for a detailed discussion of overtime compensation under the Fair Labor Standards Act.) Any tips received by the employee in excess of the tip credit are not included in the regular rate.

§ 10.25 Frequency of pay.

Wage payments to workers shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under Executive Order 13658 may not be of any duration longer than semi-monthly.

§ 10.26 Records to be kept by contractors.

(a) The contractor and each subcontractor performing work subject to Executive Order 13658 shall make and maintain, for three years, records containing the information specified in paragraphs (a)(1) through (6) of this section for each worker and shall make them available for inspection and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(1) Name, address, and social security number of each worker;

(2) The worker's occupation(s) or classification(s);

(3) The rate or rates of wages paid;

(4) The number of daily and weekly hours worked by each worker;

(5) Any deductions made; and

(6) The total wages paid.

(b) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with workers at the worksite during normal working hours.

(c) Nothing in this part limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, or their implementing regulations.

§ 10.27 Anti-kickback.

All wages paid to workers performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (except as set forth in § 10.23), rebate, or kickback on any account. Kickbacks directly or indirectly to the employer or to another person for the employer's benefit for the whole or part of the wage are prohibited.

§ 10.28 Tipped employees.

(a) *Payment of wages to tipped employees.* With respect to workers who are tipped employees as defined in § 10.2 and this section, the amount of wages paid to such employee by the employee's employer shall be equal to:

(1) An hourly cash wage of at least:

(i) $4.90 an hour beginning on January 1, 2015;

(ii) For each succeeding 1-year period until the hourly cash wage equals 70 percent of the wage in effect under section 2 of the Executive Order, the hourly cash wage applicable in the prior year, increased by the lesser of $0.95 or the amount necessary for the hourly cash wage to equal 70 percent of the wage in effect under section 2 of the Executive Order;

(iii) For each subsequent year, 70 percent of the wage in effect under section 2 of the Executive Order for such year rounded to the nearest multiple of $0.05; and

(2) An additional amount on account of the tips received by such employee (tip credit) which amount is equal to the difference between the hourly cash wage in paragraph (a)(1) of this section and the wage in effect under section 2 of the Executive Order. Where tipped employees do not receive a sufficient amount of tips in the workweek to equal the amount of the tip credit, the employer must increase the cash wage paid for the workweek under paragraph (a)(1) of this section so that the amount of the cash wage paid and the tips received by the employee equal the minimum wage under section 2 of the Executive Order.

(3) An employer may pay a higher cash wage than required by paragraph (a)(1) of this section and take a lower tip credit but may not pay a lower cash wage than required by paragraph (a)(1) of this section and take a greater tip credit. In order for the employer to claim a tip credit, the employer must demonstrate that the worker received at least the amount of the credit claimed in actual tips. If the worker received less than the claimed tip credit amount in tips during the workweek, the employer is required to pay the balance on the regular payday so that the worker receives the wage in effect under section 2 of the Executive Order with the defined combination of wages and tips.

(4) If the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 *et seq.,* or any other applicable law or regulation is higher than the wage required by section 2 of the Executive Order, the employer shall pay additional cash wages equal to the difference between the wage in effect under section 2 of the Executive Order and the highest wage required to be paid.

(b) *Tipped employees.* (1) As provided in § 10.2, a covered worker employed in an occupation in which he or she receives tips is a ''tipped employee'' when he or she customarily and regularly receives more than $30 a month in tips. Only tips actually retained by the employee after any tip pooling may be counted in determining whether the person is a ''tipped employee'' and in applying the provisions of section 3 of the Executive Order. An employee may be a ''tipped employee'' regardless of whether the employee is employed full time or part time so long as the employee customarily and regularly receives more than $30 a month in tips. An employee who does not receive more than $30 a month in tips customarily and regularly is not a tipped employee for purposes of the Executive Order and must receive the full minimum wage in section 2 of the Executive Order without any credit for tips received under the provisions of section 3.

(2) *Dual jobs.* In some situations an employee is employed in a tipped occupation and a non-tipped occupation (dual jobs), as for example, where a maintenance person in a hotel also works as a server. In such a situation if the employee customarily and regularly receives at least $30 a month in tips for the work as a server, the employee is a tipped employee only when working as a server. The tip credit can only be taken for the hours spent in the tipped occupation and no tip credit can be taken for the hours of employment in the non-tipped occupation. Such a situation is distinguishable from that of a tipped employee performing incidental duties that are related to the tipped occupation but that are not directed toward producing tips, for example when a server spends part of his or her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. Related duties may not comprise more than 20 percent of the hours worked in the tipped occupation in a workweek.

