(5) *Treatment of net operating losses incurred in post-2017 taxable years that are carried back to pre-2018 taxable years*—(i) *In general.* Except as provided in paragraph (j)(5)(ii) of this section, a net operating loss incurred in a taxable year beginning after December 31, 2017 (a ''post-2017 taxable year''), which is carried back, pursuant to section 172, to a taxable year beginning before January 1, 2018 (a ''pre-2018 carryback year''), will be carried back under the rules of § 1.904(g)–3(b). For purposes of applying the rules of § 1.904(g)–3(b), income in a pre-2018 separate category in the taxable year to which the net operating loss is carried back is treated as if it included only income that would be assigned to the post-2017 general category. Therefore, any separate limitation loss created by reason of a passive category component of a net operating loss from a post-2017 taxable year that is carried back to offset general category income in a pre-2018 carryback year will be recaptured in post-2017 taxable years as general category income, and not as a combination of general, foreign branch, and section 951A category income.

(ii) *Foreign source losses in the post-2017 separate categories for foreign branch category income and section 951A category income.* Net operating losses attributable to a foreign source loss in the post-2017 separate categories for foreign branch category income and section 951A category income are treated as first offsetting general category income in a pre-2018 carryback year to the extent available to be offset by the net operating loss carryback. If the sum of foreign source losses in the taxpayer's separate categories for foreign branch category income and section 951A category income in the year the net operating loss is incurred exceeds the amount of general category income that is available to be offset in the carryback year, then the amount of foreign source loss in each of the foreign branch and section 951A categories that is treated as offsetting general category income under this paragraph (j)(5)(ii), is determined on a proportionate basis. General category income in the pre-2018 carryback year is first offset by foreign source loss in the taxpayer's post-2017 separate category for general category income in the year the net operating loss is incurred before any foreign source loss in that year in the separate categories for foreign branch category income and section 951A category income is carried back to reduce general category income. To the extent a foreign source loss in a post-2017 separate category for foreign branch category income or section 951A category income offsets general category income in a pre-2018 taxable year under the rules of this paragraph (j)(5)(ii), no separate limitation loss account is created.

* * * * *

(7) *Applicability date.* Except as otherwise provided in this paragraph (j)(7), this paragraph (j) applies to taxable years ending on or after December 31, 2017. Paragraph (j)(5) of this section applies to carrybacks of net operating losses incurred in taxable years beginning on or after January 1, 2018.

■ **Par. 6.** Section 1.951A–3 is amended by adding a sentence at the end of paragraph (e)(2) to read as follows:

§ 1.951A–3 Qualified business asset investment.

* * * * *

(e) * * *

(2) * * * For purposes of applying section 951A(d)(3) and this paragraph (e), the technical amendment to section 168(g) (to provide a recovery period of 20 years for qualified improvement property for purposes of the alternative depreciation system) enacted in section 2307(a) of the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (2020) is treated as enacted on December 22, 2017.

* * * * *

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

Approved: September 10, 2021.

Mark J. Mazur,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2021–20615 Filed 9–21–21; 4:15 pm]

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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 531, 578, 579 and 580

RIN 1235–AA21

Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal

AGENCY: Department of Labor, Wage and Hour Division.

ACTION: Final rule.

SUMMARY: In December 2020, the Department promulgated a final rule (2020 Tip final rule) to amend its tip regulations to address the Consolidated Appropriations Act of 2018 (CAA) amendments to section 3(m) of the Fair Labor Standards Act (FLSA), among other things. In this final rule, the Department withdraws two portions of the 2020 Tip final rule that have not yet gone into effect addressing civil money penalties (CMPs) and finalizes proposed changes to those portions of the 2020 Tip final rule. The Department also modifies regulatory provisions adopted by the 2020 Tip final rule addressing managers and supervisors.

DATES: As of November 23, 2021 Wage & Hour is withdrawing the revisions to §§ 578.3, 578.4, 579.1, 579.2, 580.2, 580.3, 580.12, and 580.18, published December 30, 2020, at 85 FR 86756, delayed until April 30, 2021, on February 26, 2021, at 86 FR 11632, and delayed until December 31, 2021, on April 29, 2021 at 86 FR 22597.

This final rule is effective November 23, 2021.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at *https://www.dol.gov//whd/contact/local-offices* for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Section 3(m) of the FLSA allows an employer that satisfies certain requirements to count a limited amount of the tips received by its ''tipped employees'' as a credit toward the employer's Federal minimum wage obligation (known as a ''tip credit''). *See* 29 U.S.C. 203(m)(2)(A). In 2018, Congress passed the Consolidated Appropriations Act (CAA), Public Law 115–141, Div. S., Tit. XII, sec. 1201, 132 Stat. 348, 1148–49 (2018), which amended section 3(m). The CAA added a new statutory provision at section 3(m)(2)(B) which expressly prohibits employers from keeping employees' tips

''for any purposes'' regardless of whether the employer claims a tip credit. This includes prohibiting ''managers or supervisors'' from keeping employees' tips. The CAA also amended section 16(e)(2) of the FLSA to give the Department discretion to impose civil money penalties (CMPs) of up to $1,100 when employers unlawfully keep employees' tips. On December 30, 2020, the Department issued a final rule (2020 Tip final rule) that updated the Department's tip regulations to implement the CAA amendments. The 2020 Tip final rule also made other changes to the Department's regulations, including revising the definition of ''willful'' in the Department's CMP regulations.

On March 25, 2021, the Department published a notice of proposed rulemaking (CMP NPRM) in the **Federal Register**, 86 FR 15817, proposing to withdraw and repropose two portions of the 2020 Tip final rule and seeking comment on whether to revise another portion of the 2020 Tip final rule. The Department proposed to withdraw and repropose: (1) The portion of the 2020 Tip final rule incorporating the CAA's new provisions authorizing the assessment of CMPs for violations of section 3(m)(2)(B) of the Act; and (2) the portion of its CMP regulations addressing willful violations. The Department subsequently finalized a delay of the effective date of these portions of the rule until December 31, 2021 to allow the Department to review these and one other portion of the 2020 Tips final rule. In the CMP NPRM, the Department also sought comment on whether to revise certain aspects of the 2020 Tip final rule that apply to ''managers or supervisors'' who perform tipped work and went into effect on April 30, 2021. Section 578.1, as revised by the 2020 Tip final rule, at *85 FR 86756*, and the effective date of which the Department also delayed, will go into effect on December 31, 2021.

After considering the comments, the Department has decided to adopt the NPRM's proposed changes to the portion of the 2020 Tip final rule incorporating the CAA's new provisions authorizing the assessment of CMPs for violations of section 3(m)(2)(B) of the Act, and the portion of its CMP regulations addressing willful violations. The Department has also decided to modify portions of the 2020 Tip final rule addressing managers and supervisors who perform tipped work.

The final rule modifies the CMP provisions for violations of 3(m)(2)(B) included in the 2020 Tip final rule by withdrawing regulatory language in 29 CFR 578.3, 578.4, 579.1, 580.2, 580.3, and 580.12 that limited assessment of CMPs for section 3(m)(2)(B) violations to only repeated or willful violations.[1] This modification upholds the Department's statutorily-granted discretion with regard to section 3(m)(2)(B) CMPs and aligns the Department's regulations with the statutory text. At the same time, the final rule adopts the same rules, procedures, and amount considerations for CMPs for violation of 3(m)(2)(B) as the Department applies for other FLSA CMPs, and therefore preserves consistent enforcement procedures that are familiar to the Department and the public.

The final rule also modifies the amendments made by the 2020 Tip final rule to the portion of the Department's CMP regulations at 29 CFR 578.3(c)(2) and (3) and 29 CFR 579.2 addressing when a violation of section 6 or 7 of the FLSA is willful. Specifically, the rule modifies these regulations by clarifying that multiple circumstances, not just the circumstance identified in §§ 578.3(c)(2) and (3), can be sufficient to show that a violation is willful because it is knowing or is done with reckless disregard for whether the conduct violates the FLSA and by reinserting language addressing the meaning of reckless disregard. These revisions further align the Department's regulations with applicable precedent and how the Department litigates willfulness and provide improved guidance on circumstances where employers' conduct may be willful.

In addition, the Department has decided to modify § 531.54(c)(3) and (d), which currently provide that an employer may not ''include'' managers and supervisors in tip pools or sharing arrangements. The final rule clarifies that while managers and supervisors may not receive tips from mandatory tip pools or tip sharing arrangements, managers or supervisors are not prohibited from contributing tips to eligible employees in mandatory tip pools or sharing arrangements. The Department is also modifying language in § 531.52, as amended by the 2020 Tip final rule, which currently explains that it is not a violation of section 3(m)(2)(B) when a manager or supervisor keeps tips that the manager or supervisor receives directly from customers based on the service that the manager or supervisor directly provides. The modified language clarifies that a manager or supervisor may keep tips only when the tip is based on a service the manager or supervisor directly and ''solely'' provides. Thus, under the Department's tip regulations as revised by this final rule, when a manager or supervisor directly receives tips for services the manager or supervisor directly and solely provides, an employer may allow the manager or supervisor to keep those tips, and may also require the manager or supervisor to share some portion of the tips with other eligible employees. The final regulations reflect the reality that some managers or supervisors perform work for which they receive tips, while ensuring that managers and supervisors do not keep any portion of other employees' tips in violation of section 3(m)(2)(B).

II. Background

A. Tips and Tip Pooling

Section 6(a) of the FLSA generally requires covered employers to pay employees at least the federal minimum wage, which is currently $7.25 per hour. 29 U.S.C. 206(a). Section 3(m)(2)(A) allows an employer to satisfy a portion of its minimum wage obligation to any ''tipped employee'' by taking a partial credit toward the minimum wage based on tips the employee receives. 29 U.S.C. 203(m)(2)(A). An employer may take a tip credit only if, among other requirements, the tipped employee retains all the tips he or she receives. *Id.* An employer taking a tip credit is, however, allowed to require tipped employees to participate in a mandatory, ''traditional'' tip pool[2] in which tipped employees share tips with other employees who ''customarily and regularly receive tips.'' 29 U.S.C. 203(m)(2)(A). The employee must retain sufficient tips to make up the difference between the cash wage paid and the minimum wage. *Id.*

In 2011, the Department issued regulations interpreting what is now section 3(m)(2)(A) to prohibit all covered employers—regardless of whether the employer takes a tip credit—from using employees' tips other than as a credit against its minimum wage obligation to the employee, or in furtherance of valid traditional tip pools. *See* 76 FR 18832, 29 CFR 531.52 (2011); 29 CFR 531.54

[1] The Department also finalizes as proposed the revision to § 580.18(b)(3), which corrected a technical error.

