

economic hardship must demonstrate to the DSO at the school where he or she is enrolled that this employment is necessary to avoid severe economic hardship. If the DSO agrees that the student should receive such employment authorization, he or she must recommend application approval to USCIS by entering information in the remarks field of the student's SEVIS record. The authority to collect this information is currently contained in the SEVIS collection of information currently approved by OMB under OMB Control Number 1653-0038.

This notice also allows F-1 students whose country of citizenship is Libya and who are experiencing severe economic hardship as a direct result of civil unrest in Libya since February 1, 2011, to obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load, while continuing to maintain their F-1 student status.

To apply for work authorization an F-1 student must complete and submit currently approved Form I-765 according to the instructions on the form. The authority to collect the information contained on the current Form I-765 has previously been approved by the Office of Management and Budget under the Paperwork Reduction Act (PRA) (OMB Control No. 1615-0040). Although there will be a slight increase in the number of Form I-765 filings because of this notice, the number of filings currently contained in the OMB annual inventory for Form I-765 is sufficient to cover the additional filings. Accordingly, there is no further action required under the PRA.

Janet Napolitano,
Secretary.

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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 307, 381, and 590

[Docket No. FSIS-2010-0014]

RIN [0583-AD35]

Changes to the Schedule of Operations Regulations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending

the meat, poultry products, and egg products regulations pertaining to the schedule of operations. FSIS is amending these regulations to define the 8-hour work day as including time that inspection program personnel need to spend at the workplace donning and doffing required gear, time spent walking to their workstations after donning required gear, and time spent walking from their work stations prior to doffing required gear.

DATES: Effective July 11, 2011.

FOR FURTHER INFORMATION CONTACT:

Daniel L. Engeljohn, Assistant Administrator, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250-3700, telephone: (202) 205-0495.

SUPPLEMENTARY INFORMATION:

Background

The Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.*, and the Poultry Products Inspection Act (PPIA), 21 U.S.C. 451 *et seq.*, provide for mandatory Federal inspection of livestock and poultry slaughtered at official establishments and of meat and poultry products processed at official establishments. The Egg Products Inspection Act (EPIA), 21 U.S.C. 1031 *et seq.*, provides for mandatory inspection of egg products processed at official plants. FSIS bears the cost of mandatory inspection provided during non-overtime and non-holiday hours of operation. Official establishments and egg products plants pay for inspection services performed on holidays or on an overtime basis.

On August 9, 2010, FSIS proposed to amend its regulations pertaining to the schedule of operations. FSIS proposed to define the 8-hour work day as including time that inspection program personnel need to spend at the workplace donning and doffing required gear, time spent walking to their workstations after donning required gear, and time spent walking from their work stations prior to doffing required gear. As explained in the preamble to the proposed rule, FSIS proposed the amendments to administer its inspection program in accord with the Supreme Court's holding in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), and policy guidance from the Office of Personnel Management (OPM).

Specifically, the preamble to the proposed rule explained that this regulatory change is necessary in light of the Supreme Court's ruling that the Fair Labor Standards Act (FLSA) covers (1) any activity that is integral and

indispensable to a principal activity; and (2) during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity. *IBP*, 546 U.S. at 37. The preamble to the proposed rule also briefly addressed OPM's treatment of the *de minimis* exception, codified at 5 CFR 551.412(a), and an OPM letter to the National Treasury Employees Union discussing that regulation. Finally, the preamble to the proposed rule described a settlement reached between FSIS and the National Joint Council of Food Inspectors regarding inspector compensation for donning and doffing activities.

Comments and FSIS Responses

FSIS received 20 comments on the proposed rule from the public, industry, and trade organizations. FSIS also received a letter concerning the proposal from the Department of Labor. Commenters generally supported that FSIS inspection program personnel should be fully compensated for work. However, commenters had varying opinions regarding the Agency's interpretation of *IBP*, the distinction between unique and non-unique gear, and application of the *de minimis* rule; and questions about how FSIS will implement the rule.

Unique Versus Non-Unique Gear and the Application of De Minimis

Several comments addressed the Agency's treatment of *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), as it relates to the distinction between unique and non-unique gear and application of the *de minimis* rule. The two comments discussed in detail below were reflective of all comments related to this topic. "Unique" gear refers to items that are unique to the jobs at issue, such as cut-resistant gloves and chain link metal aprons in livestock slaughter establishments. "Non-unique" gear refers to generic items, such as hardhats, and hairnets, worn in all slaughter and processing establishments.