(c) *Characteristics of tips.* A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a fixed charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. Tips are the property of the employee whether or not the employer has taken a tip credit. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than as a credit against its minimum wage obligations under the Executive

Order to the employee, or in furtherance of a valid tip pool. An employer and employee cannot agree to waive the workers right to retain his or her tips. Customers may present cash tips directly to the employee or may designate a tip amount to be added to their bill when paying with a credit card or by other electronic means. Special gifts in forms other than money or its equivalent such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of determining wages paid under the Executive Order.

(d) *Service charges.* (1) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its workers, cannot be counted as a tip for purposes of determining if the worker is a tipped employee. Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to workers of the hotel, the amounts so distributed are not tips.

(2) As stated above, service charges and other similar sums are considered to be part of the employer's gross receipts and are not tips for the purposes of the Executive Order. Where such sums are distributed by the employer to its workers, however, they may be used in their entirety to satisfy the wage payment requirements of the Executive Order.

(e) *Tip pooling.* Where tipped employees share tips through a tip pool, only the amounts retained by the tipped employees after any redistribution through a tip pool are considered tips in applying the provisions of FLSA section 3(t) and the wage payment provisions of section 3 of the Executive Order. There is no maximum contribution percentage on valid mandatory tip pools, which can only include tipped employees. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

(f) *Notice.* An employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit. The employer must inform the tipped employee of the amount of the cash wage that is to be paid by the employer, which cannot be lower than the cash wage required by paragraph (a)(1) of this section; the additional amount by which the wages of the tipped employee will be considered increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to tipped employees; and that the tip credit shall not apply to any worker who has not been informed of these requirements in this section.

§ 10.29 Notice.

(a) The contractor must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. With respect to service employees on contracts covered by the Service Contract Act and laborers and mechanics on contracts covered by the Davis-Bacon Act, the contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes.

(b) With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by workers.

(c) Contractors that customarily post notices to workers electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

Subpart D—Enforcement

§ 10.41 Complaints.

(a) Any worker, contractor, labor organization, trade organization, contracting agency, or other person or entity that believes a violation of the Executive Order or this part has occurred may file a complaint with any office of the Wage and Hour Division. No particular form of complaint is required. A complaint may be filed orally or in writing. If the complainant is unable to file the complaint in English, the Wage and Hour Division will accept the complaint in any language.

(b) It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. Disclosure of such statements shall be governed by the provisions of the Freedom of Information Act (5 U.S.C. 552, *see* 29 CFR part 70) and the Privacy Act of 1974 (5 U.S.C. 552a).

§ 10.42 Wage and Hour Division conciliation.

After receipt of a complaint, the Administrator may seek to resolve the matter through conciliation.

§ 10.43 Wage and Hour Division investigation.

The Administrator may investigate possible violations of the Executive Order or this part either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator may conduct interviews with the relevant contractor, as well as the contractor's workers at the worksite during normal work hours; inspect the relevant contractor's records (including contract documents and payrolls, if applicable); make copies and transcriptions of such records; and require the production of any documentary or other evidence the Administrator deems necessary to determine whether a violation, including conduct warranting imposition of debarment, has occurred. Federal agencies and contractors shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all aspects of investigations.

§ 10.44 Remedies and sanctions.

(a) *Unpaid wages.* When the Administrator determines a contractor has failed to pay the applicable Executive Order minimum wage to workers, the Administrator will notify the contractor and the applicable contracting agency of the unpaid wage violation and request the contractor to remedy the violation. If the contractor does not remedy the violation of the Executive Order or this part, the Administrator shall direct the contractor to pay all unpaid wages to the affected workers in the investigative findings letter it issues pursuant to § 10.51. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Government be

withheld as necessary to pay unpaid wages. Upon the final order of the Secretary that unpaid wages are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(b) *Antiretaliation.* When the Administrator determines that any person has discharged or in any other manner retaliated against any worker because such worker filed any complaint or instituted or caused to be instituted any proceeding under or related to the Executive Order or this part, or because such worker testified or is about to testify in any such proceeding, the Administrator may provide for any relief to the worker as may be appropriate, including employment, reinstatement, promotion, and the payment of lost wages.