[2] The Department uses the term ''tip pool'' to describe any scenario in which a tip provided by a customer is shared, in whole or in part, between employees. The Department recognizes, however, that in some workplaces or under state laws, the term ''tip pooling'' may refer to a narrower set of practices, and that employers and workers may use other terms—for example ''tip out,'' ''tip sharing,'' or ''tip jar''—to describe certain practices regarding transferring tips between employees. *See* 84 FR 53961.

(2011); 29 CFR 531.59 (2011). These regulations were consistent with the Department's longstanding position on tipped employees, and the Department stated that, although the statutory language did not expressly address the use of an employee's tips when an employer does not take a tip credit and pays a direct cash wage equal to or greater than the minimum wage, the regulations filled a gap in the statutory scheme.[3] *See* 76 FR 18841–42.

On March 23, 2018, Congress enacted the CAA, which amended section 3(m) of the FLSA to expressly prohibit employers from keeping employees' tips ''for any purposes,'' ''regardless of whether or not the employer takes a tip credit.'' *See* Public Law 115–141, Div. S., Tit. XII, sec. 1201; 29 U.S.C. 203(m)(2)(B). Section 3(m)(2)(B) also prohibits employers from ''allowing managers or supervisors to keep any portion of employees' tips.'' *Id.* In addition, the CAA suspended the portions of the Department's 2011 regulations that restricted tip pooling when employers do not take a tip credit, by providing that those regulations ''shall have no further force or effect until any future action taken by [the Department of Labor].'' *See* Public Law 115–141, Div. S, Tit. XII, sec. 1201(c).

The CAA also amended the penalty provisions in section 16 of the FLSA to incorporate the new statutory prohibition on employers keeping tips. Among other things, the CAA amended section 16(e)(2) to authorize the assessment of a civil money penalty (CMP) for violations of section 3(m)(2)(B): ''Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed $1,100[4] for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages[.]''

Shortly after Congress passed the CAA, the Department issued a Field Assistance Bulletin (FAB) concerning the Wage and Hour Division's (WHD) enforcement of the amendments to section 3(m). *See* FAB No. 2018–3 (Apr. 6, 2018). The Department explained that the CAA had effectively suspended the regulatory restrictions that prohibited an employer that does not take a tip credit from requiring tip pooling, and that ''given these developments, employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools.'' *Id.* As a result, the Department explained, such employers may implement mandatory, ''nontraditional'' tip pools in which employees who do not customarily and regularly receive tips, such as cooks and dishwashers, may participate. The FAB also explained that the amendments prohibit employers, including managers or supervisors, from keeping tips received by their employees, regardless of whether the employer takes a tip credit under 29 U.S.C. 203(m). In addition, the FAB provided that, as ''an enforcement policy, WHD will use the duties test at 29 CFR 541.100(a)(2)–(4) to determine whether an employee is a manager or supervisor,'' and thus cannot ''keep'' another employee's tips under section 3(m)(2)(B). *Id.* Finally, the FAB stated that the Department will follow its ''normal procedures'' for FLSA CMPs when enforcing the new tips CMP, and will assess tips CMPs only when it determines that a violation of section 3(m)(2)(B) is repeated or willful. *Id.*

B. ''Willful'' Requirement for CMPs for FLSA Minimum Wage and Overtime Violations

Section 16(e)(2) of the FLSA provides for the assessment of CMPs for violations of the minimum wage (section 6), overtime pay (section 7), and, with the enactment of the CAA, tip provisions (section 3(m)(2)(B)) of the FLSA. Section 16(e)(2) authorizes the Department to assess CMPs for minimum wage and overtime pay violations only when the violations are ''repeated[ ] or willful[ ].'' *See* 29 U.S.C. 216(e)(2). The Department's regulations at 29 CFR 578.3(c) and 579.2 address what violations are willful under the Act. These regulations are intended to implement the Supreme Court's decision in *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128, 133 (1988), that a willful violation occurs when the employer knew or showed reckless disregard for whether its conduct was prohibited by the FLSA. For many years, these regulations identified two specific circumstances in which a violation ''shall be deemed'' willful. 29 CFR 578.3(c)(2) and (3), 579.2. Specifically, the Department's regulations at sections 578.3(c)(2) and 579.2 provided that ''an employer's conduct shall be deemed knowing,'' among other situations, if the employer received prior advice from WHD that its conduct was unlawful. Additionally, sections 578.3(c)(3) and 579.2 stated that ''an employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act,'' among other situations, if the employer failed to inquire further into the lawfulness of its conduct when it should have. The Department's regulations further provided that WHD shall take into account ''[a]ll of the facts and circumstances surrounding the violation'' when determining whether a violation is willful. 29 CFR 578.3(c)(1), 579.2.

In *Baystate Alt. Staffing, Inc.* v. *Herman,* 163 F.3d 668, 680–81 (1st Cir. 1998), the U.S. Court of Appeals for the First Circuit identified an ''incongruity'' between the regulatory provisions deeming two specific circumstances to be willful, and ''the *Richland Shoe* standard on which the regulation is based'' which takes into account all of the facts and circumstances. The court urged the Department ''to reconsider'' § 578.3(c)(2) and (3) ''to ensure that they comport with'' *Richland Shoe. Id.* at 681 n.16. In 2016, the U.S. Court of Appeals for the D.C. Circuit also addressed these regulations and noted that the Department had not altered them despite being urged to do so by the court in *Baystate. See Rhea Lana, Inc.* v. *Dep't of Labor,* 824 F.3d 1023, 1030–31 (D.C. Cir. 2016).

C. 2020 Tip Final Rule

On October 8, 2019, the Department issued an NPRM proposing to revise the Department's tip regulations to incorporate the CAA amendments, among other things. *See* 84 FR 53956. Because the Department was revising its CMP regulations to incorporate the new CMP provision for section 3(m)(2)(B) violations, the Department also proposed to address the ''willful'' provisions of the Department's existing FLSA CMP regulations in light of the decisions of the courts of appeals in *Baystate* and *Rhea Lana. See id.* at 53964. The Department published the Tip final rule on December 30, 2020. *See* 85 FR 86756. The 2020 Tip final rule was initially scheduled to go into effect on March 1, 2021; however, the Department delayed the 2020 Tip final rule's effective date to April 30, 2021, in order to give the Department additional time to consider issues of law, policy,

[3] In December 2017, the Department published an NPRM proposing to rescind the portions of its 2011 tip regulations that imposed restrictions on employers that do not take a tip credit against their minimum wage obligations, in part because of litigation involving these regulatory provisions. *See* 82 FR 57395. The Department withdrew this NPRM in October 2019 after the CAA amendments to the FLSA directly impacted the subject of the rulemaking. *See* 84 FR 53960. For a more detailed history of this rulemaking, see 86 FR 15817.

[4] The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, sec. 701), requires that inflationary adjustments be made annually in these civil money penalties according to a specified formula.

and fact that warranted additional review. *See* 86 FR 11632. The Department subsequently further delayed the effective date, until December 31, 2021, of three portions of the 2020 Tip final rule, including the two portions addressing CMPs. *See* 86 FR 22597.[5]

Most of the provisions of the 2020 Tip final rule went into effect on April 30, 2021. The 2020 Tip final rule amended the Department's tip pooling regulations at 29 CFR 531.52, 531.54, and 531.59 to implement newly added section 3(m)(2)(B), which prohibits employers—regardless of whether they take a tip credit—from keeping employees' tips for any purposes, and prohibits managers and supervisors from keeping employees' tips. The 2020 Tip final rule explained that section 3(m)(2)(B) proscribes all manner of keeping tips, and is so broad as to prohibit an employer from exerting control over employees' tips other than to (1) distribute tips to the employee who received them, (2) require employees to share tips with other eligible employees, or, (3) where the employer facilitates tip pooling by collecting and redistributing employees' tips, to distribute tips to employees in a tip pool. The 2020 Tip final rule further provided that any employer that collects tips to facilitate a mandatory tip pool must fully redistribute the tips, no less often than when it pays wages, to avoid ''keep[ing]'' the tips in violation of section 3(m)(2)(B).

The 2020 Tip final rule also addressed who is a manager or supervisor, and therefore may not keep employees' tips under section 3(m)(2)(B). The rule defined a ''manager or supervisor,'' as an individual who meets the duties test at § 541.100(a)(2)–(4) or § 541.101. As a result, a manager or supervisor for purposes of section 3(m)(2)(B) is any employee (1) whose primary duty is managing the enterprise or a customarily recognized department or subdivision of the enterprise; (2) who customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and (3) who has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring or firing are given particular weight. The definition also includes as managers or supervisors any individuals who own at least a bona fide 20 percent equity interest in the enterprise in which they are employed and who are actively engaged in its management.

The final rule revised § 531.54 to state that FLSA section 3(m)(2)(B) ''prohibits employers from requiring employees to share tips with managers and supervisors,'' and to state that employers ''may not include supervisors and managers'' in a tip pool. The rule at § 531.52(b) specified, however, that such a manager or supervisor may keep tips that he or she receives directly from customers based on the service that he or she directly provides.

Consistent with the CAA amendments, the 2020 Tip final rule also removed the provisions of the Department's 2011 regulations that imposed restrictions on employers that do not take a tip credit. In addition, the 2020 Tip final rule amended § 531.54 to explicitly state that an employer that pays tipped employees the full minimum wage and does not take a tip credit may require tipped employees to share tips with dishwashers, cooks, or other employees who are not employed in an occupation in which employees customarily and regularly receive tips, as long as that arrangement does not include any employer, supervisor, or manager. The 2020 Tip final rule also incorporated a new recordkeeping requirement for employers that administer such ''nontraditional'' tip pools.

These portions of the 2020 Tip final rule—addressing the CAA's changes to tips and tip pooling in section 3(m) and related recordkeeping requirements, including the provisions on managers and supervisors—went into effect on April 30, 2021. 86 FR 22597.

