authorized to perform a particular function. ATF also believes these multiple delegation instruments exacerbate the administrative burden associated with maintaining up-to-date delegations, resulting in an undue delay in reflecting current authorities.

Accordingly, this final rule rescinds all authorities of the Director in part 30 that were previously delegated and places those authorities with the ''appropriate ATF officer.'' Most of the authorities of the Director that were not previously delegated are also placed with the ''appropriate ATF officer.'' Along with this final rule, ATF is publishing ATF Order 1130.17, Delegation Order—Delegation of the Director's Authorities in part 30, Gauging Manual, which delegates certain of these authorities to the appropriate organizational level.

The effect of these changes is to consolidate all delegations of authority in part 30 into one delegation instrument. This action both simplifies the process for determining what ATF officer is authorized to perform a particular function and facilitates the updating of delegations in the future. As a result, delegations of authority will be reflected in a more timely and user-friendly manner.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule because there are no new or revised recordkeeping or reporting requirements.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this rule, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. A copy of this final rule was submitted to the Chief Counsel for Advocacy of the Small Business Administration in accordance with 26 U.S.C. 7805(f). No comments were received.

Executive Order 12866

It has been determined that this rule is not a significant regulatory action because it will not: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Administrative Procedure Act

Because this final rule merely makes technical amendments and conforming changes to improve the clarity of the regulations, it is unnecessary to issue this final rule with notice and public procedure under 5 U.S.C. 553(b). Similarly it is unnecessary to subject this final rule to the effective date limitation of 5 U.S.C. 553(d).

Drafting Information

The principal author of this document is Lisa Gesser, Regulations Division, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 30

Alcohol and alcoholic beverages, Measurement standards, Scientific equipment.

Authority and Issuance

Title 27, Code of Federal Regulations is amended as follows:

PART 30—GAUGING MANUAL

Paragraph 1. The authority citation for part 30 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 2. Section 30.11 is amended by removing the definitions of ''ATF officer'' and ''Regional director'' and by adding a new definition of ''Appropriate ATF officer'' to read as follows:

§ 30.11 Meaning of terms.

* * * * *

Appropriate ATF Officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any functions relating to the administration or enforcement of this part by ATF Order 1130.17, Delegation Order—Delegation of the Director's Authorities in 27 CFR Part 30—Gauging Manual.

* * * * *

§§ 30.11, 30.31, 30.36, 30.43, and 30.51 [Amended]

Par. 3. Part 30 is further amended by removing the words ''Director'' each place it appears and adding, in substitution, the words ''appropriate ATF officer'' in the following places:

(a) The definition of ''Bulk conveyance'' in § 30.11;

(b) Section 30.31(b);

(c) Section 30.36;

(d) The last sentence of § 30.43; and

(e) The first sentence of § 30.51.

Par. 4. Section 30.21(c) is revised to read as follows:

§ 30.21 Requirements.

* * * * *

(c) *Appropriate ATF Officers.* Appropriate ATF officers shall use only hydrometers and thermometers furnished by the Government. However, where this part requires the use of a specific gravity hydrometer, ATF officers shall use precision grade specific gravity hydrometers conforming to the provisions of § 30.24, furnished by the proprietor. However, the appropriate ATF officer may authorize the use of other instruments approved by the appropriate ATF officer as being equally satisfactory for determination of specific gravity and for gauging. From time to time appropriate ATF officers shall verify the accuracy of hydrometers and thermometers used by proprietors.

* * * * *

Par. 5. Section 30.24(a) is amended by adding the word ''appropriate'' before the words ''ATF officers.''

Par. 6. Section 30.24(b) is amended by adding the word ''appropriate'' before the words ''ATF officer.''

Bradley A. Buckles,

Director.

Approved: August 11, 2001.

John P. Simpson,

Deputy Assistant Secretary (Regulatory, Tariff and Trade Enforcement).

[FR Doc. 01–1165 Filed 1–18–01; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

29 CFR Part 552

RIN 1215–AA82

Application of the Fair Labor Standards Act to Domestic Service

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

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The Department of Labor is proposing to amend several of the existing regulations under the Fair Labor Standards Act (FLSA) pertaining to the exemption for companionship

services. Section 13(a)(15) exempts from the minimum wage and overtime provisions of the FLSA domestic service employees employed ''to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' This exemption was enacted in 1974 at the same time that Congress amended the FLSA to cover domestic service employees generally. The pertinent regulations governing this exemption have been unchanged since they were promulgated in 1975. Due to significant changes in the home care industry over the last 25 years, workers who today provide in-home care to individuals needing assistance with activities of daily living are performing types of duties and working in situations that were not envisioned when the companionship services regulations were promulgated. The number of workers providing these services has also greatly increased, and most of these workers are being excluded from the FLSA under the companionship services exemption. The Department has reevaluated the regulations and determined that—as currently written—they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section 13(a)(15). Therefore, the Department proposes to amend the regulations to revise the definition of ''companionship services,'' which sets out the duties that a companion must be employed to perform in order to qualify for the exemption, to more closely mirror Congressional intent. The Department also proposes to amend the regulations to clarify the criteria used to judge whether employees qualify as trained personnel, who are not recognized as exempt companions. Finally, the Department proposes to amend the regulations pertaining to employment by a third party. This change would deny the companionship services exemption if the worker is employed by someone other than a member of the family in whose home he or she works. It would similarly deny the exemption for live-in domestics, who are exempt from the FLSA's overtime requirements pursuant to section 13(b)(21), if they are employed by someone other than a member of the family in whose home they reside and work.