(c) *Debarment.* Whenever a contractor is found by the Secretary of Labor to have disregarded its obligations under the Executive Order, or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, shall be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to three years from the date of publication of the name of the contractor or responsible officer on the ineligible list. Neither an order for debarment of any contractor or its responsible officers from further Government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors under this section shall be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge.

(d) *Civil action to recover greater underpayments than those withheld.* If the payments withheld under § 10.11(c) are insufficient to reimburse all workers' lost wages, or if there are no payments to withhold, the Department of Labor, following a final order of the Secretary, may bring action against the contractor in any court of competent jurisdiction to recover the remaining amount of underpayments. The Department of Labor shall, to the extent possible, pay any sums it recovers in this manner directly to the underpaid workers. Any sum not paid to a worker because of inability to do so within three years shall be transferred into the Treasury of the United States as miscellaneous receipts.

(e) *Retroactive inclusion of contract clause.* If a contracting agency fails to include the applicable contract clause in a contract to which the Executive Order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation and termination).

Subpart E—Administrative Proceedings

§ 10.51 Disputes concerning contractor compliance.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning a contractor's compliance with subpart C of this part. The procedures in this section may be initiated upon the Administrator's own motion or upon request of the contractor.

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor(s) and the prime contractor (if different) of the investigative findings by certified mail to the last known address.

(2) A contractor desiring a hearing concerning the Administrator's investigative findings letter shall request such a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. The request shall set forth those findings which are in dispute with respect to the violations and/or debarment, as appropriate, and explain how the findings are in dispute, including by making reference to any affirmative defenses.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation to an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 10.52, the Administrator shall notify the contractor(s) of the investigation findings by certified mail to the last known address, and shall issue a ruling in the investigative findings letter on any issues of law known to be in dispute.

(2)(i) If the contractor disagrees with the factual findings of the Administrator or believes that there are relevant facts in dispute, the contractor shall so advise the Administrator by letter postmarked within 30 calendar days of the date of the Administrator's letter. In the response, the contractor shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a timely response under paragraph (c)(2)(i) of this section alleging the existence of a factual dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor accordingly.

(3) If the contractor desires review of the ruling issued by the Administrator under paragraph (c)(1) or (c)(2)(ii) of this section, the contractor shall file a petition for review thereof with the Administrative Review Board postmarked within 30 calendar days of the date of the ruling, with a copy thereof to the Administrator. The petition for review shall be filed in accordance with the procedures set forth in 29 CFR part 7.

(d) If a timely response to the Administrator's investigative findings letter is not made or a timely petition for review is not filed, the Administrator's investigative findings letter shall become the final order of the Secretary. If a timely response or petition for review is filed, the Administrator's letter shall be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Administrative Review Board, or otherwise becomes a final order of the Secretary.

§ 10.52 Debarment proceedings.

(a) Whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to workers or subcontractors under Executive Order 13658 or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, shall be

ineligible for a period of up to three years to receive any contracts or subcontracts subject to Executive Order 13658 from the date of publication of the name or names of the contractor or persons on the ineligible list.

(b)(1) Whenever the Administrator finds reasonable cause to believe that a contractor has committed a violation of Executive Order 13658 or this part which constitutes a disregard of its obligations to workers or subcontractors, the Administrator shall notify by certified mail to the last known address, the contractor and its responsible officers (and any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest), of the finding. The Administrator shall afford such contractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under Executive Order 13658 or this part. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter to the Administrator postmarked within 30 calendar days of the date of the investigative findings letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute.

(2) Hearings under this section shall be conducted in accordance with the procedures set forth in 29 CFR part 6. If no hearing is requested within 30 calendar days of the letter from the Administrator, the Administrator's findings shall become the final order of the Secretary.

§ 10.53 Referral to Chief Administrative Law Judge; amendment of pleadings.

(a) Upon receipt of a timely request for a hearing under § 10.51 (where the Administrator has determined that relevant facts are in dispute) or § 10.52 (debarment), the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the respondent. The investigative findings letter from the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceedings.