The 2020 Tip final rule also made changes to the Department's CMP regulations at 29 CFR parts 578, 579, and 580. The Department delayed the effective date of these changes, and the revised provisions have not gone into effect. *See* 86 FR 22597. The 2020 Tip final rule updated the Department's FLSA CMP regulations to add references to the new CMP for violations of 3(m)(2)(B). The 2020 Tip final rule also specified that the Department may assess CMPs only for ''repeated or willful'' violations of section 3(m)(2)(B), although the statute does not include this limitation. The 2020 Tip final rule also amended the Department's CMP regulations at §§ 578.3(c)(2) and 579.2 regarding when a violation is knowing, and thus willful, to address the appellate court decisions that have, for example, ''urge[d]'' the Department to reconsider those regulations to ensure their consistency with the Supreme Court's interpretation of the meaning of ''willful'' in the FLSA. *See* 85 FR 86757. In addition, the 2020 Tip final rule deleted § 578.3(c)(3) and the corresponding language in § 579.2 regarding when a violation is in reckless disregard of the FLSA. *See id.* at 86774.

D. Legal Challenge to the 2020 Tip Final Rule

On January 19, 2021, before the 2020 Tip final rule went into effect, Attorneys General from eight states and the District of Columbia (''AG Coalition'') filed a complaint in the United States District Court for the Eastern District of Pennsylvania, in which they argued that the Department violated the Administrative Procedure Act in promulgating the 2020 Tip final rule.[6] The complaint argues that the 2020 Tip final rule made several changes to the Department's regulations that are contrary to the FLSA and the CAA, including the 2020 Tip final rule's imposition of a willfulness requirement for CMPs for section 3(m)(2)(B) violations, and the rule's revisions to its CMP regulations on willful violations. It further argues that the 2020 Tip final rule's revisions to the Department's CMP regulations on willful violations contradict the longstanding Supreme Court precedent on willfulness. The complaint also asserts that the 2020 Tip final rule's provisions on managers and supervisors improperly prevent certain lower-paid managers and supervisors from receiving tips.

E. The Department's Proposal

On March 25, 2021, the Department issued an NPRM proposing to withdraw and repropose the two portions of the 2020 Tip final rule addressing CMPs and seeking comment on whether to revise another portion of the 2020 Tip final rule. *See* 86 FR 15817. Because of its concerns that the 2020 Tip final rule inappropriately circumscribed the Department's discretion to assess CMPs for violations of 3(m)(2)(B), the Department proposed to withdraw that portion of the rule and adopt regulatory language so that the Department is not limited in its assessment of CMPs to only repeated and willful violations of section 3(m)(2)(B). At the same time, the Department reproposed language that would, similar to the language in the 2020 Tip final rule, adopt the same rules, procedures, and amount considerations for CMPs for violation of 3(m)(2)(B), as the Department applies for other FLSA CMPs. The Department also proposed to withdraw the portion of its CMP regulations addressing

[5] The third portion of the 2020 Tip final rule, delayed until December 31, 2021, addresses when an employee is performing both tipped and non-tipped work (dual jobs) under the FLSA. The Department has issued a separate notice of proposed rulemaking on this issue. *See* 86 FR 32818.

[6] *See* Compl., *Commonwealth of Pennsylvania et al.* v. *Scalia et al.,* No. 2:21–cv–00258 (E.D. Pa.).

willful violations, and reproposed those portions with modifications to further align the regulations with Supreme Court and appellate court decisions and provide improved guidance on circumstances where employers' conduct may be willful. Finally, the Department requested comment on whether to revise the 2020 Tip final rule's language regarding managers or supervisors, which went into effect on April 30, 2021, to better address the fact that some managers and supervisors perform tipped work.[7]

The 60-day comment period for the NPRM ended on May 24, 2021. The Department received 33 unique comments from various constituencies including small business owners, worker advocacy groups, employer and industry associations, non-profit organizations, law firms, attorneys general, and other interested members of the public. All timely received comments may be viewed on the *regulations.gov* website, docket ID WHD–2019–0004. The Department has considered the timely submitted comments addressing the proposed changes and discusses significant comments below.

The Department also received a small number of comments on issues that are beyond the scope of this rulemaking. These include, for example, comments suggesting that the amount of the federal minimum wage should be increased, and comments requesting that the Department revise the regulatory definition of ''managers or supervisors'' that cannot keep employees' tips to include a salary component. The Department does not address those issues in this final rule.

III. Final Regulatory Revisions

A. Civil Money Penalties for Violations of Section 3(m)(2)(B)

The CAA amended FLSA section 16(e), which establishes CMPs for certain violations of the Act, to add new penalty language for employers who violate section 3(m)(2)(B) by ''keep[ing]'' employees' tips. 29 U.S.C. 216(e)(2). This provision states that: ''Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed $1,100[8] for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept . . . .'' Unlike the statutory provisions in section 16(e)(2) setting forth CMPs for minimum wage and overtime violations, the statute does not limit the assessment of CMPs to repeated or willful violations of section 3(m)(2)(B). Instead, the penalty language subjects persons who violate 3(m)(2)(B) to civil penalties ''as the Secretary determines appropriate.''

Although the 2020 Tip final rule acknowledged the Department's discretion to assess CMPs for any violation of section 3(m)(2)(B), the 2020 Tip final rule limited this discretion by restricting CMPs to only repeated or willful violations of section 3(m)(2)(B). In the CMP NPRM, the Department proposed to withdraw the 2020 Tip final rule CMP provisions for violations of 3(m)(2)(B) and adopt regulatory language in 29 CFR 578.3, 578.4, 579.1, 580.2, 580.3, and 580.12 that retains the full discretion granted to the Secretary to assess CMPs for any violation of section 3(m)(2)(B). The Department also proposed to adopt the same rules, procedures, and amount considerations for CMP assessments applicable to violation of section 3(m)(2)(B) as the Department applies to other FLSA CMP assessments.[9] These procedures are found in §§ 578.3, 578.4, 579.1, 580.2, 580.3, and 580.12.

Many commenters, such as the National Partnership for Women & Families and the Employee Rights Center, supported the proposal, stating that it ''aligns with the plain language of the FLSA and Congress's legislative intent.'' Several commenters that supported the proposal noted that it preserved the full discretion the statute grants to the Department to assess CMPs for violations of section 3(m)(2)(B). The AG Coalition noted that by including regulatory language in the proposal that differentiates between violations of section 3(m)(2)(B) and repeated or willful minimum wage and overtime violations, the ''Department retains its discretion to levy CMPs against employers that violate the FLSA, as intended by Congress and limited only by the statute.'' Texas RioGrande Legal Aid stated that the discretion permitted by the proposal would mean that ''DOL investigators will have more tools at their disposal to help workers'' and argued that the Department should not ''hamper its own investigations'' by restricting such discretion.

Other commenters opposed the proposal. The National Restaurant Association (NRA) stated that the Department should instead retain the 2020 Tip final rule requirement that the Department would only assess CMPs for repeated and willful violations of section 3(m)(2)(B), noting that the Department had previously explained that this limitation was ''consistent with how the Department enforces other FLSA wage violations.'' The NRA also argued that making such a differentiation between violations of sections 6 and 7 and violations of section 3(m)(2)(B) will ''destroy the public trust.'' The Department disagrees. The statute itself distinguishes between violations of sections 6 and 7 and violations of section 3(m)(2)(B) with regard to the assessment of CMPs. Thus, removing the 2020 Tip final rule's repeated or willful requirement for section 3(m)(2)(B) CMPs is consistent with the FLSA itself. Moreover, the Department's enforcement of different sections of the FLSA currently varies depending on whether the statutory text limits CMPs to repeated or willful violations or not. The child labor provisions of the FLSA—like the statutory text for violations of section 3(m)(2)(B)—do not limit CMPs to repeated or willful violations. *Compare* 29 U.S.C. 216(e)(1)(A)(i) (''Any person who violates the provisions of sections 212 or 213(c) of this title, relating to child labor . . . shall be subject to a civil penalty . . . for each employee who was the subject of such a violation'') *with* 29 U.S.C. 216(e)(1)(A)(ii) (CMPs for violations that caused the death or serious injury of a child employee ''may be doubled where the violation is a repeated or willful violation''). The Department's final rule will bring the assessment of section 3(m)(2)(B) CMPs into harmony with the statutory text, as is currently the case with the child labor CMP provisions. Furthermore, this final rule adopts the same rules, procedures, and amount considerations for determining section 3(m)(2)(B) CMPs that the Department uses to determine CMPs for other FLSA wage violations. Therefore, the final rule will preserve consistent enforcement procedures familiar to the Department and the public.

The National Federation of Independent Businesses (NFIB) also opposed the proposal. Recognizing that the statute ''vests wide discretion in the Secretary of Labor,'' NFIB asked the Department to keep the ''repeated or

[7] The Department also asked questions about how it might improve the recordkeeping requirements in the 2020 Tip final rule in a future rulemaking.

[8] The CMP amount in the 2020 Tip final rule was adjusted to $1,162 for inflation, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, sec. 701).

[9] In the 2020 Tip final rule, the Department similarly adopted the same rules, procedures, and considerations applicable to CMP assessments for violations of section 3(m)(2)(B) as the Department applies to other FLSA CMP assessments. As explained above, the Department proposed to withdraw those provisions, which have not gone into effect.

willful'' requirement from the 2020 Tip final rule for small businesses that violate section 3(m)(2)(B). The Department declines to adopt this recommendation, because it would not be consistent with its enforcement in other areas to impose the requirement that CMPs be assessed against small businesses only when the violations committed are repeated and willful. However, NFIB also requested that the Department preserve the requirement that it consider the seriousness of the violation and the size of the employer's business when assessing CMPs for section 3(m)(2)(B). The Department's final rule does preserve that requirement, because, as explained above, it adopts the same longstanding rules and procedures that the Department applies for other FLSA CMPs for the assessment of section 3(m)(2)(B) CMPs. This includes the obligation, required by 29 U.S.C. 216(e)(3), to consider the size of the employer's business when determining the amount of any civil money penalty.

After review of the comments, the Department agrees that it was inappropriate to limit the statutorily-granted discretion by regulation and that instead the regulations should reflect the statutory text. Therefore, the Department finalizes the revisions to 29 CFR 578.3, 578.4, 579.1, 580.2, 580.3, and 580.12 that eliminate the references limiting CMP assessments for violations of section 3(m)(2)(B) to repeated and willful violations as proposed. The Department also finalizes as proposed the other revisions to §§ 578.3, 578.4, 579.1, 580.2, 580.3, and 580.12 which amend those provisions to adopt the same rules, procedures, and amount considerations for tip CMP assessments as the Department applies for other FLSA CMP assessments, which will promote the goals of consistency and familiarity that the Department emphasized in the 2020 Tip final rule.