DATES: Comments are due on or before March 20, 2001.

ADDRESSES: Submit written comments to T. Michael Kerr, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Attention: Fair Labor Standards Team, Room S–3516, 200 Constitution Avenue NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped postcard, or to submit comments by certified mail, return receipt requested. As a convenience, commenters may transmit comments by facsimile (''FAX'') machine to (202) 693–1432. This is not a toll free number. If comments are transmitted by FAX and a hard copy is also submitted by mail, please indicate on the hard copy that it is a duplicate copy of the FAX transmission.

FOR FURTHER INFORMATION CONTACT: Richard M. Brennan, Deputy Director, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0745. This is not a toll free number. Copies of this proposed rulemaking may be obtained in alternative formats by calling (202) 693–0745 or (202) 693–1461 (TTY). The alternative formats available are large print electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System) and audiotape.

SUPPLEMENTARY INFORMATION

I. Background

Congress expressly extended coverage to ''domestic service'' workers under the FLSA in 1974, amending the law to apply to employees performing services of a household nature in or about the private home of the person by whom they are employed. 29 U.S.C. 202(a), 206(f), 207(l). Domestic service workers were made subject to the FLSA even though they worked for a private household and not for a covered enterprise. Domestic service workers include, for example, employees working as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, and family chauffeurs. Senate Report No. 93–690, 93d Cong., 2d Sess. (1974), p. 20. Simultaneously with extending coverage under the FLSA to domestic service workers, Congress created a complete exemption from both the minimum wage and overtime requirements for casual babysitters and persons ''employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]).'' 29 U.S.C. 213(a)(15). Congress also created a more limited exemption from the overtime requirements for domestic service employees in a household who reside in that household. 29 U.S.C. 213(b)(21).

Congressional committee reports describe the reasons for extending the minimum wage protections to domestics as ''so compelling and generally recognized as to make it hardly necessary to cite them.'' Senate Report No. 93–690, p. 18. Private household work had been one of the least attractive fields of employment. Wages were low, work hours were highly irregular, and non-wage benefits were few. Senate Report No. 93–690, p. 18.

The U.S. House of Representatives, Committee on Education and Labor stated its expectation ''that extending minimum wage and overtime protection to domestic workers will not only raise the wages of these workers but will improve the sorry image of household employment. * * * Including domestic workers under the protection of the Act should help to raise the status and dignity of this work.'' House Report No. 93–913, 93d Cong., 2d Sess., (1974), pp. 33–34. The legislative history states that the 1974 Amendments were intended to include all employees whose vocation was domestic service, but to exempt from coverage babysitters and companions who were not regular bread-winners or responsible for their families' support. It was not intended that the statute exclude trained personnel such as nurses, whether registered or practical, from the protections of the Act. Senate Report No. 93–690, p. 20. Senator Williams, Chairman of the Senate Subcommittee on Labor and the Senate floor manager of the 1974 FLSA Amendments, described companions as ''elder sitters'' whose main purpose of employment is to watch over an elderly or infirm person in the same manner that a babysitter watches over children. All other work (such as occasionally making a meal or washing clothes for the person) must be incidental to that main purpose. 119 Cong. Rec. 24773, 24801 (1973).

The Department promulgated implementing regulations in 1975 that define ''companionship services'' as including ''fellowship, care, and protection'' provided to a person who, because of advanced age or physical or mental infirmity, could not care for his or her own needs. The regulation defined such exempt services as including household work related to the person's care (such as meal preparation, bed making, washing of clothes, and other similar services). A companion could also perform additional general

household work without losing the exemption if it was incidental and comprised not more than 20 percent of the total weekly hours worked. Finally, a companion could be exempt even if employed solely by a third-party employer or agency, rather than by an individual or family directly. 29 CFR 552.6; 552.109(a). Similarly, live-in domestic service workers could be exempt even if employed solely by a third-party employer or agency, rather than by the individual or family in whose home they resided and worked. 29 CFR 552.109(c).

The home care industry has changed dramatically since the Department published the 1975 regulations implementing the exemption for companionship services. There has been a growing demand for long-term in-home care for persons of all ages, in part because of the rising cost of and increasing dissatisfaction with traditional institutional care, and because of the availability of public funding assistance for in-home care under Medicare and Medicaid. According to the National Association of Home Care (NAHC) publication, *Basic Statistics About Home Care (March 2000)*, data from the Department of Health and Human Services' Health Care Financing Administration (HCFA) show that the number of Medicare-certified home care agencies increased over three-fold from 2,242 in 1975 to 7,747 in 1999. The number of for-profit agencies not associated with a hospital, rehabilitation facility, or skilled nursing facility, *i.e.*, freestanding agencies, increased more than any other category of agency from 47 in 1975 to 3,129 in 1999. These for-profit agencies grew from 2 percent of total Medicare-certified agencies to over 40 percent by 1999, and now represent the greatest percentage of certified agencies. Public health agencies, which constituted over half of the certified agencies in 1975, now represent only 12 percent.

