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Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S – 3502
200 Constitution Avenue NW
Washington D.C. 20210

Submitted via the Federal eRulemaking Portal at http://www.regulations.gov

RE: Independent Contractor Status Under the Fair Labor Standards Act (RIN 1235-AA34)

To Whom It May Concern:

The Signatory Wall and Ceiling Contractors Alliance (SWACCA) is a national, non-profit trade association that advocates for the interests of union-signatory wall and ceiling construction industry employers. SWACCA represents approximately 400 wall and ceiling construction employers – including many of the largest employers in our industry – who perform framing, drywall and interior systems work nationwide, primarily in the commercial construction industry. Our members employ many thousands of carpenters, drywall finishers, plasterers, and other building trades personnel throughout the United States. SWACCA prides itself on representing construction contractors that accept responsibility for paying fair wages and benefits, and abide by labor and employment standards, workers compensation laws, and unemployment insurance requirements.

SWACCA opposes the proposed rule issued by the Department entitled "Independent Contractor Status Under the Fair Labor Standards Act" published September 25, 2020 (the NPRM) to revise its interpretation of independent contractor status under the Fair Labor Standards Act (FLSA). SWACCA supports the existing standard that has been developed by the federal courts and believes that codifying the six-factor economic reality balancing test would achieve the Department's stated goals of promoting certainty for stakeholders, reducing litigation, and encouraging innovation in the economy while minimizing regulatory familiarization costs and the potential for significant disruption to employment relationships. It also bears reminding that DOL's primary mission is not to undertake experiments to promote economic innovation. Rather, it is: "To foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the **United States**; improve working conditions; advance opportunities for

profitable employment; and assure work-related benefits and rights."[1] It is the job of the Commerce Department "to create the conditions for economic growth and opportunity."[2]

SWACCA respectfully submits the following comments focusing on the impact that the NPRM will have on SWACCA's employer members, the members of their workforce, and the construction industry at large.

I. BACKGROUND

The use of multiple contractors on a single project is standard practice in the construction industry in which SWACCA members compete. Multiple contractors may work under a general contractor, directly for a project owner, or under a hybrid arrangement where the project owner contracts directly with multiple contractors who are overseen by a construction manager that also contracts with the project owner. These arrangements are ordinarily lawful and legitimately structured for the use of specialized contractors to perform specific scopes of work. However, the subcontracting structure may also be exploited by unscrupulous employers to avoid various obligations, including those of the FLSA.

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Increasingly, SWACCA's members find themselves competing with companies that seek to reduce their cost structures and liabilities by dissociating themselves from the traditional obligations that come with being an employer. The key to these schemes is often a contractor's willingness to characterize most or all their regular, recurring workforce as independent contractors rather than as employees. This business model allows unscrupulous employers to get the benefits of workers' labor while evading the costs of paying minimum wage, overtime, workers compensation and unemployment insurance for their workforce.

The nature of the construction industry can make it difficult for government authorities to achieve meaningful enforcement against unscrupulous, cheating contractors. First, the majority of the construction industry operates on a project basis, which can have the effect of isolating risk to specific projects and the time period associated with them. Second, the construction industry relies heavily on foreign-born workers who are especially vulnerable to nefarious independent contractor schemes that exert unlawful control over their wages and working conditions. Finally, when liability is pushed down to unstable employers, it becomes extremely difficult – due to undercapitalization, corporate shape-shifting,

[1] U.S. Department of Labor Website, https://www.dol.gov/general/aboutdol#:~:text=Our%20Mission,work%2Drelated%20benefits%20and%20rights (accessed October 22, 2020).
[2] U.S. Department of Commerce Website, https://www.commerce.gov/about (accessed October 22, 2020).

and individuals who cannot be located – to achieve meaningful enforcement even when the responsible party can be identified.

In general, SWACCA is concerned that the proposed rule will endorse and encourage the use of more independent contractors in the construction industry. By focusing on the two core factors proposed by the Department – the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss – the Department will narrow the coverage of the FLSA. This narrowing will magnify the trend of would-be employers passing cost and liability to workers at the expense of not only those workers, but also the entrepreneurs who create middle-class jobs and the American taxpayers who pay for the social safety net programs that replace employer-provided retirement benefits, health insurance, workers compensation coverage, and unemployment insurance.

II. ANALYSIS

A. A codification of the six-factor economic reality balancing test in place of the proposed weighted test would maximize the net benefits of the proposed rule.