The Department also finalizes as proposed the revision to § 580.18(b)(3), which eliminates the reference in that regulation to willful violations of section 3(m)(2)(B), which was a technical error in the 2020 Tip final rule, since the CAA Amendments did not provide for criminal penalties for violations of section 3(m)(2)(B).

B. Civil Money Penalties for Willful Violations of the Fair Labor Standards Act

1. Summary of Proposed Changes to Portions of CMP Regulations Addressing When a Violation of Section 6 or Section 7 of the FLSA Is Willful

In addition to revising its regulations to preserve the Department's full discretion to assess CMPs for violations of section 3(m)(2)(B), the Department proposed to further modify §§ 578.3(c) and 579.2 of its CMP regulations, which address when a violation of the FLSA is ''willful,'' and thus subject to a CMP under section 16(e). 86 FR 15822. Specifically, the Department proposed to withdraw and repropose with a modification the language at §§ 578.3(c)(2) and 579.2 addressing when an employer's violation is knowing, and further proposed to reinsert language at §§ 578.3(c)(3) and 579.2 to provide guidance regarding the meaning of reckless disregard.

As previously explained,[10] the Department's definition of a ''willful'' violation in §§ 578.3(c) and 579.2 is based on *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128, 133 (1988), which held that a violation is willful if the employer ''knew or showed reckless disregard'' for whether its conduct was prohibited by the FLSA. The Department incorporated this holding into § 578.3(c)(1) of its CMP regulations when they were first promulgated in 1992, and § 578.3(c)(1) further states that ''[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.'' 29 CFR 578.3(c)(1); 57 FR 49130 (1992). The 2020 Tip final rule made no changes to this language in § 578.3(c)(1), and the Department did not propose any in the CMP NPRM. *See* 86 FR 15822.

The Department's 1992 CMP regulations identified two specific circumstances in which a violation ''shall be deemed'' knowing and in reckless disregard, respectively, and thus willful: Prior advice from WHD to the employer that its conduct was unlawful, and the employer's failure to adequately inquire further into the lawfulness of its conduct when it should have. 57 FR 49130; 29 CFR 578.3(c)(2)–(3). As the Department noted in the NPRM for the 2020 Tip final rule, two appellate courts identified an inconsistency between the 1992 regulations' language, on the one hand, that conduct ''shall be deemed knowing'' if the employer was previously advised by WHD that the conduct was unlawful, and its language, on the other hand, derived from *Richland Shoe,* that WHD shall take into account ''[a]ll of the facts and circumstances surrounding the violation'' when determining willfulness. *See* 84 FR 53964–65 (discussing *Rhea Lana, Inc.* v. *Dep't of Labor,* 824 F.3d 1023, 1030–32 (D.C. Cir. 2016), and *Baystate Alt. Staffing, Inc.* v. *Herman,* 163 F.3d 668, 680–81 (1st Cir. 1998)). The Department also explained in the NPRM for the 2020 Tip final rule that it does evaluate all of the facts and circumstances surrounding a violation when litigating willfulness, notwithstanding the regulatory language that appeared to be to the contrary. *See* 84 FR 53965. Accordingly, the NPRM for the 2020 Tip final rule proposed to revise §§ 578.3(c)(2)–(3) and 579.2 to state that an employer's receipt of advice from WHD that its conduct is unlawful and its failure to inquire further regarding the legality of its conduct are each ''a relevant fact and circumstance'' in determining willfulness. *See* 84 FR 53978.

After considering comments received, the 2020 Tip final rule revised § 578.3(c)(2) and the corresponding language in § 579.2 to state that, in considering all of the facts and circumstances, an employer's receipt of advice from WHD that its conduct was unlawful ''can be sufficient'' to show that the violation is knowing but is ''not automatically dispositive.'' *See* 85 FR 86774. In addition, the 2020 Tip final rule deleted § 578.3(c)(3) and the corresponding language in § 579.2 addressing the meaning of reckless disregard. The 2020 Tip final rule explained that, unlike § 578.3(c)(2), § 578.3(c)(3) does not just identify a fact and address how that fact impacts a willfulness finding; instead, it addresses a scenario—in which an employer should have inquired further into the lawfulness of its conduct but did not do so adequately—that is ''tantamount to reckless disregard.'' *See* 85 FR 86774 (citing *Davila* v. *Menendez,* 717 F.3d 1179, 1185 (11th Cir. 2013)). According to the 2020 Tip final rule, revising § 578.3(c)(3) in the same manner as § 578.3(c)(2) thus ''did not seem helpful.'' *Id.*

In the CMP NPRM, the Department stated that it believed a modification to § 578.3(c)(2) and the corresponding language in section § 579.2 regarding knowing violations was necessary to clarify that other circumstances, not just the circumstance identified in these regulations, can be sufficient to show that a violation is knowing. Accordingly, the Department proposed to withdraw and repropose § 578.3(c)(2)

[10] *See supra* Section II.B.

and the corresponding language in § 579.2 to state that ''the employer's receipt of advice from a responsible [WHD] official . . . to the effect that the conduct in question is not lawful, among other situations, can be sufficient to show that the employer's conduct is knowing, but is not automatically dispositive.'' 86 FR 15823. The Department also explained in the CMP NPRM that, although the preamble to the 2020 Tip final rule stated that an employer's failure to make adequate further inquiry into the lawfulness of its conduct when it should have done so is ''tantamount to reckless disregard,'' the rule's deletion of § 578.3(c)(3) and the corresponding language in § 579.2 could be read as suggesting the opposite. *See id.* Accordingly, the Department proposed to reinsert language in §§ 578.3(c)(3) and 579.2 addressing reckless disregard—specifically, that ''reckless disregard of the requirements of the Act means, among other situations, that the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry.'' 86 FR 15823.

2. Comments Regarding Proposed Willfulness Changes

Multiple commenters supported the willfulness changes proposed in the CMP NPRM. The AG Coalition stated that the proposed revisions to §§ 578.3(c)(2) and (3) and 579.2 would address their concerns with the 2020 Tip final rule's amendments to these provisions, which ''[left] the regulated community without guidance in determining when reckless conduct is willful'' (among other concerns). The AG Coalition supported the Department's proposal to ''clarif[y] that there may be other situations'' where a violation can be found knowing, in addition to when an employer has received advice from WHD that its conduct is unlawful. The AG Coalition also supported the Department's proposal to reinstate regulatory text regarding the meaning of reckless disregard in §§ 578.3(c)(3) and 579.2, including the Department's proposal that reckless disregard may be established in situations other than where ''the employer should have inquired further but did not do so adequately.'' [11] The Center for Workplace Compliance (CWC) stated that it was ''pleased to support'' the Department's proposal to retain language in §§ 578.3(c)(2) and 579.2 stating that an employer's receipt of advice from WHD that its conduct was unlawful is ''not automatically dispositive'' of willfulness. According to CWC, this language ''recognizes that employers should not be automatically subject to [CMPs] where legitimate questions exist concerning . . . coverage.''

Commenters representing employees generally supported the proposed willfulness changes in part. Commenters such as Restaurant Opportunities Centers United (ROC United), the North Carolina Justice Center (NCJC), and the National Employment Lawyers Association (NELA) supported the Department's affirmation in the CMP NPRM that the two scenarios identified in its regulations—an employer's receipt of advice from WHD that its conduct was unlawful and an employer's failure to adequately inquire into the lawfulness of its conduct when it should have done so—''can be sufficient'' to establish willfulness. *See also* Texas RioGrande Legal Aid (TRLA) (''TRLA appreciate[s] the DOL's improvement between the prior notice of proposed rulemaking and this reproposal.''). These commenters noted that they understood the Department's concern that the 1992 versions of §§ 578.3(c)(2) and (3) and 579.2 ''may be in tension'' with *Richland Shoe* and with § 578.3(c)(1)'s requirement that all facts and circumstances be considered.[12] However, to give the scenarios identified in the regulations ''the proper weight,'' commenters representing employees recommended that the Department ''establish a rebuttable presumption that a violation is knowing when an employer received notice from WHD that its conduct was unlawful, and that a violation is in reckless disregard of the law if the employer failed to make adequate inquiry into whether its conduct was compliant.'' *See, e.g.,* ROC United; NCJC; NELA; NELP; TRLA.

The NRA and NFIB urged the Department to retain the 2020 Tip final rule's revisions to §§ 578.3(c)(2) and (3) and 579.2. The NRA stated that it supported the 2020 Tip final rule's willfulness changes ''for the reasons that the Department already outlined'' in the 2020 Tip final rule before the Department's ''sudden'' change of opinion in the CMP NPRM. The NFIB supported the 2020 Tip final rule's willfulness changes over those proposed in the CMP NPRM as well, characterizing the 2020 revisions as ''reasonable and practical.'' In the alternative, NFIB requested that the Department retain the 2020 Tip final rule's willfulness changes for ''small and independent businesses.''

3. Discussion of Comments and Rationale for Finalizing Proposed Changes to Portions of CMP Regulations Addressing When a Violation Is Willful

After considering all the comments, the Department is finalizing the revisions to §§ 578.3(c)(2) and (c)(3) and 579.2 as proposed.

The Department continues to believe that revisions to its 1992 regulations regarding when a violation of the FLSA is willful are necessary for the reasons identified in the 2020 Tip final rule: To resolve the tensions identified by appellate courts within § 578.3(c) and between § 578.3(c) and *Richland Shoe* and to align these provisions more closely with how the Department actually litigates. Accordingly, as proposed in the CMP NPRM, the Department is retaining the language in § 578.3(c)(2) and the corresponding language in § 579.2 that an employer's receipt of advice from WHD that its conduct is unlawful is ''not automatically dispositive'' of a knowing violation. By clarifying that an employer's receipt of advice from WHD that its conduct is unlawful is not automatically dispositive, the Department also addresses the concern raised by CWC that such evidence should not ''automatically subject'' an employer to CMPs where the employer has a legitimate disagreement with WHD concerning the FLSA's coverage.

At the same time, this rule's revisions to §§ 578.3(c)(2) and 579.2 affirm that an employer's receipt of advice from WHD that its conduct is unlawful ''can be sufficient'' to show that a violation is knowing and thus willful. In accordance with § 578.3(c)(1), all facts and circumstances surrounding the violation must be taken into account when determining willfulness. However, an employer's receipt of advice from WHD that its conduct is unlawful is a significant, and may be a determining, factor regarding that employer's willfulness.