The Federal Government pays for much of the cost of providing home care services to care recipients. Medicare provides a notable portion of the industry's total revenues; other payment sources include Medicaid, insurance plans, and direct pay. Based on data from ''A Profile of Medicare Home Health''—a HCFA publication—Medicare and Medicaid together account for more than half of the revenues paid to freestanding agencies (40 and 15 percent, respectively). Other private funds (philanthropy) account for 12 percent, while private health insurance accounts for 11 percent. Out-of-pocket funds account for 22 percent of agency revenues.

There has been a similarly dramatic increase in the employment of home health aides and personal and home care aides in the private homes of individuals who need assistance with basic daily living or health maintenance activities. Bureau of Labor Statistics' (BLS) national occupational employment and wage estimates from the Occupational Employment Statistics (OES) survey show that the number of workers in these jobs tripled during the decade between 1988 and 1998, and by 1998 there were 430,440 people working as home health aides and 255,960 people working as personal and home care aides. The combined occupations of personal care and home health aides constitute the seventh most rapidly growing occupational group, and BLS estimates that their number will increase by another 150 percent from 1998 to 2008. The earnings of both categories of employees remain among the lowest in the service industry—a 1998 mean annual wage of $16,250 for home health aides and $14,920 for personal and home care aides according to the OES data. Based on the same data source, ten percent of home health aides and personal and home care aides earn below $12,300 a year—lower than the 1999 poverty threshold level of $13,880 for a family of three.

Home health aides generally received more than personal and home care aides—$7.51 per hour (mean hourly wage) for personal and home care aides, and $8.17 per hour for home health aides. However, 10 percent of home health aides were paid less than $5.87 an hour, while 10 percent of personal and home care aides received less than $5.60 per hour. Although 90 percent of home health aides and personal and home care aides received hourly wages at or above $5.87 or $5.60, nearly 70,000 of these workers received hourly wages at or below such rates, and possibly below the minimum wage.

According to the BLS National Industry-Occupation Employment Matrix (1998), the largest percentage (38 percent) of personal care and home health care aides are employed in the home health care services industry. Others are employed by miscellaneous social service agencies, residential care facilities, personnel supply service agencies, nursing homes and hospitals. Only about two percent were self-employed and another two percent were employed in private households.

Current data suggest that many workers in the home care industry are now employed in their primary occupation. BLS National Current Employment Statistics for 1999 show an average weekly number of hours worked among non-supervisory employees in the home health care services industry (SIC 808) of 29.1 hours. Workers in the individual and family social services industry (SIC 832) averaged 31.2 hours per week. In the residential care industry (SIC 836), workers averaged 32.4 weekly hours worked. To the extent that time spent traveling from one client to the next has not been considered hours worked and thus captured in the above data, home care workers may actually be working longer than revealed by the BLS statistics. As indicated earlier, it clearly was Congress' intent under the 1974 FLSA Amendments to cover all workers who performed domestic services as a *vocation*, excluding casual babysitters and providers of companionship services who were *not* regular bread winners or responsible for their families' support.

These workers perform a variety of housekeeping, personal care, and medical duties for individuals who need assistance with activities of daily living to enable them to remain in their homes. Home health aides perform duties such as preparing meals, dressing patients, administering medication and performing medical procedures under a doctor's or nurse's direction. Personal and home care aides perform a variety of tasks in the home, including household work and assistance with nutrition and cleanliness. Employers have generally treated workers employed as home health aides and personal and home care aides as exempt companions, based upon the Department's current regulations. To the extent that the current regulations allow for the exemption of an employee who provides very little fellowship, and whose duties involve almost exclusively the performance of household chores or medical services, they do not appropriately implement Congress' limited exemption for employees who provide companionship services. As a result, the Department believes it is necessary to amend the regulations to focus them on the fellowship and protection duties that Congress originally intended the companion exemption to cover.

II. Proposed Regulatory Revisions

A. Duties of a Companion (29 CFR 552.6)

The Department proposes to amend the definition of ''companionship services'' in section 552.6 to clarify the focus on the element of fellowship, to align the regulation more closely with Congressional intent. The dictionary definition of ''companionship'' is

instructive in revising the regulation to conform to the concept of a companion as originally intended in the legislative history: someone in the home primarily to watch over and care for the elderly or infirm person, much as a neighbor or babysitter would. The dictionary defines companionship as the ''relationship of companions; fellowship.'' And the term ''companion'' is defined as a ''person who accompanies or associates with another; comrade'' and as a person ''employed to assist, live with, or travel with another.'' It further defines ''fellowship'' as including ''the condition of being together,'' ''friendship'' and coming together ''in a congenial atmosphere.'' The American Heritage Dictionary of the English Language, 1976 Edition. Thus, we propose a revision of the regulation that requires that fellowship be a significant, important and fundamental aspect of the job under the companionship services exemption. Only where the worker and the person being served or assisted interact on a close personal basis, for a significant percentage of the time, would the companionship services exemption be applicable. Of course, the precise nature of what activities constitute fellowship will vary, depending upon the needs, capabilities, and interests of the care recipient. For example, fellowship might involve reading a book or a newspaper to the person, chatting with him or her about family or other events, playing cards, watching television, or going for a walk. Whatever the specific activity, it must involve personal interaction between the in-home care provider and the care recipient in order for the proposed companionship services exemption to apply.