The first comment, submitted by the Department of Labor (DOL), argued that whether gear worn by employees is unique or non-unique is irrelevant to whether donning and doffing the gear is a principal, compensable activity. DOL stated that the preamble to the proposed rule incorrectly implied that *IBP* only dealt with unique protective gear. Rather, DOL stated that the two lower court cases that were consolidated by the Supreme Court in *IBP* in fact dealt with both unique and non-unique gear, and that the Supreme Court treated all items interchangeably, without regard to

weight or uniqueness, declaring that both lower court cases involved required protective gear that the lower courts found integral and indispensable to the employees' work. Next, DOL pointed out that the Supreme Court in *IBP* also cited approvingly to an older Supreme Court decision, *Steiner v. Mitchell*, 350 U.S. 247 (1956), in which the court held that changing into and out of old work clothes at a battery plant was an integral and indispensable part of the workers' principal activities, and therefore compensable. DOL argued that the old work clothes in *Steiner* clearly qualify as non-unique gear.

On the other hand, a comment submitted by an industry trade organization argued that the time associated with donning and doffing non-unique gear is noncompensable because it is *de minimis* as a matter of law. The trade organization stated that in *IBP*, the Supreme Court did not hold that the donning and doffing of non-unique gear by on-line inspectors in poultry establishments is a compensable activity. The trade organization stated that the question of what constitutes integral and indispensable activity was not addressed by the Supreme Court in that case. The trade organization stated that *IBP* only addressed whether walking time associated with donning and doffing integral and indispensable gear is compensable. The trade organization stated that the proposed rule incorrectly assumed that gear for both poultry and livestock inspection program personnel is integral and indispensable but that court precedent has not established that to be the case. The trade organization stated that, to the contrary, before *IBP* reached the Supreme Court, the 9th Circuit expressly concluded in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), that donning and doffing time is compensable except for time associated with the donning and doffing of generic protective gear, such as the hardhats and safety goggles worn in the poultry industry, because the time it takes to don and doff such generic gear is *de minimis* as a matter of law. The trade organization stated that the Agency's proposed rule ignores the *de minimis* rule set forth by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), and OPM's rule dealing with the *de minimis* rule as applied to Federal employees, 5 CFR 551.412(a)(1).

Response:

The comments described above address two distinct concepts that must be considered in turn to determine whether inspection program personnel donning and doffing activities must be

compensated under Federal law. The first is: Are inspection program personnel donning and doffing activities integral and indispensable to their principal activity, and therefore covered under the FLSA? The second is: If the donning and doffing activities are covered under the FLSA, are they nevertheless noncompensable because they are *de minimis*? For the reasons described below, FSIS has determined that (1) inspection program personnel donning and doffing activities are covered by the FLSA; and (2) they are not *de minimis* to the extent that FSIS can reasonably account for them.

1. FSIS has determined that the FLSA covers time inspectors spend donning and doffing both unique and non-unique gear which they are directed by FSIS or an establishment to don and doff at the workplace in order to provide inspection services.

The Portal-to-Portal Act excludes from FLSA coverage time spent walking to and from the actual place of performance of the principal activity of an employee, and activities that are "preliminary or postliminary" to that principal activity. 29 U.S.C. 254(a). In *IBP*, the Supreme Court clarified the scope of what the Portal-to-Portal Act excludes from FLSA coverage, holding: (1) Any activity that is integral and indispensable to a principal activity is itself a principal activity and therefore outside the scope of the Portal-to-Portal Act, and thus covered by the FLSA; and (2) during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is also outside the scope of the Portal-to-Portal Act and thus covered by the FLSA. *IBP*, 546 U.S. at 37.

Accordingly, if donning and doffing is integral and indispensable to inspectors' principal work activity, then it must also be considered a principal activity covered by the FLSA. The classification of gear as unique or non-unique has no bearing on whether the donning and doffing of such gear at the workplace is an integral and indispensable activity. For example, in *Steiner*, the Supreme Court considered whether changing into and out of old work clothes at a battery plant was an integral and indispensable part of the employees' principal activity of making batteries. 350 U.S. at 256. Although there was arguably nothing unique about the old work clothes at issue in *Steiner*, the Court held that the employees' donning and doffing activity was integral and indispensable to their principal activity. *Id.* The Court's analysis in that case hinged not upon whether the donning and doffing

involved unique or non-unique gear, but upon the relationship of the pre-shift and post-shift activity in question (i.e., donning and doffing the work clothes) to the principal productive activity performed by the employees (i.e., making batteries). Because of the toxic nature of making batteries, the plant owners provided employees with old but clean work clothes to change into and out of before and after their shift. In doing so, the plant owners were able to "make their plant as safe a place as [was] possible under the circumstances and thereby increase the efficiency of its operation." *Id.* at 249–51.