By finalizing the proposed changes to § 578.2(c)(2) and the corresponding language in § 579.2, this rule also makes explicit, consistent with considering all of the facts and circumstances, that

[11] The AG Coalition also stated that ''section 578.3(c)(2) could be strengthened by re-inserting the 'shall be deemed' language while maintaining consistency with *Richland Shoe,* though the proposed revision is much improved from the 2020 Tip Rule.''

[12] In contrast, NELP stated that ''the longstanding regulatory language'' in §§ 578.3(c)(2) and (3) and 579.2 stating that violations ''shall be deemed'' willful in certain scenarios is ''not in tension with language elsewhere in FLSA regulations and in precedent requiring that 'all of the facts and circumstances' be considered in determining whether a violation was willful.''

evidence other than an employer's receipt of advice from WHD that its conduct was unlawful can be sufficient to show that a violation was knowing. As noted above, the AG Coalition urged the Department to finalize this proposed change. This rule thus makes clear that other circumstances, not just the circumstance identified in § 578.3(c)(2), can be sufficient to show that a violation is knowing.

This rule also restores regulatory text regarding the meaning of willfulness by reinserting language regarding reckless disregard in §§ 578.3(c)(3) and 579.2. The Department agrees with the AG Coalition and advocacy groups representing employees who argued that simply deleting § 578.3(c)(3) and the corresponding language in § 579.2 may have led to confusion and uncertainty. The revised language in §§ 578.3(c)(3) and 579.2 regarding reckless disregard aligns the Department's regulations with appellate court precedent, pursuant to which an employer's failure to adequately inquire into whether it violated the FLSA when it should have done so is considered tantamount to reckless disregard. *See Davila* v. *Menendez,* 717 F.3d 1179, 1184 (11th Cir. 2013). The revisions to § 578.3(c)(3) and the corresponding language in § 579.2 also make clear that reckless disregard can be proven by evidence other than that the employer should have inquired further but did not do so adequately. When determining reckless disregard, the Department must still consider all of the relevant facts and circumstances. *See* § 578.3(c)(1). Accordingly, under revised §§ 578.3(c)(3) and 579.2, an employer is in reckless disregard of the FLSA when, among other situations, the Department determines based on all of the facts and circumstances that the employer should have inquired into whether its conduct was lawful but failed to do so adequately.

The Department appreciates the concern of commenters representing employees that the circumstances identified in §§ 578.3(c)(2) and (3) be accorded appropriate weight in the willfulness analysis. However, the Department declines to incorporate into its regulations a rebuttable presumption that a violation of the FLSA is willful in these scenarios. Any rebuttable presumption would need to be carefully calibrated to ensure that it is consistent with § 578.3(c)(1)'s requirement, derived from *Richland Shoe,* that all facts and circumstances be considered in determining willfulness.[13] Incorporating a rebuttable presumption into these provisions would also create administrative difficulties, as it would require a change in how WHD assesses CMPs and how the Department litigates CMP proceedings.

Moreover, the Department does not agree that incorporating a rebuttable presumption of willfulness into its CMP regulations would accord greater weight to the scenarios identified in §§ 578.3(c)(2) and (3) than is accorded by its revisions to these provisions. As discussed above, under the proposed revisions—which this rule finalizes—an employer's receipt of advice from WHD that its conduct was unlawful ''can be sufficient'' to establish a knowing violation; thus, the revisions accord significant, and possibly determinative, weight to this fact in the willfulness analysis. Additionally, as noted above, an employer is in reckless disregard of the FLSA when, based on all of the facts and circumstances, it should have inquired into the lawfulness of its conduct but failed to do so adequately. Since any rebuttable presumption would need to be carefully calibrated to avoid conflicting with the requirement that all facts and circumstances be considered and would necessitate a change in how the Department administers CMPs and litigates willfulness, and given that incorporating a rebuttable presumption into the regulations would not necessarily accord greater weight to the scenarios in §§ 578.3(c)(2) and (3) and 579.2, the Department declines to incorporate a rebuttable presumption of willfulness into its CMP regulations.

Finally, the Department declines to retain the 2020 Tip final rule's willfulness revisions, as urged by the NRA and NFIB. Upon review of the comments and for the reasons discussed above, the Department believes that the proposed revisions to §§ 578.3(c)(2) and (3) and 579.2 make needed modifications to its CMP regulations.[14] The Department also declines NFIB's suggestion to preserve the 2020 Tip final rule's willfulness revisions for smaller employers. Consistent with the text of section 16(e)(2) of the FLSA, which provides that ''any person who repeatedly or willfully violates'' section 6 or 7 of the FLSA ''shall be subject to a civil penalty,'' 29 U.S.C. 216(e)(2), the Department has always maintained a uniform standard of willfulness applicable to all persons who violate the FLSA. *See* 57 FR 49128. Adopting different standards of willfulness for different sizes of employers would present administrative difficulties for WHD.

Accordingly, the final rule adopts the revisions to §§ 578.3(c)(2) and (c)(3) and 579.2 as proposed.

C. Managers and Supervisors Under 3(m)(2)(B)

Section 3(m)(2)(B) prohibits employers, regardless of whether they take a tip credit, from keeping tips received by employees, ''including allowing managers or supervisors to keep any portion of employees' tips.'' 29 U.S.C. 203(m)(2)(B). Section 531.52(b)(2), as amended by the 2020 Tip final rule, reiterates the prohibition in section 3(m)(2)(B) that ''[a]n employer may not allow managers and supervisors to keep any portion of an employee's tips, regardless of whether the employer takes a tip credit.'' 29 CFR 531.52(b)(2). However, § 531.52(b)(2) clarifies that an employer does not violate 3(m)(2)(B) when a manager or supervisor keeps tips that ''he or she receives directly from customers based on the service that he or she directly provides.'' The Department explained in the 2020 Tip final rule that section 3(m)(2)(B) does not bar managers and supervisors from keeping their own tips but only prohibits managers and supervisors from keeping ''tips received by employees other than themselves.'' *See* 85 FR 86764. Thus, for example, a salon manager may ''keep tips left by customers whose hair she personally styles,'' without violating the statute. *Id.*

In the CMP NPRM, the Department observed that some managers and supervisors may directly engage in a significant amount of tipped work for which they earn tips, and requested comments on whether it could make additional adjustments to the regulations to better address these employees without running afoul of section 3(m)(2)(B)'s prohibition of these individuals ''keeping'' other employees' tips. The Department asked whether language in the current regulation is sufficient to allow managers and supervisors to retain the tips they earn from customer service work. The Department also requested comment on whether it should modify the regulation to clarify that managers and supervisors can contribute tips to mandatory tip

[13] Additionally, courts have made clear that the burden of proving that an employer acted willfully ultimately falls in the employee. *See, e.g., Davila,* 717 F.3d at 1184–85.

[14] The Department notes that it disagrees with the NRA's assertion that the proposed willfulness changes represent a ''sudden'' change in position from the 2020 Tip final rule. Although the proposed revisions make important and needed modifications to §§ 578.3(c)(2) and (3) and 579.2, these revisions clearly build upon rather than depart from the fundamental reasoning behind and objectives of the 2020 Tip final rule's willfulness revisions: To better align the Department's CMP regulations with appellate court precedent and with how the Department actually litigates willfulness.

pools. In addition, the Department asked general questions about managers and supervisors and tipped work, including: (1) How commonly managers and supervisors perform tipped work; (2) whether, prior to the CAA, managers and supervisors who perform tipped work typically participated in tip pools or tip sharing arrangements; and (3) whether it is common for tips provided for work performed by a manager or supervisor to be commingled with other employees' tips.

1. Managers and Supervisors May Keep Tips They Directly Receive for Service They Directly and Solely Provide

Commenters—representing both employers and employees—generally noted that it is not unusual for managers and supervisors in service industries to perform tipped work. *See* Werman Salas; NRA. NRA stated that, in the restaurant industry, managers and supervisors ''take orders,'' and ''serve food . . . on [a] daily basis throughout the country.'' NRA also explained that, in ''some circumstances,'' a ''manager might be the only individual serving tables because it is a slow day or because it is an event outside the restaurant location and only supervisors are managing it.'' One brewery employer noted that its bar manager has three jobs codes—manager, bartender, and brewery assistant—and that ''there are many times'' when the manager ''must change roles and work under a bartender job code for 4 hours of a 6 hour shift.'' The commenter further noted that even in large restaurants, ''[i]f a bartender doesn't show up for work,'' the manager may be ''forced to stop managing and become the bartender for a night.'' Commenters also indicated that managers and supervisors are performing more tipped work as a result of the COVID–19 pandemic. The Employment Rights Center commented that, as a result of the pandemic, a manager might, for example, be more likely to ''serve an unexpected in-person table, while a server is staffing a takeout counter or preparing to-go orders.'' ROC United stated that managers and supervisors at full-service restaurants ''have performed tipped work on a daily and hourly basis over the last year.''

Nearly all commenters supported regulatory language allowing managers and supervisors who receive their own tips for services they directly provide to keep those tips. *See, e.g.,* Economic Policy Institute (EPI); Employee Rights Center; Public Justice Center; Kentucky Equal Justice Center; National Employment Lawyers Association; National Employment Law Project; NFIB; National Partnership for Women and Families; National Women's Law Center; ROC United; and Worker Justice Center of New York. NFIB stated that this policy, ''reasonably recognizes situations in which a manager or supervisor provides leadership services with respect to other employees, but also furnishes services to customers on the same basis as those employees, as happens frequently, for example, in the restaurant business.'' One individual commenter, however, argued that managers and supervisors should not be able to keep the tips that they receive for their direct service, as this would incentivize managers or supervisors to ''use less staff, so they 'have to' lend a hand.''

Commenters also described instances in which tips provided for work performed by a manager or supervisor may be commingled with tips provided to other tipped employees. Werman Salas commented that commingling frequently occurs in two scenarios: When a manager or supervisor ''performs tipped work alongside other tipped employees and there is a common tip jar,'' or when the manager or supervisor assists with tipped work, but ''is not solely responsible for the service that results in the gratuity being given by the customer.'' For example a manager or supervisor might run food to a table, but the ''server is otherwise responsible for the balance of the guest experience.'' *Id.*

The Department requested comments on whether it was possible to modify the regulations so that a manager or supervisor could retain tips in commingling scenarios without allowing the manager or supervisor to keep other employees' tips in violation of 3(m)(2)(B). Commenters who responded to this question generally stated that such an approach was not feasible because it will often be impossible to determine the amount of the tip ''earned'' by the manager or supervisor. *See* Werman Salas; NWLC. For example, NWLC stated that when a customer leaves a single tip for a service experience in which both a manager or supervisor and a non-managerial tipped employee participate, it is not possible to attribute a portion of the tip to the manager or supervisor. Rather than revise the language in § 531.52(b)(2) to allow a manager or supervisor to keep commingled tips, these commenters proposed revising the regulation to ''state the opposite'' and provide that a manager or supervisor may keep a tip he or she directly receives for service he or she directly provides only if the tip is not commingled with and is segregable from other employees' tips. Werman Salas Law Firm; *see also* NWLC. NRA, on the other hand, agreed generally that ''tips to managers and supervisors should not be 'commingled' with tips provided to tipped employees,'' but suggested that managers and supervisors could pool tips among themselves. According to the NRA, ''no tipped employee shares tips with a supervisor or manager'' in these scenarios.