The regulatory definition of companionship services cannot be so broad as to include someone who essentially is serving as a maid or household worker. In 1974, Congress amended the FLSA specifically to include domestic service workers (such as maids, cooks, valets and laundresses) among those intended to be covered by the Act. Congress simultaneously created a narrowly-tailored exemption for casual babysitters and those providing companionship services to the elderly and infirm. The regulations implementing the exemption should strike a balance that implements Congress' twin goals by recognizing that the fellowship and protection provided by a companion are very different from the household chores performed by a maid or cook or laundress. Furthermore, the regulations should also reflect that coverage under the FLSA is construed broadly and exemptions narrowly to effectuate the Act's remedial purposes.

The Department recognizes that it is possible to define companionship services in several different ways, with the options arrayed along a spectrum. The definitions may vary in the degree to which they require the provision of fellowship only, or allow the provision of fellowship in conjunction with hands-on care. The percentage of time that must be spent in fellowship as compared to other care duties also may vary. The Department proposes three alternatives for defining companionship services and seeks comments on all three alternatives. The three possible definitions involve variations in the specific types of duties the employee may perform and the amount of time the employee may spend in performing such duties. All of the alternatives increase the emphasis on fellowship as a critical component of a companion's duties, and narrow or eliminate the type of care that may comprise a companion's duties. In all three alternatives, we also propose to eliminate the current regulatory provision that allows the exemption to apply when the worker spends up to 20 percent of his or her time performing general household work which is unrelated to the care of the person, such as general vacuuming and dusting. Such general household work is precisely the sort of work that Congress sought to cover when it amended the Act in 1974 to reach domestic service workers, and therefore would be precluded.

The first proposal requires that fellowship be a significant part of the person's duties for the companionship services exemption to apply, but does not require fellowship duties to occupy a set percentage of the worker's time. This proposal anticipates that fellowship would occur in conjunction with the performance of other intimate personal care chores, such as bathing, grooming, and dressing, which also would constitute exempt duties. The first proposal also would allow the exemption if the worker performs a limited amount (up to 20 percent of the hours worked per week) of work of a household nature that is directly related to the client's personal care, such as cooking the person's meal, making the person's bed, or washing the dishes for that person.

The second proposal focuses on fellowship and protection as the primary duties in order for the companionship services exemption to apply. Thus, an employee must spend more than 50 percent of his or her time engaging in fellowship or protection duties to be exempt. Such fellowship and protection duties would include activities providing only fellowship or protection as well as activities in which fellowship or protection is provided concurrently with the performance of other intimate personal care chores, such as bathing, grooming, and toileting. However, only one-half the time spent providing fellowship or protection simultaneously with such other intimate personal care chores would count when determining if the employee's primary duty was providing fellowship or protection. The second proposal also would allow the exemption if the worker performs a limited amount (up to 20 percent of the weekly hours) of work of a household nature that is directly related to the person's care.

The third proposal would require that fellowship and protection be the sole core duties in order for the exemption to apply. To qualify for the exemption, the individual would have to spend at least 80 percent of his or her time in activities that provide fellowship or protection, not in conjunction with other personal care duties. The 20 percent tolerance for other types of work would apply to other intimate care and related chores. Thus, under this proposal, time spent on intimate personal care chores (such as grooming, toileting, and feeding) and on directly related work for the person (such as cooking the person's meal) may not exceed 20 percent of the weekly hours worked for the companionship services exemption to apply.

B. Trained Personnel (29 CFR 552.6)

There has also been a dramatic change since the enactment of the 1974 FLSA Amendments in the nature of the duties performed by many employees classified as exempt under the companionship services exemption. Because many individuals who were formerly institutionalized or moved to nursing homes are able, with assistance, to stay in their homes, home care providers have taken on a broader range of medically-related duties. For example, individuals treated as exempt in providing companionship services may now perform duties such as medication management, taking vital signs (pulse, temperature, respiration), routine skin and back care, and assistance with exercise and the performance of simple procedures as an extension of physical therapy service.

The training necessary for an employee to perform such duties, while less than the training of a physician or nurse, means that such individuals are not acting simply as elder sitters or as babysitters watching over their charge.

Some courts, interpreting the current regulations, have allowed employees to qualify for exemption under the present regulatory definition of companionship services despite the fact that they had extensive training, on the theory that they did not have the two or more years of training generally required for LPNs and RNs. For example, in *McCune* v. *Oregon Senior Services Division*, 894 F.2d 1107 (9th Cir. 1990), the court found that certified nursing assistants who had to pass a 60-hour training class were exempt despite their extensive medical training. Similarly, in *Cox* v. *Acme Health Services, Inc.*, 55 F.3d 1304 (7th Cir. 1995), the court held that certified home health aides with 75 hours of state-required training were exempt. The court in *Terwilliger* v. *Home of Hope, Inc.*, 21 F. Supp. 2d 1294 (N.D. Okla. 1998), also found that employees with 160 hours of training, who had to obtain 40 additional hours of training each year, were exempt.

The Department believes that Congress did not intend for the companionship services exemption to apply to employees with the level of training necessary to perform medically-related duties such as medication management and assistance with physical therapy. Duties being performed that require such extensive training are beyond what Congress envisioned when it stated that persons providing companionship services are present in the home, as a neighbor might be, to watch over an elderly person the way a babysitter watches over a child. Thus, the Department proposes to clarify the regulatory definition of companionship services in section 552.6 to exclude personnel trained in the performance of such medically related duties from the companion exemption.

C. Third Party Employment (29 CFR 552.109)

The Department also proposes to amend section 552.109, the regulation pertaining to employment by a third party. People providing in-home care and assistance to individuals with activities of daily living may be employed, or jointly employed, by various parties such as the family or household using the companionship services, State or local governments, private for-profit agencies, and hospital-related and not-for-profit agencies.