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SWACCA recommends the codification of the six-factor balancing test to promote certainty for employers, protect workers, reduce litigation, minimize regulatory familiarization costs, and avoid significant disruption to employment relationships. The codification of the six-factor test would be less burdensome and more cost-effective than the weighted test proposed by the Department. It is most likely to establish a standard that would be applied consistently to identify employees covered by the FLSA.

The Department argues that the six-factor test would benefit from "clarification, sharpening, and streamlining" and would not yield the perpetual benefits and cost savings discussed in the NPRM, such as improved clarity and reduced FLSA litigation. SWACCA disagrees with these arguments. The Department also asserts that the six-factor balancing test would not yield the cost savings described in the NRPM. SWACCA similarly disagrees with this belief.

The Department proposes to depart from current law – generally, the six-factor balancing test – without clear authority from Congress to do so. There is no certainty that courts would adopt or defer to the Department's proposed interpretation if it is finalized. It may well result in conflicting opinions on analyzing employment relationships under the FLSA and less to less clarity and more confusion for the regulated community. Only Congress or the U.S. Supreme Court could guarantee the clarity and certainty desired by the Department. By contrast, a codification of the six-factor economic reality test that has been generally established in caselaw would encourage if not achieve the desired results.

1. A codification of the six-factor balancing test would achieve more certainty than the proposed weighted test.

A codification of the six-factor balancing test would achieve more certainty than the proposed weighted test. Employment relationships under the FLSA are inherently complex and the six-factor balancing test is a standard that has been litigated over decades, resulting in a generally accepted standard that has been applied by stakeholders and the federal courts. More consistency of its application, something that its codification would promote, would be a welcome development. Instead, the NPRM proposed a novel weighted test that will result in more litigation and less certain outcomes absent intervention by Congress or the Supreme Court.

The Department argues that the existing economic reality test creates confusion among stakeholders as to the outcomes it generates. This argument is supported by the fact that the federal appellate courts have not consistently applied the economic reality test. But this result is not surprising because, as the NPRM also noted, the economic reality test was developed in caselaw and has not been conclusively addressed by the Supreme Court. If the Department has the authority to direct the courts on this topic, a codification of the six-factor test might achieve a "level-set" among the federal circuits if they defer to the rule and adopt it into caselaw. At a minimum, it would encourage this outcome. Establishing clarity as to the standard that would be applied nationwide to identify employees and independent contractors would in and of itself create more certainty for stakeholders.

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The Department argues that focusing on two core factors while minimizing the remaining four factors will create more certainty for stakeholders. This is incorrect. In fact, it will create less certainty by establishing a new standard that has not been interpreted by the courts or applied by employers. The question of *how* the new standard would be applied creates uncertainty. Moreover, there is a question as to whether the federal courts would adopt the new standard at all. This question of *whether* the new standard would be applied by the courts creates more uncertainty still for stakeholders and will encourage a raft of test cases.

A codification of the six-factor balancing test would more foster more consistent analysis and, therefore, more consistent outcomes. Courts have generally accepted the six-factor test even without regulatory guidance. Regulatory guidance in the form of the six-factor balancing test would support a more consistent analysis among the federal circuit courts and more certainty for stakeholders.

The Department's argument that the proposed weighted test would establish a more definite analysis impliedly rests on two pillars: 1) it would narrow the scope

of the employee definition under the FLSA; and 2) it would be adopted by the federal circuit courts. These pillars cannot coexist because the Department has not been granted the authority by Congress to narrow the FLSA's employee definition and, as a result, courts are unlikely to honor the Department's proposed weighted test.

The NPRM seemingly bemoans the fact that the employment relationships under the FLSA are analyzed on the totality of circumstances, which might encompass "millions of facts."[3] The decision cited by the Department asks for a legal rule with which to sift the material facts from the immaterial.[4] The six-factor balancing test does that in a way that has been largely accepted by stakeholders and the federal courts.

The proposed weighted rule is a novel concept and a departure from existing caselaw. It attempts to create new law by modifying the existing standard. As the judiciary is the final authority on issues of statutory construction, the Department's attempt to modify the existing interpretation is demonstrably tenuous. Courts have intervened where the Department has previously undertaken efforts to modify the FLSA without the requisite statutory authority. *See State of Nevada, et al. v. United States Department of Labor et. al.*, Case No. 4:16-cv-00731-ALM (E.D. Texas 2016).