In *Alvarez*, the Ninth Circuit ruled that, in light of *Steiner*, the donning and doffing of both unique and non-unique gear by meat slaughter and processing plant employees was integral and indispensable to their principal activities of slaughtering and processing beef and therefore was not excluded from FLSA coverage by the Portal-to-Portal Act. *Alvarez*, 339 F.3d at 903. The Ninth Circuit based this conclusion on the finding that the donning and doffing activities in question were necessary to the principal work done by the employees (i.e., slaughtering and processing beef) and done for the benefit of the employer. *Id.* at 902–03. However, the Ninth Circuit ruled that since the time it takes to perform the donning and doffing of this non-unique gear is *de minimis*, therefore, it could not justify compensation for the time on these tasks. *Id.* At 904.

As the comment from the industry trade organization pointed out, the Supreme Court was not asked to review the Ninth Circuit's holding that donning and doffing were integral and indispensable to the principal activities of the meat slaughter and processing plant employees. However, the Supreme Court did consider the Ninth Circuit's related holding that during a continuous workday, time spent by employees walking to their workstation after donning their required gear was not excluded from the FLSA coverage by the Portal-to-Portal Act. *IBP*, 546 U.S. at 32. The Supreme Court's affirmation of the Ninth Circuit's holding with respect to walking to and from production areas was premised on the correctness of the Ninth Circuit's holding that the donning in question was indeed an integral and indispensable activity marking the beginning of the continuous workday. *See Perez v. Montaire Farms, Inc.*, 601 F.Supp.2d 670, 676 (D. Md. 2009).

As was the case with the gear considered in *Steiner* and *IBP*, sanitary and protective gear that FSIS inspectors are directed by FSIS or an establishment to don and doff at the workplace in

order to provide inspection services is directly related to the principal activity which they are employed to perform. The principal productive activity of FSIS inspectors is to provide inspection services at meat, poultry and egg products establishments. The purpose of food inspection is to advance FSIS's mission of protecting the health and welfare of consumers by verifying that food products are wholesome and not adulterated. Inspection program personnel don sanitary gear (e.g., hairnets, frocks, or smocks), if required by the establishment, and protective gear required by FSIS, as discussed in this Final rule under the heading "Establishment Specific Application of the Rule and What Does FSIS Mean by Required Gear" before providing inspection services, and doff it afterwards. To minimize the risk of food contamination during inspection and to ensure that inspection program personnel are protected from injury and may continue to fulfill their duties safely and without interruption. The donning and doffing of sanitary and protective gear by inspection program personnel is, therefore, necessary to the provision of proper inspection services. This is equally true of unique and non-unique gear. Accordingly, FSIS finds that all gear that inspection program personnel are directed by FSIS or an establishment to don and doff at the workplace in order to provide inspection services is integral and indispensable to the performance of their principal activities.

Because inspection program personnel's donning and doffing activities are integral and indispensable to inspection program personnel's principal activities, under the Supreme Court's ruling in *IBP*, those donning and doffing activities are themselves principal activities and are therefore covered by the FLSA. See *IBP*, 546 U.S. at 37. Additionally, during a continuous workday, if the donning and doffing are "principal activities," post-donning and pre-doffing walk time is also covered by the FLSA. *Id.*; See 29 CFR 790.6.

2. Although inspection program personnel's donning and doffing activities are covered by the FLSA, such activities might still be deemed noncompensable if they fall under the *de minimis* exception. The comment submitted by the trade organization argued that donning and doffing time at poultry slaughter establishments is never compensable because the donning and doffing of non-unique gear, such as that worn by inspectors at poultry slaughter establishments, is always *de minimis*. In light of the prevailing case law defining what constitutes *de*

minimis activities, and OPM's regulation limiting application of the *de minimis* exception in the Federal sector to periods of 10 minutes per day or less, FSIS disagrees with the trade organization comment.

Whether pre-shift and post-shift activity can be considered *de minimis* requires a fact-specific inquiry. Although, "[a]s a general rule, employees cannot recover for otherwise compensable time if it is *de minimis*," *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984), FSIS has determined that for inspection program personnel, time spent donning and doffing is not *de minimis*.

The Supreme Court has reasoned that overtime compensation for "a few seconds or minutes" is *de minimis* "in light of the realities of the industrial world." *Anderson*, 328 U.S. at 692; see also *Lindow*, 738 F.2d at 1062. *Lindow*, one of the most frequently cited cases on the question of determining whether time spent in pre-shift and post-shift activity is *de minimis*, describes three factors to be considered: (1) The practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work. *Id.* at 1063; see also *Bobo v. United States*, 136 F.3d 1465, 1468 (Fed. Cir. 1998) (citing approvingly to *Lindow*). In light of these three factors, FSIS has determined that, in most cases, the time inspection program personnel are directed to spend at the workplace donning and doffing required gear, and walking to their workstation after donning and before doffing, is not *de minimis*.