Under the existing regulation, employees who are employed by an employer or agency other than the family or household using the companionship services may still qualify for the exemption. Similarly, under the current regulation live-in workers who are employed by a third party, rather than by the family in whose household they work and reside, nevertheless may qualify for an overtime exemption under section 13(b)(21) of the FLSA.

The Department believes that employment by a party other than the family or household using the companionship services is inconsistent with the status of a companion, because the exemption for companionship services in section 13(a)(15) of the FLSA is limited to employees who are domestic service employees. The overtime exemption in section 13(b)(21) for live-in employees who reside in the household is similarly limited to domestic service employees. While domestic service was not defined by Congress in the Act, the Senate report reflects Congress' view that ''the generally accepted meaning of domestic service relates to service of a household nature performed by an employee in or about a private home of the person by whom he or she is employed.'' Senate Report No. 93–690, p. 20 (emphasis added). The regulations mirror Congressional intent in defining domestic service employment as services of a household nature performed by an ''employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.'' 29 CFR 552.3. Thus, the current regulations contain an internal inconsistency, because they allow the companion and live-in domestic exemptions to be applied to an employee employed by someone other than the person in whose private home the work is being performed.

In 1993, the Department published a proposal to amend this regulation in light of the statutory requirement that the exemptions for companionship services and live-ins only applied to domestic service employees. The proposal provided that the companionship services exemption would not apply unless the person receiving the companionship services acted, alone or jointly, as an employer. 58 FR 69310, December 30, 1993. The subsection pertaining to live-in employees was similarly proposed for amendment. In 1995 the rule was reproposed, suggesting that the exemption might apply if either the person receiving the services or a family member or state agency acted as an employer of the person providing companionship services, if the care recipient was unable to act on his or her own behalf. 60 FR 46797, September 8, 1995. The Department received very few comments on either of those proposals, and many of the comments indicated that there was confusion about the impact and effect of the proposals.

The Department continues to believe that the current regulation impermissibly extends the exemption for companionship services and for live-in workers to employees who do not qualify as domestic service employees, because they are not working *in* the home of their employer, *i.e.*, the third party employer. In addition, as discussed above, changes in the industry and in the nature of the duties being performed in peoples' homes by this segment of the work force have resulted in increasing numbers of employees working for third-party employers. Under the 1974 Amendments, Congress extended coverage of the FLSA to domestic service employees who were not previously covered, *i.e.,* those who worked only for a private family and not for a covered enterprise. Anyone who prior to 1974 had worked for a covered placement agency, for example, but who was assigned to work in someone's home, would have been covered previously by the FLSA. The Department believes that Congress did not intend the 1974 amendments to change the status of workers already covered by the FLSA, but only intended to exclude casual babysitters and companions from those newly covered by the law, that is, those exclusively employed by the homeowner or family member.

Accordingly, we propose to amend section 552.109 (a) and (c) to make the exemptions in sections 13(a)(15) and 13(b)(21) of the FLSA applicable only with respect to the family or household using the worker's services. For employees who are employed, whether solely or jointly, by an employer *other than* the family or household, such workers would *not* be engaged in ''domestic service employment'' with respect to those third party employers, and those third party employers, therefore, would *not* be able to avail themselves of the exemptions. A corresponding revision is made to the definition of *domestic service employment* in section 552.103.

III. Paperwork Reduction Act

This proposed regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act.

IV. Executive Order 12866

The proposed rule is not an ''economically significant'' regulatory action within the meaning of section 3(f)(1) of Executive Order 12866 on

''Regulatory Planning and Review.'' The rule is not likely to: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. As a result, the Department concluded that a full economic impact and cost/benefit analysis was not required for the rule under Section 6(a)(3) of the Order. However, because of its importance to the public and to the Administration's priorities, the rule was treated as a significant regulatory action and it was, therefore, reviewed by the Office of Management and Budget.

Based on our preliminary analysis of the data, it is our conclusion that the proposals to change how the companionship services exemption is applied under the FLSA will not produce a significant economic or budgetary impact on affected entities. The data indicate that more than 90 percent of the workers employed in the potentially affected occupational categories already receive the current federal minimum wage of $5.15 an hour or higher, and changing their status under the FLSA from exempt to non-exempt would not impose any new wage costs to meet minimum wage requirements. Similarly, because it appears that most of the workers in these occupational categories do not regularly work overtime (*i.e.,* more than 40 hours per week), there would be little impact from overtime wage costs if their status were changed from exempt to non-exempt. Our analysis suggests that most of the likely impact, although small, will be limited to the less than 10 percent of workers who do not receive at least $5.15 an hour and to those workers who may be entitled to additional compensation (minimum wage or overtime) for time spent traveling between multiple client work sites during the day. Some employers may not now pay for such travel time. For those few workers who may be paid at or near the $5.15 minimum wage or who work overtime hours once the travel time is included, some employers could incur minor additional wage costs to meet FLSA's minimum wage or overtime requirements. However, there are many scheduling options available to employers to enable them in that event to limit the total hours worked by an employee to 40 or fewer hours per week to ensure that overtime costs are not incurred if paying overtime wages is not in their own economic self-interests.