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The fact that the proposed rule is a departure from current law, combined with the fact that the Department's authority to depart from current law is questionable, makes it less likely that the proposed rule will be consistently applied. In fact, the Department cannot know whether or how the courts will apply the proposed rule because no court has ever considered it.

Even if courts did adopt the Department's test, it does not establish a bright line. As noted, the proposed weighted rule is a novel concept and would be subject to a new interpretation. The complex nature of employment relationships will ensure that any new test will be subject to extensive interpretation, resulting litigation, and a likelihood of varying outcomes.

The six-factor test exists in longstanding caselaw. The Department accurately notes that the courts have not applied the six-factor test in a perfectly consistent fashion. But courts have applied it generally and the caselaw can be analyzed to predict outcomes more accurately. Codification of the six-factor balancing test may well achieve more consistency of application from the courts as it pushes them to develop their similar precedents to align with the Department's views. As

[3] Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600 at 60606 (proposed September 25, 2020) (hereinafter "NPRM").
[4] *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987).

importantly, it is less likely to be enjoined or disregarded by the courts because it more closely aligns with their existing interpretations of the relevant statutory language and congressional intent.

2. A codification of the six-factor test would reduce litigation. The proposed new test with weighted factors would increase it.

A codification of a specific six-factor test that has been generally applied by federal courts for decades will reduce litigation. Such a final rule would have the effect of encouraging, if not achieving, a more standardized application that can consistently be relied upon by stakeholders, legal practitioners, and ultimately courts. It is reasonable to expect that courts would apply the codified standard because it aligns with existing caselaw. The resulting consistency would reduce litigation by creating a more even application of the law that could be better relied upon by all stakeholders.

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The proposed rule could increase litigation by creating an entirely new standard that is subject, as noted, not only to new interpretation but also to potential non-application by the courts. The uncertainty of *how* and even *whether* the new standard would be applied by a court will increase litigation at least until new caselaw has been established to answer these questions. This pandora's box could cause more confusion and more litigation for the foreseeable future.

There is additional uncertainty – and resulting litigation risk – as to *whether* the proposed rule would be applied. The Department would apply the proposed rule in its application of the law. But it is unclear if the federal courts would apply it. A court might find that the proposed rule is contrary to Congress's intent through its express modification of the definitions contained in statutory language of the FLSA as interpreted by the courts. Moreover, it is possible that some federal courts would defer to the proposed rule while others may not. It is entirely possible that the proposed rule would create a new, additional standard that must be considered *in addition to* the existing caselaw.

3. A codification of the six-factor test would minimize regulatory familiarization costs. The proposed new standard would require significant regulatory familiarization costs that would exceed those estimated by the Department.

The Department argues that codifying the six-factor balancing test would not reduce initial regulatory familiarization costs or provide per-contract cost savings because stakeholders will likely spend the same amount of time learning about any new regulatory language addressing independent contractor status because no regulatory guidance on the topic currently exists. This argument is wholly illogical.

On the same page of the NRPM where it makes this argument, the Department references WHD Opinion Letter FLSA2019-6, which articulates the six-factor balancing test.[5] This subregulatory guidance is ubiquitous to the analysis of whether a worker is an employee or an independent contractor under the FLSA. The NPRM overlooks the fact that codifying the six-factor balancing test would simply incorporate what is now subregulatory guidance at the regulatory level. It is absurd to argue that the cost of familiarizing stakeholders with existing guidance would cost the same as familiarizing stakeholders with new guidance.

The six-factor balancing test has existed in caselaw for more than 70 years. Even without Opinion Letter FLSA 2019-6, it is already familiar to stakeholders, legal practitioners, and courts. Stakeholders can easily draw on existing interpretation to understand the six-factor balancing test. At the same time, there is obviously no caselaw applying the Department's proposed new standard.

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The NRPM's proposed weighted test is unfamiliar to stakeholders and has not been adopted by the courts. This not only creates uncertainty as previously discussed, but it will create a range of analyses that will result in inconsistent applications despite apparent good intentions. Thus, regulatory familiarization costs would not only be imposed upon adoption of a final rule but would be ongoing as stakeholders begin to understand whether and how it will be applied.

B. The proposed rule's "core factor" structure would improperly narrow the coverage of the FLSA.

The weighted structure of the proposed rule attempts to constrict the definition of "employee" under the FLSA, and therefore its coverage, by narrowing the analysis of the facts and circumstances surrounding the business-worker relationship.