(b) At any time prior to the closing of the hearing record, the complaint (investigative findings letter) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as he/she may approve. For proceedings pursuant to § 10.51, such an amendment may include a statement that debarment action is warranted under § 10.52. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The presiding Administrative Law Judge may, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 10.54 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the Administrative Law Judge's discretion prior to the issuance of the Administrative Law Judge's decision, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the Administrator's findings letter and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and the Administrative Review Board regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 10.55 Proceedings of the Administrative Law Judge.

(a) The Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's investigative findings letters issued under §§ 10.51 and 10.52. Any party may, when requesting an appeal or during the pendency of a proceeding on appeal, timely move an Administrative Law Judge to consolidate a proceeding initiated hereunder with a proceeding initiated under the Service Contract Act or the Davis-Bacon Act.

(b) *Proposed findings of fact, conclusions, and order.* Within 20 calendar days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals. Each party shall serve such proposals and brief on all other parties.

(c) *Decision.* (1) Within a reasonable period of time after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 calendar days of receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall issue a decision. The decision shall contain appropriate findings, conclusions, and an order, and be served upon all parties to the proceeding.

(2) If the respondent is found to have violated Executive Order 13658 or this part, and if the Administrator requested debarment, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the

ineligible list, including findings that the contractor disregarded its obligations to workers or subcontractors under the Executive Order or this part.

(d) *Limit on scope of review.* The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, Administrative Law Judges shall have no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(e) *Orders.* If the Administrative Law Judge concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, monetary relief for unpaid wages. Where the Administrator has sought imposition of debarment, the Administrative Law Judge shall determine whether an order imposing debarment is appropriate.

(f) *Finality.* The Administrative Law Judge's decision shall become the final order of the Secretary, unless a timely petition for review is filed with the Administrative Review Board.

§ 10.56 Petition for review.

(a) Within 30 calendar days after the date of the decision of the Administrative Law Judge (or such additional time as is granted by the Administrative Review Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on debarment shall also state the disregard of obligations to workers and/or subcontractors, or lack thereof, as appropriate. A party must serve the petition for review, and all briefs, on all parties and the Chief Administrative Law Judge. It must also timely serve copies of the petition and all briefs on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(b) *Effect of filing.* If a party files a timely petition for review, the Administrative Law Judge's decision shall be inoperative unless and until the Administrative Review Board issues an order affirming the letter or decision, or the letter or decision otherwise becomes a final order of the Secretary. If a petition for review concerns only the imposition of debarment, however, the remainder of the decision shall be effective immediately. No judicial review shall be available unless a timely petition for review to the Administrative Review Board is first filed.

§ 10.57 Administrative Review Board proceedings.

(a) *Authority*—(1) *General.* The Administrative Review Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from investigative findings letters of the Administrator issued under § 10.51(c)(1) or (2), Administrator's rulings issued under § 10.58, and decisions of Administrative Law Judges issued under § 10.55. In considering the matters within the scope of its jurisdiction, the Administrative Review Board shall act as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary concerning such matters.

(2) *Limit on scope of review.* (i) The Board shall not have jurisdiction to pass on the validity of any provision of this part. The Board is an appellate body and shall decide cases properly before it on the basis of substantial evidence contained in the entire record before it. The Board shall not receive new evidence into the record.

(ii) The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, the Administrative Review Board shall have no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(b) *Decisions.* The Board's final decision shall be issued within a reasonable period of time following receipt of the petition for review and shall be served upon all parties by mail to the last known address and on the Chief Administrative Law Judge (in cases involving an appeal from an Administrative Law Judge's decision).

(c) *Orders.* If the Board concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, monetary relief for unpaid wages. Where the Administrator has sought imposition of debarment, the Board shall determine whether an order imposing debarment is appropriate.

(d) *Finality.* The decision of the Administrative Review Board shall become the final order of the Secretary.

§ 10.58 Administrator ruling.

(a) Questions regarding the application and interpretation of the rules contained in this part may be referred to the Administrator, who shall issue an appropriate ruling. Requests for such rulings should be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(b) Any interested party may appeal to the Administrative Review Board for review of a final ruling of the Administrator issued under paragraph (a) of this section. The petition for review shall be filed with the Administrative Review Board within 30 calendar days of the date of the ruling.

Appendix A to 29 CFR Part 10—Contract Clause

The following clause shall be included by the contracting agency in every contract, contract-like instrument, and solicitation to which Executive Order 13658 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR):

(a) *Executive Order 13658.* This contract is subject to Executive Order 13658, the regulations issued by the Secretary of Labor in 29 CFR part 10 pursuant to the Executive Order, and the following provisions.