The Department of Health and Human Services' Health Care Finance Administration informally estimates that the proposal will have a negligible effect on Medicare costs as the types of services at issue are not a significant component of the Medicare program. Annual Medicaid program expenditures may increase somewhere within a $30 to $40 million range, of which 57 percent would be the Federal share. An equivalent percent increase in private expenditures for home health services would suggest the possibility of a maximum additional increase of $35 million in total private expenditures. The combined private and public total would likely be no greater than $75 million.

Accordingly, it is our conclusion that this rulemaking is not an economically significant regulatory action for purposes of Executive Order 12866.

V. Small Business Regulatory Enforcement Fairness Act

For similar reasons as noted above, the Department has concluded that this proposed rule is not a ''major'' rule requiring approval by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). It will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

VI. Unfunded Mandates Reform Act

For similar reasons for purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include a Federal mandate that may result in increased expenditures by State, local, and tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million.

VII. Executive Order 13132 (Federalism)

The Department has reviewed this rule under the terms of Executive Order 13132 regarding federalism and has determined that it does not have federalism implications. Because the economic effects under the rule will not be substantial for the reasons noted above, the rule does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

VIII. Effects on Families

The Department has assessed this rule under section 654 of the Treasury and General Government Appropriations Act, 1999, for its effect on family well-being and hereby certifies that it will not adversely affect the well-being of families.

IX. Regulatory Flexibility Act

The Department has determined for similar reasons that this proposed regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, and the Department has so certified to the Chief Counsel for Advocacy of the Small Business Administration. As discussed above in the analysis under Executive Order 12866, more than 90 percent of the workers employed in occupational categories addressed by this rulemaking already receive wages at rates above the current federal minimum wage, and they typically work fewer than 40 hours per week. Furthermore, employers are reimbursed by the Federal government or insurance companies for most of the cost of providing these benefits. Thus, even assuming that the alternative covering the most additional (and therefore exempting the fewest) workers is adopted, the rule will not have a significant economic impact. The following regulatory flexibility analysis supports this determination.

(1) Reasons Why Action is Being Considered

Section 13(a)(15) of the Fair Labor Standards Act (29 U.S.C. 213(a)(15)) contains an exemption from both the minimum wage and overtime pay requirements for ''3 any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)'' (emphasis added). Due to considerable growth in home care and the home health care industry since the implementing regulations were promulgated in 1975, the Department's

more recent experience indicates that the ''companionship services'' exemption is being asserted in an expansive way for many more workers than we believe the Congress originally intended based on a careful analysis of the background and legislative history to the exemption. Vast numbers of workers employed in regular vocations to provide domestic services and care for individuals in their private homes are being excluded from FLSA coverage as a result of this misapplication of this exemption, which we believe is contrary to the intent and specific purposes of the 1974 FLSA Amendments. The Department is therefore issuing this proposal to invite public comments on possible clarifications to the definitional terms describing the companionship services exemption to bring it more in line with original Congressional intent.

(2) Objectives of and Legal Basis for Rule

This proposed rule is issued under the authority provided by section 13(a)(15) of the FLSA (29 U.S.C. 213(a)(15)), which grants the Secretary of Labor legislative rulemaking authority to define and delimit the terms ''employee employed in domestic service employment to provide companionship services'' for purposes of exempting such workers from the minimum wage and overtime pay requirements of the FLSA.

(3) Number of Small Entities Covered Under the Rule

A small business profile obtained from the U.S. Small Business Administration's Office of Advocacy web site indicates that the health services industry is among the top small business industries in the United States according to employment figures. The SBA small business size standard for Home Health Care Services, NAICS 6216, applies a $10 million threshold in annual receipts for defining a small business. Based on data from the U.S. Census Bureau's 1997 Economic Census, there were 16,895 home health care establishments (both exempt from and subject to federal income tax) in 1997 that operated for the entire year. Of that number, 16,486 (or 98%) had revenues (in the case of tax exempt firms) or receipts (in the case of non-exempt firms) of less than $10,000,000. For purposes of this analysis, we have assumed that most of the entities potentially affected by this proposal would likely meet the applicable criteria defining a small business in the home health care industry.

(4) Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

The rule contains no reporting, recordkeeping or other compliance requirements. All employers covered by the FLSA must comply with its minimum wage, overtime pay, child labor, and generally applicable recordkeeping requirements with respect to each employee who is not otherwise exempt from the FLSA's requirements.

(5) Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Rule

There are no Federal rules that duplicate, overlap, or conflict with this rule governing the scope of the companionship services exemption under the FLSA. Regulations issued under the Medicare and Medicaid programs govern qualifying reimbursements for eligible expenses under those programs.

(6) Differing Compliance or Reporting Requirements for Small Entities

This proposed rule contains no reporting, recordkeeping, or other compliance requirements specifically applicable to small entities or that differ from FLSA requirements generally applicable to all employers subject to the FLSA. Furthermore, since this is a question of application of the basic minimum wage and overtime requirements of the Act, and most affected employers would be small, no special treatment would be appropriate for small entities. However, the Department has prepared three alternative definitions of the scope of exempt duties and requested comments on all three.

(7) Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements

There is continuing confusion, among both employees and employers, over the scope of the companionship services exemption as it relates to the home health care industry. This proposal is intended to delimit how the exemption applies in a manner that conforms more fully with Congressional intent. Compliance requirements—*i.e.*, payment of not less than the minimum wage for all hours worked and overtime pay, computed at time-and-one-half the regular rate for hours worked over 40 per week to all covered employees—are imposed by statute but are also relatively simple and easy to comply with. Under the recordkeeping requirements generally applicable to all FLSA-covered employers, no particular order or form of records is prescribed by regulation and employers are free to use any format that assures the essential records are kept that meets compliance needs.