The first factor, the practical administrative difficulty of recording the additional time for payroll purposes, merits some discussion. FSIS bills federally inspected establishments for inspection services provided in excess of eight hours per shift. At slaughter establishments, carcasses are not permitted to begin passing the post-mortem inspection station on the evisceration line until an FSIS on-line inspector is at his or her post-mortem inspection station, ready to conduct carcass-by-carcass inspection. But inspectors must don and doff their required gear before they begin on-line carcass inspection. As a result, slaughter establishments must know in advance of planning their schedule of operations how much of their eight hours of free inspection services will be used for inspection program personnel donning and doffing activities. For example, if a poultry slaughter establishment does not wish to pay for overtime inspection services, and the establishment knows

that inspection program personnel must spend a total of 9 minutes per day conducting FLSA-covered donning, doffing, and walking activities, then the establishment can adjust its slaughter inspection operations accordingly. If it chooses to conduct slaughter operations for a full eight hours, it will incur overtime costs because FSIS will have provided more than 8 hours of inspection services.

In order to inform slaughter establishments how much donning and doffing time to account for as part of their regular eight hours of inspection services, FSIS will need to determine in advance of implementing this rule how much time it actually takes for inspection program personnel to conduct FLSA-covered donning, doffing, and walking activities at each individual slaughter establishment.¹ Because donning and doffing activities do not typically change from day to day at a given establishment, FSIS has determined that it is administratively practical to accurately assess the amount of time inspectors spend in those activities each day at each establishment, to inform slaughter establishments how much inspection time will be used for those activities in each respective establishment, and to ensure that inspection program personnel have the correct amount of time to conduct those activities each day.

The second *de minimis* factor, the aggregate amount of compensable time, also weighs in favor of a finding that inspection program personnel donning and doffing time is not *de minimis*. Inspection program personnel donning and doffing takes place every day, often for several minutes per day. In aggregate over time, this results in a substantial amount of compensable time.

The third *de minimis* factor, the regularity of the additional work, weighs in favor of the same conclusion because donning and doffing of generally the same gear occurs at the beginning and the end of every work day, generally for the same amount of time each day. Accordingly, FSIS finds that for inspection program personnel,

¹ However, it should be noted that FSIS does not intend to use this advance estimate of donning, doffing and walking time at each establishment for payroll purposes, but only for scheduling and billing purposes. FSIS intends to use the time studies only to provide advance notice of the duration and costs to each establishment of these principal activities. However, FSIS employees will be paid based on the time it actually takes them each day to perform these activities. FSIS anticipates that this time will be recorded on the time and attendance sheet that each inspector fills out. The actual time worked may or may not include overtime, depending on how the establishment schedules the work.

time they spend on donning and doffing activities is not *de minimis*.

The trade organization also argued that the donning and doffing of non-unique gear is always noncompensable in light of an OPM regulation addressing the *de minimis* doctrine in the context of Federal employees. See 5 CFR 551.412(a)(1). Under that regulation, “OPM limits the application of the *de minimis* doctrine to periods of 10 minutes or less per day.” *Bull v. United States*, 68 Fed.Cl. 212, 226 (2005) (citing 5 CFR 551.412(a)(1); see also *Riggs v. U.S.*, 21 Cl.Ct. 664, 683 (1990) (holding that OPM’s 10 minute threshold for time spent in pre-shift and post-shift activities is a proper application of the *de minimis* rule to the FLSA and the Portal-to-Portal Act).

Specifically, OPM’s rule directs: “If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee’s principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.” 5 CFR 551.412(a)(1).

The trade organization argued that under the OPM rule, preparatory and concluding activities such as inspection program personnel donning and doffing are only compensable when the total time spent in such activities is more than 10 minutes per workday. To the contrary, as the court explained in *Bull*, OPM’s regulation provides an upper limit to the amount of time that a Federal agency may consider noncompensable under the *de minimis* exception, directing that if FLSA-covered activity exceeds 10 minutes per work day, the agency must compensate its employees for that activity. The rule forecloses the possibility of a Federal agency finding that an FLSA-covered preparatory or concluding activity which exceeds 10 minutes per day is *de minimis*. However, based on the three factor test discussed above, FSIS has determined that for inspection program personnel, most time spent on donning and doffing activity is not *de minimis*, so OPM’s regulation limiting application of the *de minimis* doctrine is generally not applicable.