Having carefully considered the comments, the Department has decided to slightly modify the statement in § 531.52(b)(2) that a manager or supervisor may keep tips that ''he or she receives directly from customers based on the service that he or she directly provides.'' In this final rule, the Department amends the regulatory language to clarify that a manager or supervisor may keep tips only for services the manager or supervisor directly and ''solely'' provides. Particularly given comments highlighting the prevalence of tipped work among managers and supervisors in the service industry, it is important that the Department's regulations continue to reflect the fact that section 3(m)(2)(B) does not prohibit managers and supervisors who are tipped employees from keeping tips that are theirs alone. Moreover, as one individual commenter noted, if managers and supervisor cannot keep such tips, it is unclear who would be entitled to them.

However, by clarifying that a manager or supervisor may keep tips only for services the manager or supervisor directly and ''solely'' provides, the modified regulatory text will prevent managers and supervisors from keeping tips when it is not possible to attribute the tip solely to the manager or supervisor. The modified regulatory text thus helps to ensure that managers and supervisors do not keep ''any portion'' of other employees' tips, *see* 29 U.S.C. 203(m)(2)(B). With respect to commenters' suggestion that the Department specify that such tips must be segregable from or not commingled with other employees' tips, the Department believes that the clarified language of § 531.52(b)(2) makes clear that a manager or supervisor may keep only those tips that the manager or supervisor receives directly for a service that the manager or supervisor directly and solely provides. Thus, a manager who serves her own tables may keep her own tips, for example. However, when a manager simply runs food to a table for which a server is otherwise responsible, she may not keep any portion of the tip the customer leaves for the server since that tip was not earned solely by the manager or supervisor.

The Department also declines to amend the regulations to allow mandatory tip pools comprised only of managers and supervisors, as proposed by NRA. The statute does not permit such arrangements: Managers and supervisors are employees under the FLSA, *see* 29 U.S.C. 203(e)(1), and 3(m)(2)(B) prohibits employers from allowing managers or supervisors to keep other ''employees' tips.'' [15] This includes other managers and supervisors' tips. Moreover, to permit scenarios in which a higher-ranking manager or supervisor—for example, the general manager of a restaurant—could keep tips from a lower-ranking manager or supervisor—for example, a shift supervisor who also tends bar—would undermine the CAA's mandate of preventing employers and their agents from keeping employees' tips.

2. Managers and Supervisors May Contribute Tips To, But Not Receive Tips From, Tip Pools

In this final rule, the Department also amends §§ 531.54(c)(3) and 531.54(d) to clarify that an employer may not allow a manager or supervisor to receive tips from employer-mandated tip pools or tip sharing arrangements, but may require a manager and supervisor to contribute tips to such an arrangement. As discussed above, section 3(m)(2)(B) prohibits managers and supervisors from keeping any portion of other employees' tips. *See also* § 531.52(b)(2). Sections 531.54(c)(3) and (d), as amended by the 2020 Tip final rule, implement this prohibition by barring employers from ''includ[ing]'' such managers and supervisors in mandatory tip pools. The preamble accompanying the 2020 Tip final rule interpreted § 531.54(c)(3) and (d) to prohibit employers from requiring managers and supervisors to contribute, as well as from allowing them to receive, tips from mandatory tip pooling or sharing arrangements. 85 FR 86764. As a result of the Department's interpretation in the 2020 Tip final rule, a restaurant employer, for example, can require non-managerial servers to give a portion of their tips to the bussers, but is prohibited from requiring a manager who also serves tables to similarly contribute. Or a salon employer may require non-supervisory stylists to share a portion of tips with the shampoo assistant, but cannot require a stylist who is also a supervisor to do the same. In the CMP NPRM, the Department therefore sought comment on whether it should adjust its regulations to allow managers and supervisors, like other employees who receive tips, to contribute tips to eligible employees in mandatory tip pools or tip sharing arrangements, so long as: (1) They do not *receive* any tips from a pool; or (2) alternatively, so long as they receive out of the tip pool no more than what they contributed.

Commenters overwhelmingly supported a change to allow employers to require managers and supervisors, like other employees who receive tips, to contribute to tip pooling or sharing arrangements. *See, e.g.,* EPI; Employee Rights Center; Public Justice Center; ROC United; North Carolina Justice Center; Workplace Justice Project; National Employment Lawyers Association; National Employment Law Project; Kentucky Equal Justice Center; National Partnership for Women and Families; National Women's Law Center; Worker Justice Center of New York; NRA.[16] NRA noted that mandatory tip sharing arrangements in which managers or supervisors who have ''responsibility for serving tables'' share a portion of their tips with bartenders, bussers, or other employees who help them, are common in the restaurant industry. Commenters also stated that allowing managers and supervisors who earn tips to contribute them to eligible employees in mandatory tip pools would benefit non-managerial employees. *See* Werman Salas; NRA. In addition, the Center for Workplace Compliance commented that modifying the regulations to allow managers and supervisors to contribute to mandatory tip pools would benefit employers by giving them ''a little more flexibility to adopt tip pooling practices that work best in their industry.'' NRA also stated that the statute does not prohibit employers from requiring managers and supervisors to share their own tips.

To the extent that commenters addressed the possibility of allowing managers and supervisors who contribute tips to a tip pool to receive tips from the arrangement up to the amount they contributed, commenters opposed this alternative. *See* Werman Salas; NRA. Werman Salas asserted that a policy allowing managers or supervisors to receive some tips from a tip pool, but no more than what the manager or supervisor contributes, ''would be difficult or impossible to apply.'' In contrast, allowing employers to require managers and supervisors to contribute a portion of their tips to mandatory tip pooling or sharing arrangements, while preserving ''the prohibition on managers and supervisors receiving any tips from such pooling or sharing arrangements'' would maintain ''the integrity of the tip pooling arrangements without improper participation from managers or supervisors.''

Having considered the comments, the Department adopts changes to its regulations to clarify that, while an employer may not allow a manager or supervisor to keep other employees' tips by receiving tips from a tip pool or tip sharing arrangement, section 3(m)(2)(B) does not prohibit an employer from requiring a manager and supervisor who receives tips directly from customers to contribute some portion of those tips to eligible employees in an employer-mandated tip pooling or tip sharing arrangement. The final rule similarly provides that employers—some of whom may themselves be managers or supervisors who perform tipped work—may not receive tips from a tip pool or sharing arrangement, but does not bar employers who receive tips directly from customers from sharing those tips with their employees.

The Department agrees with commenters that allowing employers to require managers and supervisors to

[15] A manager or supervisor who performs tipped work may satisfy the definition of a ''tipped'' employee under section 3(t) because they are engaged in an occupation in which they ''customarily and regularly receive[ ] more than $30 a month in tips.'' *See* 29 U.S.C. 203(t). Under those circumstances, an employer may take a tip credit for the hours worked in the tipped occupation pursuant to section 3(m)(2)(A), assuming that all other requirements for the tip credit are satisfied. If the employer does so, it may not require the tipped manager to contribute tips to a nontraditional tip pool, and may only require the tipped manager or supervisor to contribute their tips to a traditional tip pool comprised of other tipped employees. Regardless of whether an employee is engaged in a tipped occupation, however, if the employee satisfies the duties test for managers and supervisors, including the requirement that management is the employee's primary duty, the employee cannot *receive* other employees' tips from a mandatory tip pool or tip sharing arrangement pursuant to section 3(m)(2)(B). Thus, even if a manager or supervisor is engaged as a tipped employee under section 3(t) and can be paid with a tip credit and participate in a tip pool under section 3(m)(2)(A), they may also still qualify as manager or supervisor under 3(m)(2)(B), in which case they would be prohibited from receiving tips from the tip pool, and from otherwise keeping other employees' tips.

[16] Several commenters argued that permitting managers and supervisors to contribute to mandatory tip sharing arrangements ''makes it all the more important that only employees who are bona fide managers and supervisors are classified as such,'' and urged the Department to reconsider the definition of ''manager or supervisor'' adopted in its 2018 FAB and 2020 Tip final rule. ROC United; NELP; National Partnership for Women and Families. These commenters urged the Department to include a salary component in the definition. The CMP NPRM did not contemplate changes to the regulatory definition of the terms ''manager or supervisor,'' however, and revisions incorporating a salary level are outside of the scope of this rulemaking. The Department lacks sufficient information to consider such changes as part of the final rule.

share their tips with other eligible employees will benefit non-managerial employees. When managers or supervisors contribute tips to mandatory tip pools, non-managerial employees (*e.g.,* bussers, other servers, and bartenders) may earn more from the pool and tipped non-managerial employees (*e.g.,* servers and bartenders) may be required to contribute less to the pool. The Department believes that allowing employers to require managers and supervisors, like other employees who receive tips, to contribute to tip sharing is particularly important given that managers or supervisors may have the opportunity to serve the largest tables or groups of customers, or work the more desirable shifts. In addition, the Department takes note of commenters' statement that section 3(m)(2)(B) does not expressly prohibit employers from requiring managers or supervisors to share tips.

The Department expressed concerns in the 2020 Tip final rule that allowing managers and supervisors to participate in tip pools for one purpose (contributing tips) and not for another (receiving tips) could ''create confusion among employers and employees,'' and lead to situations in which compliance is difficult. 85 FR 86764. On further consideration, however, the Department has determined that any compliance difficulties created by this policy are minimal and are outweighed by the benefits noted above. The far more intractable challenge for compliance and enforcement, as commenters noted, would be to allow managers and supervisors to contribute to employer-mandated tip pooling or tip sharing arrangements and also receive tips from the pool. Under such a policy, it would be very difficult to ensure that managers and supervisors are not taking more than the equivalent of their own tips in violation of the statute. The Department believes, however, that employers can more easily implement a bright line rule in which managers or supervisors contribute tips to mandatory tip sharing arrangements, but do not receive any tips from those arrangements.