(8) Use of Other Standards

This proposed regulation addresses only statutory coverage and definitional terms used in applying the ''companionship services'' exemption. Different standards for a statutory exemption are not appropriate for small businesses. It should be noted, however, that the proposed modification to the exemption to exclude from the exemption those workers who are employed by an employer or agency other than the family or household using their services would have the effect of excluding all large employers (as well as small employers other than the family or household).

(9) Exemption of Small Entities From Coverage of the Rule

An exemption based on the size of the entity/employer would not be permitted by the terms of the statute. Coverage and applicability of the wage and hours provisions of the FLSA are based on engagement in interstate commerce, production of goods for interstate commerce, employment in domestic service employment in private households (per se), and employment by certain enterprises named in the statute as subject to its provisions.

X. Document Preparation

This document was prepared under the direction and control of Thomas M. Markey, Deputy Administrator for Operations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 552

Domestic service workers, Employment, Labor, Minimum wages, Overtime pay, Wages.

Signed at Washington, DC on this 12th day of January, 2001.

T. Michael Kerr,

Administrator, Wage and Hour Division.

For the reasons set forth above, part 552 of title 29 of the Code of Federal Regulations is proposed to be amended as follows:

PART 552—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

1. The authority citation for part 552 continues to read as follows:

Authority: Secs. 13(a)(15) and 13(b)(21) of the Fair Labor Standards Act, as amended (29 U.S.C. 213(a)(15), (b)(21)), 88 Stat. 62; Sec. 29(b) of the Fair Labor Standards

Amendments of 1974 (Pub. L. 93–259, 88 Stat. 76), unless otherwise noted.

2. § 552.3 is proposed to be revised by adding a sentence to the end of the section to read as follows:

§ 552.3 Domestic service employment.

* * * Employees who are employed, whether solely or jointly, by an employer or agency other than the family or household using their services are not engaged in domestic service employment within the meaning of this part with respect to such third-party employer.

3. § 552.6 is proposed to be revised to read as follows:

Alternative 1 for § 552.6

§ 552.6 Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Although no specific percentage of time must be devoted exclusively to fellowship, fellowship must be a significant component of a companion's duties. Protection generally involves being present in the home of the individual to ensure the safety and well being of that individual. Care generally involves providing intimate personal care services to that individual, such as feeding the person or assisting the person with bathing, dressing, grooming, or toileting. A companion may also perform household work but only insofar as it is directly related to the care of the individual, such as preparing the individual's meal, making the individual's bed, washing the individual's clothes and other similar services for the person, provided, however, that such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked. The term ''companionship services'' does not include services relating to the care and protection of the individual which require and are performed by personnel with training in medical procedures, including, but not limited to, catheter and ostomy care, injections, and tube feeding, regardless of whether the caregiver is a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

Alternative 2 for § 552.6

§ 552.6 Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Fellowship and protection must be a companion's primary duties and the companion must spend at least 50% of his or her weekly hours worked providing fellowship or protection. A companion's time may be devoted exclusively to fellowship or protection, or fellowship and protection may be provided in conjunction with and concurrently with intimate personal care activities; however, only one-half of the time spent providing fellowship or protection in the context of and concurrently with intimate personal care activities may count towards the 50 percent requirement. Protection generally involves being present in the home of the individual to ensure the safety and well being of that individual. Care generally involves providing intimate personal care services to that individual, such as feeding the person or assisting the person with bathing, dressing, grooming, or toileting. A companion may also perform household work but only insofar as it is directly related to the care of the individual, such as preparing the individual's meal, making the individual's bed, washing the individual's clothes and other similar services for the person, provided, however, that such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked. The term ''companionship services'' does not include services relating to the care and protection of the individual which require and are performed by personnel with training in medical procedures, including, but not limited to, catheter and ostomy care, injections, and tube feeding, regardless of whether the caregiver is a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

Alternative 3 for § 552.6

§ 552.6 Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Fellowship and protection are a companion's sole core duties and a companion must spend at least 80% or his or her weekly hours worked exclusively providing fellowship or protection. Protection generally involves being present in the home of the individual to ensure the safety and well being of that individual. A companion may also perform duties that provide care, which generally involves providing intimate personal care services to the individual, such as feeding the person or assisting the person with bathing, dressing, grooming, or toileting. A companion also may perform household work but only insofar as it is directly related to the care of the individual, such as preparing the individual's meal, making the individual's bed, washing the individual's clothes and other similar services for the person. However, all intimate personal care services and household work directly related to the individual must be incidental, i.e., may not exceed 20 percent of the total weekly hours worked. The term ''companionship services'' does not include services relating to the care and protection of the individual which require and are performed by personnel with training in medical procedures, including, but not limited to, catheter and ostomy care, injections, and tube feeding, regardless of whether the caregiver is a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

4. In § 552.109, paragraphs (a) and (c) are proposed to be revised to read as follows:

§ 552.109 Third party employment.

(a) Employees who are employed, whether solely or jointly, by an employer or agency other than the family or household using their services are not engaged in ''domestic service employment'' within the meaning of these regulations with respect to such third party employer. Consequently, such a third party employer may not avail itself of the minimum wage and overtime pay exemption provided by section 13(a)(15) of the Act for employees employed in domestic service employment to provide companionship services.