The FLSA was passed by Congress to lessen the distribution in commerce of goods produced under subnormal conditions, which manifest as minimum pay and maximum hour provisions and the requirement that records of employees' services be kept by the employer.[6]

The FLSA does not define the term "independent contractor," but defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." The FLSA defines an "employee" as "any individual employed by an employer," and the statute defines the term, "employ" as "includ[ing] to suffer or permit to work."

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[5] NPRM at 60635.
[6] *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 727 (1947).

These definitions have been analyzed in caselaw for more than 70 years, which produced the six-factor balancing test. The proposed rule would narrow this test to five tightened factors, including two weighted "core" factors that would constitute the primary substance of the test.

The NRPM and the proposed rule include explanations for each of the five proposed factors. An analysis of the proposed factors in the context of the wall and ceiling industry shows that the proposed rule reflects not only a departure from the caselaw but also an attempt to narrow the definition of employee under the FLSA.

1. The Control Factor

In describing the "nature and degree of the individual's control over the work" factor (the control factor), the Department states that this factor would weigh towards the individual being an independent contractor where the individual exercises substantial control over key aspects of the performance of the work. In contrast, the control factor would weigh toward the individual being an employee where the potential employer exercises substantial control over key aspects of the work. The proposed rule goes on to emphasize that an express or practical requirement of an exclusive working relationship is evidence of a potential employer's control over a worker. The NPRM's discussion of the control factor seems to hold out the exclusivity of the working relationship as the only definitive evidence of control while the proposed rule also mentions the subjects of schedules and workload as evidence that should be considered in analyzing the control factor. In Opinion Letter FLSA2019-6, which would be superseded by the proposed rule, the Department cites "work against the interests of a competitor; work inflexible shifts, achieve large quotas, or work long hours, so that it is impracticable to work elsewhere; or otherwise face restrictions on or sanctions for external economic conduct, among others" as evidence of employer's control.

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The Department's proposed application of the control factor appears, for purposes of this factor, to identify as an independent contractor any worker who: a) does not have an express non-compete agreement or practical non-compete arrangement, and b) who does not work a schedule that is strictly dictated by the employer. The analysis of a potential employer's control over a worker is necessarily more complex.

The emphasis by the Department, in the NPRM and the proposed rule itself, on what factors do <u>not</u> establish a worker as an employee is telling. For example, the Department's emphasis that deadlines and quality control requirements are not indicative of the employee classification may, on further analysis, undermine the employee classification by expressly permitting a potential employer to dictate when the work is done (deadlines) and how the work is done (quality control

requirements) without becoming subject to the employer-employee requirements of the FLSA.

On its face, the proposed rule arguably differs subtly from the caselaw as to the control factor, but the weighting of this factor is a significant departure.

The proposed weighting of the control factor especially would permit employers to classify more employees as independent contractors. For example, where a potential employer knows how long a scope of work should take, the potential employer could use deadlines and quality control measures as proxies for a set schedule while putting the responsibility for getting the work done on the independent contractor.

A potential employer who knows generally how long a task should take – as is often the case in the wall and ceiling industry – could easily assign 50 hours of work to an individual classified as an independent contractor and demand that it be completed to specification within a week. The Department might argue that the individual could hire a helper to assist in performing the work, but the practical reality is that most independent contractors work alone because of the perilous economic incentives associated with this status, such as avoidance of workers compensation, unemployment, and other costs related to traditional employment. And the concept of hiring a helper for a specific project is unrealistic for most independent contractors who have never employed a helper.

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Under the current legal analysis, the work assignment structure described above – assigning a quantity of work to be performed in a week – arguably supports independent contractor status. But this fact is not in at all definitive of independent contractor status as part of a thorough analysis of economic reality in the six-factor balancing test. By weighting this factor, the proposed rule would short-circuit a deeper analysis and narrow the definition of employee under the FLSA.

2. The Opportunity for Profit or Loss Factor

In describing this factor, the Department states that it weighs toward the individual being an independent contractor to the extent the worker has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work. This factor weighs toward the employee classification to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or more efficiently.