As finalized, § 531.54(c)(3) and (d) provide that, consistent with section 3(m)(2)(B) of the FLSA, an employer may not receive and may not allow a manager or supervisor to receive any tips from a tip pool or tip sharing arrangement. As amended, the regulations do not prohibit an employer from contributing tips to, or from requiring a manager and supervisor who receives tips to contribute tips to, eligible employees in an employer-mandated tip pooling or tip sharing arrangement. When a manager or supervisor directly receives tips for a service the manager or supervisor directly and solely provides, an employer may allow the manager or supervisor to keep the tips, and may also require the manager or supervisor to share some portion of the tips with other eligible employees. Neither of these options runs afoul of section 3(m)(2)(B)'s prohibition on managers and supervisors ''keep[ing]'' other employees' tips.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This final rule does not contain a collection of information subject to OMB approval under the PRA.

V. Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improved Regulation and Regulatory Review

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[17] Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OIRA has determined that this rule is not economically significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this rule and was prepared pursuant to the above-mentioned executive orders.

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), OIRA has not designated this rule as a major rule, as defined by 5 U.S.C. 804(2).

B. Background

In this final rule, the Department modifies the portion of the 2020 Tip final rule incorporating the CAA's new provisions authorizing the assessment of CMPs for violations of section 3(m)(2)(B) of the Act. The Department also modifies an additional portion of its CMP regulations addressing willful violations. Because these changes will only apply when an employer violates the FLSA, the Department does not believe that they will have an impact on costs or transfers. The Department has also decided to clarify in this final rule that while managers and supervisors may not receive tips from tip pools or tip sharing arrangements, managers or supervisors are not prohibited from contributing to mandatory tip pools or sharing arrangements. The Department has discussed this change qualitatively due to data limitations. Other provisions codifying the CAA amendments were already discussed and quantified in the 2020 Tip final rule, and so have not been quantified again here. The only costs quantified here are the rule familiarization costs associated with reviewing the rule. The Department qualitatively discusses possible benefits associated with this rule.

[17] *See* 58 FR 51735, 51741 (Oct. 4, 1993).

C. Costs

1. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses associated with reviewing the new regulation. It is not clear whether regulatory familiarization costs are a function of the number of establishments or the number of firms.[18] Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple locations, and may also require these locations to familiarize themselves with the regulation at the establishment level. To avoid underestimating the costs of this rule, the Department uses both the number of establishments and the number of firms to estimate a potential range for regulatory familiarization costs. The lower bound of the range is calculated assuming that one specialist per firm will review the rule, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this rule was drafted are from the 2017 Statistics of U.S. Businesses (SUSB).[19] The Department limited this analysis to a few industries that were acknowledged to have tipped workers in the 2020 Tip final rule. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos), 721110 (Hotels and Motels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-service Restaurants), 722513 (Limited Service Restaurants), and 722515 (Snack and Nonalcoholic Beverage Bars). The Department understands that there may be entities in other industries with tipped workers who may review this rule, but did not receive any comments about other industries that should be included in the analysis. See Table 1 for a list of the number of firms and establishments in each of these industries.

TABLE 1—FIRMS AND ESTABLISHMENTS IN TIPPED INDUSTRIES

Industry	Firms	Establishments
NAICS 713210 (Casinos)	221	292
NAICS 721110 (Hotels and Motels)	42,795	53,869
NAICS 722410 (Drinking Places (Alcoholic Beverages))	39,323	40,156
NAICS 722511 (Full-Service Restaurants)	217,111	250,871
NAICS 722513 (Limited Service Restaurants)	157,353	251,100
NAICS 722515 (Snack and Nonalcoholic Beverage Bars)	47,112	65,010
Total	503,915	661,198

Source: Statistics of U.S. Businesses 2017.

The Department believes 30 minutes per entity, on average, to be an appropriate review time for this rule, because most of the information related to the CAA amendments that employers would have to familiarize themselves with was already captured in the 2020 Tip final rule. The changes in this rule are small, and one is consistent with the Department's existing enforcement. This review time represents an average of employers who will spend less than 30 minutes reviewing, and others who will spend more time. In the NPRM, the Department estimated that average review time would be 15 minutes, but has increased it here to account for the additional provisions on managers' participation in tip pools.

The Department's analysis assumes that the rule would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13–1141) or employees of similar status and comparable pay. The median hourly wage for these workers was $32.30 per hour in 2020, the most recent year of data available.[20] The Department also assumes that benefits are paid at a rate of 46 percent[21] and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of $52.65.

The Department estimates that the lower bound of regulatory familiarization cost range would be $13,265,562 (503,915 firms × $52.65 × 0.5 hours), and the upper bound, $17,406,037 (661,198 establishments × $52.65 × 0.5 hours). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimated average annualized costs of this rule over 10 years. Over 10 years, it would have an average annual cost of $1.8 million to $2.3 million, calculated at a 7 percent discount rate ($1.5 million to $1.9 million calculated at a 3 percent discount rate). All costs are in 2020 dollars.

D. Transfers Associated With Managers' Contributing to Tip Pools

As noted above, in the 2020 Tip final rule, the Department implemented section 3(m)(2)(B) of the FLSA by prohibiting employers from including managers or supervisors in mandatory tip pooling or sharing arrangements. *See* 29 CFR 531.54(c)(3), (d) (April 30, 2021). The preamble accompanying the 2020 Tip final rule interpreted § 531.54(c)(3) and (d) to prohibit employers from requiring managers and supervisors to contribute, as well as from allowing them to receive, tips from mandatory tip pooling or sharing arrangements. 85 FR 86764. This final rule clarifies that managers and supervisors are not prohibited from contributing to eligible employees in mandatory tip pools or sharing arrangements, but they may not receive tips from tip pools or tip sharing arrangements. If, prior to this final rule, a manager was prevented from contributing to tip pools, but is now able to contribute following this rule, their tipped income and overall earnings could decrease, while the tipped income and overall earnings of the other employees in the tip pool could increase. The magnitude of this change could be estimated by observing how managers' and non-manager employees' tipped income and overall earnings changed following the provisions of the 2020 Tip final rule that

[18] An establishment is a single economic unit that produces goods or services. Establishments are typically at one physical location and engaged in one, or predominantly one, type of economic activity. An establishment is in contrast to a firm, or a company, which is a business and may consist of one or more establishments.

[19] Statistics of U.S. Businesses 2017, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2017 SUSB Annual Data Tables by Establishment Industry.

[20] Occupational Employment and Wages, May 2020. *https://www.bls.gov/oes/current/oes131141.htm.*

[21] The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

prevented managers from contributing to tip pools. Although the Department lacks comprehensive data on the number of managers who perform tipped work, the Department used data from the Current Population Survey (CPS) to estimate the number of people in the occupation ''First-Line Supervisors of Food Preparation and Serving Workers.'' The Department acknowledges that this could be an undercount of the number of food service managers or supervisors who receive tips, and that this is not the only industry in which managers may receive tips. According to CPS, in 2019 there were 590,900 First-Line Supervisors of Food Preparation and Serving Workers.[22] Their overall average hourly earnings were $17.48 (includes hourly and non-hourly workers and tipped and non-tipped workers). Of those workers who are paid hourly, 24 percent report regularly receiving tips, overtime, or commissions (this question is only asked of hourly workers). After backing out estimated overtime pay, the Department estimates that these First-Line Supervisors of Food Preparation and Serving Workers earned an average of $19.71 per hour, which includes $5.68 per hour in tips. Several commenters asserted that it is common for managers and supervisors to perform tipped work. For example, Werman Salas stated, ''Our experience from litigation is that managers and supervisors who arguably satisfy the executive employee duties test also frequently perform tipped work. For example, in litigation against a national casual dining establishment, both assistant managers and managers who arguably met the duties test for executive employees, frequently greeted customers and ran food to tables as part of promoting the 'guest experience.' '' The Department did not receive any comments with data on the earnings of these managers and supervisors.

It would also be difficult to discern whether any change in earnings would be related to the provisions of the 2020 Tip final rule that prevented managers from contributing to mandatory tip pools, because the rule had only been in effect since April 30, 2021. Prior to the 2020 Tip final rule, it was unclear to the regulated community whether an employer could require a manager to contribute to tip pools following the 2018 CAA amendments. *See* NRA, Comment on the 2019 Tip NPRM (requesting clarity on this issue).

E. Benefits

This rule replaces regulatory language in the CMP regulations so that the Department is not limited in its assessment of tip CMPs to only repeated and willful violations of section 3(m)(2)(B). This change is consistent with the text of section 16(e) of the FLSA, which provides that ''[a]ny person who violates section 3(m)(2)(B) shall be subject to a civil penalty . . . for each such violation, as the Secretary determines appropriate.'' 29 U.S.C. 216(e). The Department believes that this change, by ensuring that the Department has the ability to impose CMPs for violations of section 3(m)(2)(B) when it deems appropriate, can help improve the enforcement of the statute, potentially discourage more employers from violating the FLSA, and better ensure that employees keep the tips they receive.

This rule also revises portions of the Department's CMP regulations regarding when a violation of section 6 (minimum wage) or section 7 (overtime) of the FLSA is ''willful,'' and thus subject to a CMP under section 16(e). As discussed above, these portions of the Department's regulations are based on *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128, 133 (1988), which held that a violation is willful if the employer ''knew or showed reckless disregard.'' This rule modifies the CMP regulations to clarify that multiple circumstances, including those not specified in the rule, can be sufficient to show a knowing violation of section 6 or 7. The Department also reinserts language in the CMP regulations to address the meaning of reckless disregard. The Department believes that these revisions will better align its CMP regulations with how it actually litigates willfulness and make clearer to the regulated community when a violation is knowing or in reckless disregard and thus willful. This increased clarity will enable employers to better understand when they may be subject to a CMP for violating the FLSA's minimum wage or overtime requirements, which may enhance the penalty's deterrent effect.

This rule revises the Department's regulation addressing managers and supervisors who cannot keep other employees' tips under section 3(m)(2)(B) of the FLSA. The final rule provides that managers and supervisors cannot receive tips from tip pools or tip sharing arrangements, but does not prohibit managers and supervisors, who may earn their own tips from customers, from contributing tips to such arrangements. The Department believes that these changes will result in increased flexibility in tip pooling arrangements.