How FSIS Will Apply the Rule to Daily Operations

Several commenters sought clarification regarding how application of this rule might affect establishment operating schedules.

Response

Because inspection program personnel donning and doffing are principal activities, they will be treated in the same manner as other inspection services. Thus, the new rule specifies that the regular workweek, which consists of five 8-hour days of scheduled inspection service provided without charge, will include donning and doffing activities. Establishments must therefore understand that the 8-hours per scheduled shift of inspection service which they are provided without charge must include the time inspection program personnel need for FLSA-covered donning and doffing activities. At establishments where donning and doffing activities must occur before and after the commencement of on-line, carcass and parts inspection, FSIS will ensure that establishments know how much time inspection program personnel donning and doffing activities take so that those establishments may plan their regular operating schedules accordingly. If establishments require more than 8 hours of inspection service, they must request overtime inspection service as provided in 9 CFR 307.4(d)(3), 9 CFR 381.37(d)(3), and 9 CFR 590.126.

Establishment Specific Application of the Rule and What Does FSIS Mean by Required Gear

Some industry commenters expressed concern that FSIS would impose a “one-size-fits-all” approach to implementing this regulation by requiring each establishment to schedule the same amount of time for donning and doffing activities. The commenters contended that each establishment is different, and that the required donning, doffing and walking time should reflect the realities of each individual establishment. The commenters also requested that FSIS explain what the phrase “required gear” is intended to include.

Response

FSIS agrees that actual donning, doffing, and walking time will vary in each establishment depending on plant-specific variables. The Agency does not intend to use a one-size-fits-all approach to implement this rule. Some industry commenters misunderstood the proposed rule to state that each establishment must provide 15 minutes for donning, doffing, and walking time. This figure was only used in the context of estimating the cost to industry that may result from this rule.

FSIS agrees with the commenters that post-donning and pre-doffing walk time can vary significantly among

establishments. Also, FSIS is aware that inspectors may don and doff some equipment unique to a specific establishment. However, there is equipment that FSIS requires all of its on-line personnel to wear in meat slaughter operations and poultry slaughter operations. The following is the specific gear FSIS requires its employees to wear:

- Hard Hats—FSIS Directive 4791.1, Revision 2, Amendment 2 (5/15/02), the Basic Occupational Health and Safety Program, requires hard hats to be worn.
- Hearing Protection—FSIS Directive 4791.1, Revision 2, Amendment 2 (5/15/02), the Basic Occupational Health and Safety Program, requires hearing protection.
- Cut Resistant and Cover Gloves—FSIS Directive 4791.1, Revision 2, Amendment 2 (5/15/02), the Basic Occupational Health and Safety Program, requires Cut-Resistant Gloves.
- Slaughter Equipment—Knives, hook, steel, and scabbard. This equipment is required to perform postmortem inspection procedures as outlined in FSIS Directive 6100.2 Postmortem Livestock Inspection (9/17/07). Chapter II (pages 5–16) of this directive outlines the required inspection procedures for all species of livestock.

In response to the comment about required gear, FSIS has determined that the FLSA covers time inspectors spend donning and doffing required gear which they are directed by FSIS or an establishment (e.g., hairnets, frocks, or smocks) to don and doff at the workplace in order to provide inspection services.

Although FSIS requires inspection program personnel to wear skid-resistant footwear, FSIS allows them to don and doff this footwear at home. Accordingly, time spent donning and doffing required skid-resistant footwear is generally not compensable. However, if an individual establishment requires inspection program personnel to don and doff footwear at the establishment, then that time would be compensable.

Donning and doffing activities also include time to retrieve, clean, and store equipment to maintain sanitary conditions. Such activities were calculated and included as part of the time study mentioned in the economic analysis for the proposed rule. The letter from DOL also made specific reference to the need to compensate for the time to conduct such activities.

Also, FSIS employees are entitled to their entire lunch period. Donning and doffing activities, as well as walk time, are outside of the lunch period. The donning and doffing activity can differ

around the lunch period based on several factors including the amount of equipment (helmet, ear protection, etc.) the inspectors remove before their lunch period. Some equipment is removed based on personal comfort, and some equipment is removed because of plant requirements. For this reason, the Agency determined that the most practical and reasonable approach to assessing donning and doffing time surrounding the lunch period is to assume that the inspector will remove all personal protective equipment before taking his or her lunch period and will don all equipment after the lunch period before resuming on-line inspection duties. Therefore, donning and doffing around the lunch period will be factored into the time measurement discussed below.