As compared to the six-factor balancing test, the Department excluded the investment factor from separate analysis in its proposed test. Instead, it incorporates the investment factor into the profit or loss factor as did the Second Circuit. But the Department's incorporation of this concept into the profit or loss factor would narrow the scope of the legal analysis in a way that is inconsistent even with Second Circuit caselaw. For example, in a case cited by the Department to justify its combining the investment factor with the profit and loss factor, the Second Circuit noted the "substantial financial outlay" made by the workers.[7] The Second Circuit's analysis is consistent with the investment factor stated in the six-factor balancing test: the *amount* of the worker's investment in facilities, equipment, or helpers. The Department argues that an individual need not make a significant investment to be classified as an independent contractor, and this is correct under current law. Under the six-factor balancing test, the analysis of the amount of the worker's investment is, like the other factors, not solely determinative – it is one of six factors. The Department's narrow incorporation of the investment factor into the profit and loss factor is thus patently inconsistent with established caselaw and would impermissibly narrow the definition of employee under the FLSA.

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It is noteworthy that the proposed rule states that the profit and loss factor "weighs toward the individual being an employee to the extent the individual is unable to affect his or her earning or is only about to do so by working more hours or more efficiently." This is a hallmark of an employee, but the proposed rule implies that this is the only scenario in which an individual should be classified as an employee as to the profit and loss factor.

The exercise of initiative or management of capital investment are broad concepts. Because the Department explicitly cites these concepts in the proposed rule to describe independent contractors, it casts a narrow net at employees.

As with the control factor, the weighting of the profit and loss factor is inconsistent with the caselaw and would also narrow the definition of employee under the FLSA. The Department's proposed application of the profit or loss factor appears, for purposes of this factor, to identify as an independent contractor any worker who can realize profit or loss from anything other than working more efficiently or more hours. By excluding the *amount* of investment from the analysis, the proposed rule implies that *any* amount of potential profit or loss from initiative or capital investment might satisfy this factor. In a situation where initiative and capital expenditure are minimal, as is the case in segments of the wall and ceiling construction industry, it is arguable that an individual who is simply responsible for buying the materials for a project – even if the only viable option is the vendor

[7] *Saleem v. CORPORATE TRANSP GROUP, LTD.*, 854 F.3d 131 at 144 (2d Cir. 2017).

identified by the potential employer – would be considered an independent contractor under the profit or loss factor.

An individual who installs drywall might arguably satisfy the core profit and loss factor by simply requiring his workers to supply their own tools to install drywall (i.e., a utility knife and a screw gun). Because these tools are a capital expenditure, albeit a minimal one, it would appear that the individual is at risk for a small profit or loss. Thus, he satisfies the weighted profit or loss factor with an investment of potentially less than $100. Under an analysis of the six-factor balanced test, this individual might similarly satisfy the profit or loss factor, but he would likely fail the *amount* of investment factor that the Department has excluded from the proposed rule. By weighting the profit and loss factor and excluding the amount of investment factor, the proposed rule would again short-circuit a deeper analysis and narrow the definition of employee under the FLSA.

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3. The Skill Factor

Under the proposed rule, this factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the employer does not provide. It weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training.

The proposed rule condenses the skill factor to eliminate the initiative, judgment, and foresight elements from consideration. These elements, in the specific context of the skill factor, are instructive to determine whether a worker is an employee or an independent contractor.

The consideration of initiative, judgment, and foresight as part of the skill factor originated in *Rutherford Food Corp. v. McComb*, where the Supreme Court said, "While the profits to the [workers] depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor."[8] *Rutherford Food* does not analyze whether meat boning work requires specialized training or skill that the employer in that case did not provide; instead, it analyzes *how* the individuals used their skill.

The Department argues that the analysis of initiative, judgment and foresight belongs instead in the proposed "core" control and profit-loss factors. But the proposed rule does not include any of these words within the control factor. The proposed profit-loss factor incorporates the concepts largely as they are

[8] 331 U.S. 722, 729 (1947).

incorporated with the profit-loss factor in the six-factor balancing test. Meanwhile, the proposed test renders the skill factor virtually moot.

The NPRM observes that, "the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way."[9] The Department offers this Third Circuit quote in support of its argument that capacity for initiative under the control factor is more important than having a specialized skill. This concept equally weights the argument that initiative, judgment and foresight should remain considerations within the skill factor as part of an analysis of *how* the individual uses his skill.

In *Rutherford Food*, a meat processing plant entered into an arrangement to offer one meat boner the contract to bone its meat with a team of boners. It is arguable that meat boning is a specialized skill, but the Court didn't consider that question. The Court reached its conclusion that the workers in *Rutherford Food* were employees because their work did not require any business operations skill – it did not require particular initiative, judgment or foresight on the part of the worker. It was a piecework arrangement that depended on the prospective employer to provide work opportunities. The meat boners did not use their skill in any independent way, whether that skill was specialized or not.