VI. Regulatory Flexibility Act (RFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined this rule to determine whether it would have a significant economic impact on a substantial number of small entities. The most recent data on private sector entities at the time this rule was drafted are from the 2017 Statistics of U.S. Businesses (SUSB).[23] The Department limited this analysis to a few industries that were acknowledged to have tipped workers in the 2020 Tip final rule. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos), 721110 (Hotels and Motels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-service Restaurants), 722513 (Limited Service Restaurants), and 722515 (Snack and Nonalcoholic Beverage Bars). The SUSB reports that these industries have 503,915 private firms and 661,198 private establishments. Of these, 501,322 firms and 554,088 establishments have fewer than 500 employees.

The per-entity cost for small business employers is the regulatory familiarization cost of $26.33, or the fully loaded mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist ($52.65) multiplied by ½ hour (thirty minutes). Because this cost is minimal for small business entities, and well below one percent of

[22] The Department notes that this analysis relies on data from 2019, which is prior to the COVID pandemic, because it believes that 2019 data provides a more accurate picture of the restaurant industry going forward than 2020 data. Due to the COVID–19 pandemic, many food services and drinking places (NAICS 722) adjusted their business models, and employment in this industry subsector fell in 2020. *See* Ansell, R. and Mullins, J. (2021), ''COVID–19 ends longest employment recovery and expansion in CES history, causing unprecedented job losses in 2020,'' Monthly Labor Review, U.S. Bureau of Labor Statistics, June 2021, *https://doi.org/10.21916/mlr.2021.13.* However, although employment in this industry subsector has recovered significantly in 2021, it still remains below its January 2020 level. *See Id.*

[23] Statistics of U.S. Businesses 2017, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2016 SUSB Annual Data Tables by Establishment Industry.

their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

VII. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA)[24] requires agencies to prepare a written statement for rules with a federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $165 million ($100 million in 1995 dollars adjusted for inflation) or more in at least one year.[25] This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative. This rule is not expected to result in increased expenditures by the private sector or by state, local, and tribal governments of $165 million or more in any one year.

VIII. 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 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.

VII. Executive Order 13175, Indian Tribal Governments

This rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

29 CFR Part 531

Wages.

29 CFR Part 578

Penalties, Wages.

29 CFR Part 579

Child labor, Penalties.

29 CFR Part 580

Administrative practice and procedure, Child labor, Penalties, Wages.

For the reasons set forth above, the Department amends title 29, parts 531, 578, 579, and 580 of the Code of Federal Regulations as follows:

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

■ 1. The authority citation for part 531 continues to read as follows:

Authority: 29 U.S.C. 203(m) and (t), as amended by sec. 3(m), Pub. L. 75–718, 52 Stat. 1060; sec. 2, Pub. L. 87–30, 75 Stat. 65; sec. 101, sec. 602, Pub. L. 89–601, 80 Stat. 830; sec. 29(B), Pub. L. 93–259, 88 Stat. 55 sec. 3, sec. 15(c), Pub. L. 95–151, 91 Stat 1245; sec. 2105(b), Pub. L. 104–188, 110 Stat 1755; sec. 8102, Pub. L. 110–28, 121 Stat. 112; and sec. 1201, Div. S., Tit. XII, Pub. L. 115–141, 132 Stat. 348.

■ 2. Revise § 531.52(b)(2) to read as follows:

* * * * *

(b) * * *

(2) An employer may not allow managers and supervisors to keep any portion of an employee's tips, regardless of whether the employer takes a tip credit. A manager or supervisor may keep tips that he or she receives directly from customers based on the service that he or she directly and solely provides. For purposes of section 3(m)(2)(B), the term ''manager'' or ''supervisor'' shall mean any employee whose duties match those of an executive employee as described in § 541.100(a)(2) through (4) or § 541.101 of this chapter.

■ 3. Amend § 531.54 by revising paragraphs (c)(3) and (d) to read as follows:

* * * * *

(c) * * *

(3) An employer may not receive tips from such a tip pool and may not allow managers and supervisors to receive tips from the tip pool.

(d) *Employers that do not take a section 3(m)(2)(A) tip credit.* An employer that pays its tipped employees the full minimum wage and does not take a tip credit may impose a tip pooling arrangement that includes dishwashers, cooks, or other employees in the establishment who are not employed in an occupation in which employees customarily and regularly receive tips. An employer may not receive tips from such a tip pool and may not allow supervisors and managers to receive tips from the tip pool.

PART 578—TIP RETENTION, MINIMUM WAGE, AND OVERTIME VIOLATIONS—CIVIL MONEY PENALTIES

■ 4. The authority citation for part 578 continues to read as follows:

Authority: 29 U.S.C. 216(e), as amended by sec. 9, Pub. L. 101–157, 103 Stat. 938, sec. 3103, Pub. L. 101–508, 104 Stat. 1388–29, sec. 302(a), Pub. L. 110–233, 122 Stat. 920, and sec. 1201, Div. S., Tit. XII, Pub. L. 115–141, 132 Stat. 348; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by sec. 31001(s), Pub. L. 104–134, 110 Stat. 1321–358, 1321–373, and sec. 701, Pub. L. 114–74, 129 Stat 584.

■ 5. Revise § 578.3 to read as follows:

§ 578.3 What types of violations may result in a penalty being assessed?

(a) *In general.* (1) A penalty of up to $1,162 per violation may be assessed against any person who violates section 3(m)(2)(B) of the Act.

(2) A penalty of up to $2,074 per violation may be assessed against any person who repeatedly or willfully violates section 6 (minimum wage) or section 7 (overtime) of the Act. The amount of the penalties stated in paragraphs (a)(1) and (2) of this section will be determined by applying the criteria in § 578.4.

(b) *Repeated violations.* An employer's violation of section 6 or section 7 of the Act shall be deemed to be ''repeated'' for purposes of this section:

(1) Where the employer has previously violated section 6 or section 7 of the Act, provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act; or

(2) Where a court or other tribunal has made a finding that an employer has previously violated section 6 or section 7 of the Act, unless an appeal therefrom which has been timely filed is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by such appellate tribunal.

(c) *Willful violations.* (1) An employer's violation of section 6 or section 7 of the Act shall be deemed to be ''willful'' for purposes of this section where the employer knew that its conduct was prohibited by the Act or

[24] *See* 2 U.S.C. 1501.

[25] Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful, among other situations, can be sufficient to show that the employer's conduct is knowing, but is not automatically dispositive.

(3) For purposes of this section, reckless disregard of the requirements of the Act means, among other situations, that the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry.

■ 6. Revise § 578.4(a) to read as follows:

§ 578.4 Determination of penalty.

(a) In determining the amount of penalty to be assessed for any violation of section 3(m)(2)(B) or repeated or willful violation of section 6 or section 7 of the Act, the Administrator shall consider the seriousness of the violations and the size of the employer's business.

* * * * *

PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

■ 7. The authority citation for part 579 continues to read as follows:

Authority: 29 U.S.C. 203(m), (l), 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, Pub. L. 93–257, 88 Stat. 72, 76; Secretary of Labor's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 Note.

■ 8. Amend § 579.1 by redesignating paragraph (a)(2) as paragraph (a)(2)(i), revising newly designated paragraph (a)(2)(i) and adding paragraph (a)(2)(ii) to read as follows:

§ 579.1 Purpose and scope.

(a) * * *

(2)(i) Any person who repeatedly or willfully violates section 206 or 207 of the FLSA, relating to wages, shall be subject to a civil penalty not to exceed $2,074 for each such violation.

(ii) Any person who violates section 203(m)(2)(B) of the FLSA, relating to the retention of tips, shall be subject to a civil penalty not to exceed $1,162 for each such violation.

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■ 9. Amend § 579.2 by revising the definition of ''Willful violations'' to read as follows:

§ 579.2 Definitions.

* * * * *

Willful violations under this section has several components. An employer's violation of section 12 or section 13(c) of the Act relating to child labor or any regulation issued pursuant to such sections, shall be deemed to be willful for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful. In addition, for purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful, among other situations, can be sufficient to show that the employer's conduct is knowing, but is not automatically dispositive. For purposes of this section, reckless disregard of the requirements of the Act means, among other situations, that the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry.

PART 580—CIVIL MONEY PENALTIES—PROCEDURES FOR ASSESSING AND CONTESTING PENALTIES

■ 10. The authority citation for part 580 continues to read as follows:

Authority: 29 U.S.C. 9a, 203, 209, 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 5 U.S.C. 500, 503, 551, 559; 103 Stat. 938.

■ 11. Revise the first sentence of § 580.2 to read as follows:

§ 580.2 Applicability of procedures and rules.

The procedures and rules contained in this part prescribe the administrative process for assessment of civil money penalties for any violation of the child labor provisions at section 12 of the Act and any regulation thereunder as set forth in part 579 of this chapter, and for assessment of civil money penalties for any violation of the tip retention provisions of section 3(m)(2)(B) or any repeated or willful violation of the minimum wage provisions of section 6 or the overtime provisions of section 7 of the Act or the regulations thereunder set forth in 29 CFR subtitle B, chapter V. * * *

■ 12. Revise the first sentence of § 580.3 to read as follows:

§ 580.3 Written notice of determination required.

Whenever the Administrator determines that there has been a violation by any person of section 12 of the Act relating to child labor or any regulation thereunder as set forth in part 579 of this chapter, or determines that there has been a violation by any person of section 3(m)(2)(B), or determines that there has been a repeated or willful violation by any person of section 6 or section 7 of the Act, and determines that imposition of a civil money penalty for such violation is appropriate, the Administrator shall issue and serve a notice of such penalty on such person in person or by certified mail. * * *

■ 13. Amend § 580.12 by revising the first sentence of paragraph (b) to read as follows:

§ 580.12 Decision and Order of Administrative Law Judge.

* * * * *

(b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent has committed a violation of section 12, a violation of section 3(m)(2)(B), or a repeated or willful violation of section 6 or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. * * *

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■ 14. Amend § 580.18 by revising the third sentence in paragraph (b)(3) to read as follows:

§ 580.18 Collection and recovery of penalty.

* * * * *

(b) * * *

(3) * * * A willful violation of sections 6, 7, or 12 of the Act may subject the offender to the penalties provided in section 16(a) of the Act, enforced by the Department of Justice in criminal proceedings in the United States courts. * * *

Signed in Washington, DC, this 8th day of September, 2021.

Jessica Looman,

Acting Administrator, Wage and Hour Division.

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