(b) *Minimum Wages.* (1) Each worker (as defined in 29 CFR 10.2) engaged in the performance of this contract by the prime contractor or any subcontractor, regardless of any contractual relationship which may be alleged to exist between the contractor and worker, shall be paid not less than the applicable minimum wage under Executive Order 13658.

(2) The minimum wage required to be paid to each worker performing work on or in connection with this contract between January 1, 2015 and December 31, 2015 shall be $10.10 per hour. The minimum wage shall be adjusted each time the Secretary of Labor's annual determination of the applicable minimum wage under section 2(a)(ii) of Executive Order 13658 results in a higher minimum wage. Adjustments to the Executive Order minimum wage under section 2(a)(ii) of Executive Order 13658 will be effective for all workers subject to the Executive Order beginning January 1 of the following year. If appropriate, the contracting officer, or other agency official overseeing this contract shall ensure the contractor is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 13658 minimum wage beginning on January 1, 2016. The Secretary of Labor will publish annual determinations in the **Federal Register** no later than 90 days before such new wage is to take effect. The Secretary will also publish the applicable minimum

wage on *www.wdol.gov* (or any successor Web site). The applicable published minimum wage is incorporated by reference into this contract.

(3) The contractor shall pay unconditionally to each worker all wages due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 10.23), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Executive Order may not be of any duration longer than semi-monthly.

(4) The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements. In the event of any violation of the minimum wage obligation of this clause, the contractor and any subcontractor(s) responsible therefore shall be liable for the unpaid wages.

(5) If the commensurate wage rate paid to a worker on a covered contract whose wages are calculated pursuant to a special certificate issued under 29 U.S.C. 214(c), whether hourly or piece rate, is less than the Executive Order minimum wage, the contractor must pay the Executive Order minimum wage rate to achieve compliance with the Order. If the commensurate wage due under the certificate is greater than the Executive Order minimum wage, the contractor must pay the 14(c) worker the greater commensurate wage.

(c) *Withholding.* The agency head shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the prime contractor under this or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by Executive Order 13658.

(d) *Contract Suspension/Contract Termination/Contractor Debarment.* In the event of a failure to pay any worker all or part of the wages due under Executive Order 13658 or 29 CFR part 10, or a failure to comply with any other term or condition of Executive Order 13658 or 29 CFR part 10, the contracting agency may on its own action or after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 10.52.

(e) The contractor may not discharge any part of its minimum wage obligation under Executive Order 13658 by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, the cash equivalent thereof.

(f) Nothing herein shall relieve the contractor of any other obligation under Federal, State or local law, or under contract, for the payment of a higher wage to any worker, nor shall a lower prevailing wage under any such Federal, State, or local law, or under contract, entitle a contractor to pay less than $10.10 (or the minimum wage as established each January thereafter) to any worker.

(g) *Payroll Records.* (1) The contractor shall make and maintain for three years records containing the information specified in paragraphs (g)(1) (i) through (vi) of this section for each worker and shall make the records available for inspection and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(i) Name, address, and social security number.

(ii) The worker's occupation(s) or classification(s)

(iii) The rate or rates of wages paid.

(iv) The number of daily and weekly hours worked by each worker.

(v) Any deductions made; and

(vi) Total wages paid.

(2) The contractor shall also make available a copy of the contract, as applicable, for inspection or transcription by authorized representatives of the Wage and Hour Division.

(3) Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of 29 CFR part 10 and this contract, and in the case of failure to produce such records, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, shall take such action as may be necessary to cause suspension of any further payment or advance of funds until such time as the violations are discontinued.

(4) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct investigations, including interviewing workers at the worksite during normal working hours.

(5) Nothing in this clause limits or otherwise modifies the contractor's payroll and recordkeeping obligations, if any, under the Davis-Bacon Act, as amended, and its implementing regulations; the Service Contract Act, as amended, and its implementing regulations; the Fair Labor Standards Act, as amended, and its implementing regulations; or any other applicable law.

(h) The contractor (as defined in 29 CFR 10.2) shall insert this clause in all of its covered subcontracts and shall require its subcontractors to include this clause in any covered lower-tier subcontracts. The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with this contract clause.