After publication of this rule, FSIS will measure the amount of time it takes for on-line inspection program personnel to don and doff all required gear (including before and after the lunch period), walk to and from their workstation, and retrieve, clean, and store equipment to maintain sanitary conditions at each affected meat and poultry slaughter establishment. This cumulative total will give each plant the specific donning, doffing, walking time, retrieving, cleaning, and storage time measurement needed, so that they can account for it in their daily schedule of operations or as overtime. See footnote 1 for the explanation that this time will not be used for payroll purposes. For administrative and scheduling purposes, the time will be rounded up or down to the next whole minute. If an establishment has a concern about the outcome of the time measurements in its facility it can appeal as set out in FSIS's regulations.

Making Facilities Changes To Shorten Donning, Doffing, and Walking Time

Commenters also asked if it would be possible to make changes at their establishment to reduce donning, doffing, and walk time.

Response

Establishments may make facilities adjustments to reduce donning, doffing, and walk times, provided such changes do not affect the sanitary conditions in the establishment or impede inspection.

Overtime Charges

Several commenters stated that FSIS should not charge for overtime in 15 minute increments but only bill establishments for the actual time inspectors at the establishment take to don, doff, and walk to and from their work station.

Response

As a preliminary matter, compensable donning, doffing, and walking time will not necessarily be overtime. Consistent with current regulations, overtime will only be charged for time inspection program personnel work in excess of eight hours per workday. If an establishment's schedule of operations calls for less than eight hours of on-line inspection time, then any compensable donning, doffing, and walking time may still fit within the normal 8-hour workday. In that case, no overtime charges would result.

On the other hand, if the total workday, including on-line inspection time and compensable donning, doffing, and walking time, exceeds eight hours per workday, then all time in excess of eight hours will be charged as overtime as set forth in 9 CFR 307.6. This regulation establishes that for billing purposes, eight or more minutes shall be considered a full quarter hour. Also, the National Finance Center, which is tasked with processing our bill documents, can only bill in 15 minute increments.

FSIS Employees to Whom the Regulation Applies

FSIS received comments from Federal veterinarians stating that the proposed rule concerning donning and doffing is too limited because it does not include all personnel that must be prepared and on the line when operations start, in particular Public Health Veterinarians and Supervisory Public Health Veterinarians.

Response

The new regulations include donning, doffing, and walking time as activities that are within an FSIS inspection personnel's 8-hour work-day. This would apply to any FSIS inspection program personnel, including FSIS veterinarians, who are required to don and doff and be at an inspection station on the line at the start of a shift. In general, FSIS Veterinarians, off-line inspectors, supervisory consumer safety inspectors, inspectors in processing facilities, and inspectors working in egg product plants are not required to be at an inspection workstation at start of or at the end of a shift. Note that for inspectors who are required to come in early, such as for pre-operational inspection, their donning, doffing, and walking time must also be accounted for.

Therefore, this regulatory change has no impact on their working conditions, unless they have to perform on-line duties in order for the establishment's line to start operating.

Change to the Regulatory Language

The letter that FSIS received from DOL stated that the proposed regulation would define the proposed 8-hour workday as including "the necessary time for FSIS inspection program personnel to put on required gear and walk to a work station and the necessary time for FSIS inspection program personnel to return from a work station and remove required gear. * * *" DOL requested that the word necessary be eliminated from the final regulation because it could be read to suggest something less than the actual time taken while performing such tasks.

Response

FSIS agrees with DOL that the actual time spent donning and doffing and the associated walk times are inspection activities that fall into the 8-hour workday. FSIS will know how much donning and doffing and walk time there is at each establishment as discussed above. FSIS believes this approach will ensure that FSIS employees are fully compensated as required by the FLSA. Therefore, to more accurately reflect that donning, doffing, and walk time are part of the inspector's 8-hour workday, FSIS has eliminated the word necessary from the final version of the regulation.

The Final Rule

Consistent with the proposed rule, FSIS is amending 9 CFR 307.4(c), 381.37(c), and 590.124 to provide that the eight hours of inspection service includes the time for inspection program personnel to put on required gear and walk to a work station and the time for inspection program personnel to return from a work station and remove required gear. Any time over those eight hours is overtime charged to an establishment. The only change, as discussed above, is to remove the word necessary from the regulatory language.

For egg product plants, FSIS's regulations at 9 CFR 590.124 define the normal operating schedule as consisting of a continuous 8-hour period per day (excluding not to exceed 1 hour for lunch) 5 consecutive days per week. FSIS does not believe additional time for donning and doffing will typically be necessary for inspection program personnel in egg product plants because inspection program personnel at those plants do not need to be at a required station for operations to begin. To ensure compliance with the applicable law and OPM guidance, however, the Agency is proposing to amend 9 CFR 590.124 to define the 8-hour work day as including the time for inspection

program personnel to put on required gear and walk to a work station and the time for inspection program personnel to return from a work station and remove required gear. The Agency anticipates that this change is likely to have little application to the work of the Agency's egg product inspection program personnel.