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In the construction industry, it is not uncommon for a tradesperson – whether a highly trained worker or a manual laborer – to work for multiple employers over the course of a career. The worker often arrives at his employer with skills gained through an apprenticeship program and/or jobsite experience. In many cases additional skill, particularly the ability to perform a task with greater speed and precision, comes largely with experience. These facts cause the skill factor proposed in the NPRM, if it not rendered moot by the two "core" factors, to be particularly amorphous in a construction industry application. The consideration of initiative, judgment and foresight as part of the skill factor cause a more reasoned analysis that is critical to identifying the proper worker classification.

4. The Permanence Factor

Under the proposed rule, this factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. This factor weighs in favor of the individual

[9] NPRM at 60607 (quoting *Martin v. Selker Bros.*, 949 F.2d 1286, 1295 (3rd Cir. 1991)).

being an employee to the extent the work relationship is instead by design indefinite in duration or continuous.

The construction industry is project-based. But a potential employer would normally have regular work to assign over the course of multiple projects. Under this factor as stated, a potential employer would have a choice to classify individuals as independent contractors simply by hiring them on a project-by-project basis. But in practical reality, a potential employer would need individuals to perform work on an ongoing basis on his different projects. In practice, this is an indefinite duration because the potential employer will employ the independent contractors on a continuous basis over separate projects.

To truly analyze this factor, the duration of the relationship of the potential employer and the worker should be considered – whether project based or not. The NPRM cites *Saleem* for the proposition that an individual who depends on a potential employer for work is an employee whom the employer suffers or permits to work. Whether an individual depends on a potential employer for work must consider the historical practice of the relationship, not just its "design" as stated in the proposed rule. If a potential employer has established an ongoing relationship with an individual in which the individual only performs his work for the potential employer, it is an indication of permanence that supports classification as an employee.[10]

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The proposed rule takes an overly technical approach to the permanence factor that favors an independent contractor status as compared to the caselaw. The Department, in Opinion Letter FLSA2019-6, cited caselaw in support of its assertion that "the existence of a long-term working relationship may indirectly indicate permanence." No such statement exists in the proposed rule. The Department should include this statement in any final rule.

5. The Integrality Factor

Under the proposed rule, this factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.

Whether the work is part of an integrated unit of production is key to the employee or independent contractor analysis; however, the proposed rule waters

[10] *See Scantland v. Jeffry Knight, Inc.*, 721 F. 3d 1308, 1318-1319 (11th Cir. 2013).

down the integrality factor by removing the question of whether the work performed is a primary purpose or essential part of the potential employer's business. This is a departure, as the NPRM notes, from considerable precedent.[11]

The Department correctly points out that a worker can perform services that are important to a business without being integrated or merged into that business's operations.[12] But it takes a leap in arguing that courts have mistakenly applied "integral" as meaning important or central to the employer's business.[13]

The question of whether the work is part of an integrated unit of production is insufficient to determine whether an individual's work is integrated into the potential employer's business. Workers are more likely to be employees under the FLSA if they perform the primary work of the alleged employer.[14] The NPRM appears to focus on eliminating the question of whether the work at issue was very important to the potential employer. As the NPRM points out, everything the employer does is integral to the business – why else do it?[15] But by eliminating the "importance" question, the Department's proposed change would severely water down the integrality factor to an overly technical inquiry.

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The question of the importance of the work goes to the employer's line of business. For example, a business that owns a meat processing plant but performs none of the meat processing tasks probably isn't in the meat processing business. On the other hand, a business that does process meat is, and that business's use of independent contractors to perform meat processing tasks should be closely examined. The analysis of whether an individual's work is important to a business answers what the potential employer's business actually is, so that a further analysis can take place as to whether the individual's work is integrated into that business.

The construction industry is process driven, and tradespersons are generally assigned to perform a process. For example, drywall installers may be hired to install a certain amount of drywall, which would be specified as a number of square feet, whether as a specific requirement or as a result of the amount of drywall installation required on a particular project. A business that isn't in the business of installing drywall might ordinarily use a subcontractor to perform the drywall installation task. But where a business assembles a team of independent

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[11] The NPRM notes at page 60616 that, "The Department and courts outside of the Fifth Circuit have typically articulated the sixth factor of the economic reality test as ''the extent to which services rendered are an integral part of the [potential employer's] business.''
[12] *Id.* at 60616.
[13] *Id.* at 60603.
[14] *Donovan v. DialAmerica Marketing, Inc.*, 757 F. 2d 1376, 1385 (3rd Cir. 1985).
[15] NPRM at 60617.

contractors to perform this work, that business is likely in the business of installing drywall and a closer examination of the facts is warranted.