(b) * * *

(c) Household workers who are employed, whether solely or jointly, by an employer or agency other than the

family or household using their services are not engaged ''in domestic service employment'' within the meaning of these regulations with respect to such third party employer. Consequently, such a third party employer may not avail itself of the overtime pay exemption provided by section 13(b)(21) of the Act for employees employed in domestic service who reside in the household.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 001128334–0334–01; I.D. 111300E]

RIN 648–AN40

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Interim final rule; delay of effective date.

SUMMARY: This interim final rule delays the effective date of an interim final rule amending the Atlantic Large Whale Take Reduction Plan (ALWTRP) from January 22, 2001, until February 21, 2001. Due to the rough January weather conditions in the Gulf of Maine, the affected fishers have not been able to implement the gear modifications in the interim final rule in time to meet the January 22, 2001 effective date. The intent of this delay of effective date is to allow fishers 30 additional days to implement the gear modifications.

DATES: The effective date of the interim final rule amending 50 CFR part 229 published at 65 FR 80368, December 21, 2000, is delayed until February 21, 2001.

ADDRESSES: Send comments on this interim final rule to the Chief, Marine Mammal Division, NMFS, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910. Copies of the Environmental Assessment, Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, progress reports on implementation of the ALWTRP, and a map and table of the changes to the ALWTRP may be obtained by writing Douglas Beach, NMFS/Northeast Region, 1 Blackburn Dr., Gloucester, MA 01930 or Katherine Wang, NMFS/Southeast Region, 9721 Executive Center Dr., St. Petersburg, Fl 33702–2432.

Send comments regarding any ambiguity or unnecessary complexity arising from the language used in this interim final rule to the Marine Mammal Division Chief at the previously listed address. See **SUPPLEMENTARY INFORMATION,** under the heading Electronic Access, for Internet addresses pertaining to this interim final rule.

FOR FURTHER INFORMATION CONTACT: Douglas Beach, NMFS, Northeast Region, 978–281–9254; Katherine Wang, NMFS, Southeast Region, 727–570–5312; or Patricia Lawson, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for this interim final rule and the take reduction planning process can be downloaded from the ALWTRP web site at http://www.nero.nmfs.gov/whaletrp/.

Background

The ALWTRP was developed pursuant to the Marine Mammal Protection Act (MMPA) to reduce the level of serious injury/mortality of all large whale species in East Coast lobster trap and finfish gillnet fisheries. The background for the take reduction planning process and development of the ALWTRP is set out in the preamble to the proposed (62 FR 16519, April 7, 1997), interim final (62 FR 39157, July 22, 1997), and final (64 FR 7529, February 16, 1999) rules implementing the ALWTRP. Additional information is available in the report from the ALWTRT after its recent series of meetings in 2000. Copies of these documents and supporting Environmental Assessments (EAs) are available from the NMFS/Northeast Region contact in the **ADDRESSES** section of this document.

Because of the status of the right whale population, there is a need to further reduce entanglement. The interim final rule published December 21, 2000, (65 FR 80368), with an effective date of January 22, 2001, implemented gear modifications (buoy line weak links, net panel weak links with anchoring systems, restrictions on number of buoy lines, and gear marking) that were initially discussed in the 1997 proposed and 1999 final rules and recommended by the TRT after the 2000 meetings. NMFS responded to these recommendations by promulgating the gear modifications in the December 21, 2000, interim final rule. It was agreed that the regulations implementing these gear modifications should be issued as soon as practicable. However, due to rough January weather conditions in the Gulf of Maine, effected fishers will be unable to retrieve and modify active gear by the January 22, 2001 effective date. This interim final rule delays the effective date until February 21, 2001, to allow fishers time to implement the gear modifications.

NMFS expects that a delay of the rule to February 21, 2001 will have minimal impact on the North Atlantic right whale population. Available sighting data for the January through February period suggests that most right whales in New England are congregated in Cape Cod Bay. Data reported by the NE Right Whale Alert System during 1999–2001, included only two sightings of right whales in New England waters outside of Cape Cod Bay. Whales do not begin to leave the Bay until late March (when they move to Stellwagen Bank and then perhaps on to the Great South Channel Area) by which time gear will have been modified as per the Interim Final Rule. Thus, the 30 day delay is not expected to adversely affect right whales in these waters.

Classification

An Environmental Assessment (EA) describing the impacts to the environment that would result from the implementation of the ALWTRP was prepared for the July 22, 1997, interim final rule (62 FR 39157). Supplemental EAs were also prepared for the April 9, 1999, final rule (64 FR 17292) and the December 21, 2000, interim final rule (65 FR 80368). The conclusion of those EAs was that the ALWTRP's actions would pose no significant adverse environmental impact. The delay of the effective date by 30 days does not change the determination of those EAs. This action is categorically excluded from further review because it is an action of limited size and magnitude that does not result in a significant change in the original action.

This interim final rule has been determined to be not significant for purposes of Executive Order 12866.

Given the status of the species to be protected and the fact that entanglements continue to occur under the existing regulations, the Assistant Administrator for Fisheries (AA) NOAA, for good cause under 5 U.S.C. 553(b)(3)(B), found that extending the December 21, 2000, interim final rule (65 FR 80368) to allow for prior notice and an opportunity for public comment