Executive Order 12866 and the Regulatory Flexibility Act

This rule was reviewed by the Office of Management and Budget under Executive Order 12866 and was determined to be significant.

Cost to the Industry

The FSIS cost estimate in this final rule remains similar to that of the proposed rule, but has been updated to reflect final FSIS overtime rates for FY 2011 and FY 2012.

Under this final rule, the most direct cost to the industry will be the overtime fee that the Agency will need to charge establishments for the time inspection program personnel spend donning required gear, walking to a work station, returning from a work station, and doffing required gear. If meat and poultry slaughter establishments want to maintain their normal shift length of operating for eight hours, they will incur some overtime fees. The choice is voluntary. Some meat and poultry slaughter establishments may choose not to incur the overtime charges if they expect that the decline in revenues from operating for a shorter amount of time will be smaller than the overtime fee cost. However, the Agency expects that most large meat and poultry slaughter establishments will choose to pay the overtime charge and maintain their current shift-time, as shortening the

shift time will decrease production and revenue while idling existing capacity.

The actual time FSIS inspection program personnel will take to don and doff required gear will vary in each meat and poultry slaughter establishment depending on plant-specific variables. In response to comments on the proposed rule, FSIS has decided, as discussed above, that it will measure the amount of time it takes for inspection program personnel to don and doff all required gear, walk to and from their workstation, and retrieve, clean, and store equipment to maintain sanitary conditions. See footnote 1 for the explanation that this time will not be used for payroll purposes.

For the purpose of its analysis, FSIS is using 15 minutes for donning, doffing, and walking time at all meat and poultry slaughter establishments as a reasonably conservative estimate for both poultry and livestock inspectors. The overtime fee that the Agency charges for 15 minutes is \$16.88 and \$17.16 for FY 2011 and 2012, respectively.² These costs are far less than the value of the poultry or livestock an establishment can slaughter in 15 minutes per line.

FSIS calculated these costs for the meat and poultry slaughter establishments because carcasses are not permitted to begin passing the post-mortem inspection station on the evisceration line until an FSIS on-line inspector is at his or her post-mortem inspection station, ready to conduct carcass and parts inspection.

This regulatory change should not impact the schedule of operations for meat and poultry processing establishments and egg product plants because those establishments can begin operations without FSIS inspection program personnel being at an on-line

inspection work station. Furthermore, very-small slaughter establishments typically will not be affected by this rule because of the nature of how slaughter is conducted in very-small establishments. Many of the inspectors at such establishments are on patrol assignments, inspectors typically drive up to the establishment, go into the establishment and simply put on their frock.

The most recent Agency data shows that there are 1,041 meat and poultry slaughter establishments, of which 263 are small and 566 are very small (by Small Business Administration size standards.)

FSIS started by calculating the number of inspection program personnel that this proposed rule will affect. Agency data show that there are 2,911 inspection program personnel in the poultry and meat slaughter establishments—1,954 in poultry and 957 in meat. Assuming all the establishments pay the 15-minute overtime charge per inspection program personnel, and that the establishments operate 260 days (5 days a week times 52 weeks), the annual cost for one on-line inspector will be about \$4,389 at the FY 2011 rate. The total cost to the industry will be about \$12.8 million and \$13.0 million in FY 2011 and 2012, respectively (see Table 1). Given that the annual revenue of the meat slaughtering industry alone in 2009 is about \$67.2 billion,³ the overtime cost to the industry is insignificant. If we breakdown the cost for FY 2011 by establishment size, based on the numbers of inspectors for each SBA size category, it will be \$10.6 million for the large establishments, \$2.1 million for the small and \$0.066 million for the very small establishments.⁴

TABLE 1—ESTIMATED ANNUAL COST OF THE OVERTIME CHARGE TO THE INDUSTRY

	Number of inspection program personnel	Overtime fee (15 min.)	Daily cost	Number of days	Annual cost (Daily × Number of Days)
FY 2011	2,911	\$16.88	\$49,138	260	\$12,775,797
FY 2012	2,911	17.16	49,953	260	12,987,718

Cost to the Consumer

The industry is likely to pass the increased costs on to consumers because of the inelastic nature of the consumer

demand for meat and poultry products. However, given that the total volume of meat and poultry slaughtered under Federal inspection in 2009 was about 91

billion pounds,⁵ the increased cost per pound due to the overtime fee will be only \$0.0001, on average.