6. The weighting of the two "core factors" in the proposed rule improperly encourages a determination that an individual is an independent contractor and not an employee.

The Department argues that the three of the five proposed factors – the "skill required" factor, the "permanence of the working relationship" factor, and the "integrated unit" factor – should be subordinate to two core factors: the "nature and degree of the individual's control over the work" factor and the "opportunity for profit or loss" factor. This concept is inconsistent with long standing caselaw, would create new confusion as to its application, and is unlikely to get deference from the federal courts because Congress has not granted the Department authority to modify the FLSA's definition of employee.

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The proposed rule states that if both the control factor and the profit or loss factor point toward the same classification, there is a substantial likelihood that the classification is accurate. This will narrow the definition by short circuiting a deeper analysis that is necessary to identify the proper classification under the FLSA. By its nature, determining the status of a worker is a fact-intensive, case-by-case exercise. The six-factor test developed and espoused by federal courts takes that into account. The Department's proposal that two factors are to be given weighted precedence over other relevant, determinative factors undercuts the statutory protections intended by the FLSA.

For example, there is an increasingly pervasive business model in the wall and ceiling industry that is rooted in a decision to treat every worker doing framing, drywall, and ceiling work on a jobsite as an independent contractor. This nefarious business model relies on paying the so-called independent contractor a set amount for each unit of material installed. But this is not a lawful "piece rate" arrangement. Instead, it is a scheme designed to avoid wage and hour laws, and the other costly but important obligations of an employer-employee relationship. This business model requires a steadfast insistence that all these workers are independent business operators — even though it flies in the face of reality — because it justifies evading costs such as the payment of overtime, unemployment insurance, and workers' compensation.

The proposed rule would endorse and encourage this business model. A potential employer could gather a crew of independent contractors, assign them each to hang a certain amount of drywall to specification in a portion of a building by a specific deadline, and direct them to provide their own tools for the project. This is virtually the same process used by employers as to their employees, except that

there is no set schedule – only a deadline – and the potential employer does not own the tools.

As a practical matter, there is virtually no difference between the independent contractor arrangement described above and a traditional employment arrangement. Any experienced drywall installer knows roughly how long a drywall installation will take, making it relatively easy to assign a certain number of hours' worth of work to a worker. Quality control specifications are used by employers to direct their employees. It is not uncommon for construction employees to own and use their own tools, and in the drywall installation business, the cost of tools is minimal compared to the cost of labor.

The potential employer would satisfy the basic requirements of the proposed rule's core factors by establishing that the employees are given a deadline instead of a set schedule, directed to a specification instead of a specific direction as to how to perform the work, and make a capital investment in their "business" vis-à-vis their own tools. The proposed rule would establish a "substantial likelihood" that these workers are independent contractors for purposes of the FLSA. As stated in the proposed rule, it is "highly unlikely" that the other factors would outweigh the combined weight of the core factors.

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In practice, the proposed rule would virtually always offer a potential employer a choice to classify a drywall installer as an employee or an independent contractor.

To confidently classify the drywall installers as independent contractors, the potential employer would simply assign each individual to hang a certain amount of drywall to specification in a portion of a building by a specific deadline, and direct them to provide their own tools for the project. Perhaps he would sell the tools to the individuals. The potential employer would know roughly how long the work should take, and he might assign more than 40 hours of work to be performed in a week without having to worry about paying overtime. He would know that if the installers do not install the drywall to specification, he can direct them to correct the installation at no additional cost to his company. Perhaps he would check on their progress and quality of installation once or twice a day to ensure these standards are being adhered to. He would know that if he provides enough work, the installers would only work for him during the work assignment periods, which might collectively last for years. Again, under the proposed rule, this would appear on its face to be a lawful independent contractor relationship.

The facts of this drywall installer example are remarkably similar to the facts laid out in the U.S. Supreme Court's *Rutherford Food* decision.[16] There, the individuals at issue – meat boners – worked under a contract, owned their own tools, and

[16] 331 U.S. at 728.

were paid collectively a certain amount per hundredweight of boned beef, which pay they divided among themselves.[17] The Court concluded that the meat boners in *Rutherford Food* were employees on the circumstances of the **whole activity**.[18] The limited inquiry proposed by the Department points to a different potential outcome.