(i) *Certification of Eligibility.* (1) By entering into this contract, the contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Service Contract Act, section 3(a) of the Davis-Bacon Act, or 29 CFR 5.12(a)(1).

(2) No part of this contract shall be subcontracted to any person or firm whose name appears on the list of persons or firms ineligible to receive Federal contracts.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(j) *Tipped employees.* In paying wages to a tipped employee as defined in section 3(t) of the Fair Labor Standards Act, 29 U.S.C. 203(t), the contractor may take a partial credit against the wage payment obligation (tip credit) to the extent permitted under section 3(a) of Executive Order 13658. In order to take such a tip credit, the employee must receive an amount of tips at least equal to the amount of the credit taken; where the tipped employee does not receive sufficient tips to equal the amount of the tip credit the contractor must increase the cash wage paid for the workweek so that the amount of cash wage paid and the tips received by the employee equal the applicable minimum wage under Executive Order 13658. To utilize this proviso:

(1) The employer must inform the tipped employee in advance of the use of the tip credit;

(2) The employer must inform the tipped employee of the amount of cash wage that will be paid and the additional amount by which the employee's wages will be considered increased on account of the tip credit;

(3) The employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received); and

(4) The employer must be able to show by records that the tipped employee receives at least the applicable Executive Order minimum wage through the combination of direct wages and tip credit.

(k) *Antiretaliation.* It shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or 29 CFR part 10, or has testified or is about to testify in any such proceeding.

(l) *Disputes concerning labor standards.* Disputes related to the application of Executive Order 13658 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 10. Disputes within the meaning of this contract clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the workers or their representatives.

(m) *Notice.* The contractor must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. With respect to service employees on contracts covered by the Service Contract Act and laborers and mechanics on contracts covered by the Davis-Bacon Act, the contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by workers. Contractors that customarily post notices to workers electronically may post the notice electronically provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

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

Appendix—Establishing a Minimum Wage for Contractors

WORKER RIGHTS
UNDER EXECUTIVE ORDER 13658

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

FEDERAL MINIMUM WAGE FOR CONTRACTORS

$10.10 PER HOUR

EFFECTIVE JANUARY 1, 2015 – DECEMBER 31, 2015

MINIMUM WAGE

On February 12, 2014, the President signed Executive Order 13658, establishing a Minimum Wage for Contractors. The Executive Order requires that parties who contract with the Federal Government pay workers performing work on or in connection with covered Federal contracts at least: (1) $10.10 per hour beginning January 1, 2015; and (2) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor in accordance with the Executive Order.

TIPS

Covered tipped employees must be paid a cash wage of at least $4.90 per hour effective January 1, 2015 – December 31, 2015. Beginning January 1, 2016, the required cash wage will be defined by the Secretary of Labor in accordance with the Executive Order. If a worker's tips combined with the required cash wage of at least $4.90 per hour paid by the contractor do not equal the hourly minimum wage for contractors (noted above), the contractor must increase the cash wage paid to make up the difference. Certain other conditions must also be met.

ENFORCEMENT

The Wage and Hour Division (WHD) has offices across the country to help. WHD can answer questions, in person or by telephone, about your workplace rights and protections. We can investigate employers and recover wages to which workers may be entitled. All services are free and confidential. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Executive Order. If you are unable to file a complaint in English, WHD will accept the complaint in any language.

ADDITIONAL INFORMATION

- Executive Order 13658 establishes that the Order applies only to new Federal construction and service contracts, as defined by the Secretary in the regulations.
- Workers with disabilities whose wages are governed by special certificates issued under section 14(c) of the Fair Labor Standards Act must receive no less than the full minimum wage rate as established by the Executive Order.
- Some workers are excluded. For example, some workers who provide support "in connection with" covered contracts for less than 20 percent of their hours worked in a week may not be entitled to the Executive Order minimum wage. Certain full-time students, learners, and apprentices who are employed under subminimum wage certificates are not entitled to the Executive Order minimum wage. Certain occupations are also exempt from the Executive Order minimum wage.
- Some state or local laws may provide greater worker protections. Employers need to comply with both.

For additional information:

1-866-487-9243

WHD U.S. Wage and Hour Division

www.dol.gov/whd/govcontracts

U.S. Department of Labor | Wage and Hour Division

WH1089 0914

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