² FSIS Final Rule of New Formula for Calculating the Basetime, Overtime, Holiday, and Laboratory Rates; Rate Changes Based on the Formulas; and Increased Fees for the Accredited Laboratory Program.

³ Summary of the *Animal (except Poultry) Slaughtering Industry in the U.S. and its International Trade* [2010 edition,] Supplier

Relations US, LLC. http://www.htrends.com/report-2700858-Animal_except_Poultry_Slaughtering_Industry_in_the_US_and_its_International_Trade_Edition.html, as of 7/16/2010.

⁴ Among the 2,911 inspectors, 2,416 are for the large establishments, 480 are for the small establishments, and 15 are for the very small establishments.

⁵ *Livestock, Dairy, & Poultry Outlook/LDP-M-188/February 24, 2010*; Economic Research Service, USDA. The Web-link to the report is <http://www.ers.usda.gov/Publications/ldp/2010/02Feb/ldpm188.pdf>.

Benefit of the Rule

This rule will ensure compliance with the law and the best use of Agency resources.

Regulatory Flexibility Analysis

The FSIS Administrator has made a determination that this final rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). There are 263 small and 566 very small meat and poultry slaughter establishments. Based on the data and information contained in the cost to industry section of this rule, the fee is, at most, \$4,389 per year for one on-line inspector for an extra 15 minutes (FY 2011 rate). The time required for donning and doffing for small and very small establishments is likely much less than 15 minutes. Furthermore, almost all the very-small establishments will not be affected by this rule because they are on a patrol assignment. Therefore, the impact will not be significant.

Paperwork Reduction Act

This final rule has been reviewed under the Paperwork Reduction Act and imposes no new paperwork or recordkeeping requirements.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this final rule, FSIS will announce it on-line through the FSIS Web page located at [http://www.fsis.usda.gov/Regulations & Policies/2010 Final_Rules_Index/index.asp](http://www.fsis.usda.gov/Regulations_Policies/2010_Final_Rules_Index/index.asp). FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or will be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at

http://www.fsis.usda.gov/news_and_events/email_subscription/. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

List of Subjects

9 CFR Part 307

Facilities for inspection.

9 CFR Part 381

Poultry products inspection regulations.

9 CFR Part 590

Inspection of eggs and egg products (egg products inspection act).

For the reasons discussed in the preamble, FSIS is amending 9 CFR Chapter III as follows:

PART 307—FACILITIES FOR INSPECTION

■ 1. The authority citation for part 307 continues to read as follows:

Authority: 7 U.S.C. 394; 21 U.S.C. 601–695; 7 CFR 2.17, 2.55.

■ 2. In § 307.4(c), revise the second sentence to read as follows:

§ 307.4 Schedule of operations.

* * * * *

(c) * * * The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, and shall include the time for FSIS inspection program personnel to put on required gear and to walk to a work station, and the time for FSIS inspection program personnel to return from a work station and remove required gear, excluding the lunch period; except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday, and shall include the time for FSIS inspection program personnel to put on required gear and to walk to a work station, and the time for FSIS inspection program personnel to return from a work station and remove required gear, excluding the lunch period. * * *

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PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

■ 3. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f, 450; 21 U.S.C. 451–470; 7 CFR 2.7, 2.18, 2.53.

■ 4. In § 381.37(c), revise the second sentence to read as follows:

§ 381.37 Schedule of operations.

* * * * *

(c) * * * The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, and shall include the time for FSIS inspection program personnel to put on required gear and to walk to a work station, and the time for FSIS inspection program personnel to return from a work station and remove required gear, excluding the lunch period; except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday, and shall include the time for FSIS inspection program personnel to put on required gear and to walk to a work station, and the time for FSIS inspection program personnel to return from a work station and remove required gear, excluding the lunch period. * * *

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PART 590—INSPECTION OF EGGS AND EGG PRODUCTS (EGG PRODUCTS INSPECTION ACT)

■ 5. The authority citation for part 590 continues to read as follows:

Authority: 21 U.S.C. 1031–1056.

§ 590.124 [Amended]

■ 6. In § 590.124, in the second sentence, after the word “day”, add the phrase “and shall include the time for FSIS inspection program personnel to put on required gear and to walk to a work station, and the time for FSIS inspection program personnel to return from a work station and remove required gear”.

Done at Washington, DC, on: June 7, 2011.

Alfred V. Almanza,
Administrator.

[FR Doc. 2011–14442 Filed 6–9–11; 8:45 am]

BILLING CODE 3410-DM-P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 124

[Docket No. SBA–2011–0013]

8(a) Business Development Program Regulation Changes; Tribal Consultation

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice; correction.

SUMMARY: The Small Business Administration (SBA) published a