Clearly, the workers in the drywall installer and *Rutherford Food* examples are economically dependent on the employer. Clearly, the independent contractor classification is being used to evade the obligations an employer has to his employees under the FLSA. *Rutherford Food* and the caselaw developed over the past 70 years, which analyzes the whole activity, tells us that these workers should be classified as employees under the FLSA. But the proposed rule would permit the workers in these examples to be classified as independent contractors on an almost arbitrary basis by limiting the analysis of their circumstances.

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C. The primacy of actual practice is a critical concept that should be retained in any final rule.

The proposed rule contains a provision that says the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible. It is critical that this provision be retained in any final rule to ensure that the facts and circumstances – and not just statements and documents – related to the employment relationship are not only analyzed but given primary weight in the analysis. This will promote a deeper analysis and prevent unlawful avoidance of the FLSA by parties wishing to mischaracterize an employment relationship.

D. The proposed rule will cause a significant decrease in workers' earnings and transfer significant cost to taxpayers.

The proposed rule will result in a larger share of workers being classified as independent contractors. Independent contractors earn less than employees. The proposed rule will transfer additional cost to taxpayers.

1. The use of independent contractors will increase if the proposed rule is finalized.

SWACCA believes that the use of independent contractors will increase if the proposed rule is finalized. More specifically, SWACCA believes that an increasing number of employees' classifications would change to independent contractor status. This is a logical conclusion and is even suggested by the Department in the

[17] *Id.* at 724-725.
[18] *Id.* at 730 (emphasis added).

NRPM where it states that increased "clarity" in the law could result in an increased use of independent contractors.[19]

The six-factor test has been in existence for more than seventy years. Employment relationships have been developed under this standard over decades. The proposed new standard would risk significant disruption to employment relationships by permitting, if not encouraging, businesses to modify their employment relationships. The NPRM cites a study that found employers are not, under the current law, increasingly reclassifying existing employee relationships as independent contractor relationships but *are* hiring more new workers as independent contractors rather than employees.[20] The NPRM also notes that job tenures have been on a long-term decline.[21] This information suggests that employees are replaced by independent contractors upon separation of employment, and at an increasing rate due to decreasing employee tenures.

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SWACCA agrees with the Department's speculation that increased legal certainty as to an employer's ability to classify workers as independent contractors will lead to an increase in the number of independent contractor arrangements. The proposed rule would create that certainty by bending the law to favor the independent contractor classification, which would encourage employers to reclassify employees as independent contractors in addition to hiring new employees as independent contractors. And even if only a modest increase in employee reclassification occurs, the proposed rule would redouble firms' existing inclination to hire more new workers as independent contractors rather than employees. This will cause a rapid replacement of employees with independent contractors, due to declining job tenures and as individuals go back to work following historically high unemployment brought on by the COVID-19 pandemic.

2. Independent contractors earn less than employees.

The earnings data offered by the NPRM found that employees earned an average of $24.07 per hour while independent contractors earned an average of $26.71 to $27.43 per hour.[22] The Department relies on these earnings figures to support its assertion that independent contractors earn more than employees. This assertion runs counter to the evidence before the Department.

The Department's wage analysis fails to adequately consider the earnings of independent contractors as compared to employees – earnings that are lost by independent contractors vis-à-vis employee benefits, tax liability, and workers

[19] NPRM at 60636.
[20] *Id.* at 60627 (citing K. Lim, A. Miller, M. Risch, and E. Wilking, "Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data," Department of Treasury, p. 61 (July 2019)).
[21] *Id.* at 60609.
[22] *Id.* at 60628.

compensation and employment insurance benefits, and business expenses that are offered to employees but not independent contractors.

According to the NPRM, the value of employer benefits that directly benefit employees averages 21 percent of total compensation.[23] It should be expected that employees who are reclassified as independent contractors will lose most of this compensation in addition to other elements of the total employee compensation package that are not provided to independent contractors. The Department made a contrary, unsupported assertion in the NPRM that any tax-related transfers from employers to workers are likely to be offset by higher wages employers pay to ensure workers take-home pay remains the same after reclassification from an employee to an independent contractor. SWACCA strongly disagrees.

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In 2012, U.S. Department of Labor Unemployment Insurance Tax Chief Tom Crowley, in a presentation to the National Association of State Workforce Agencies' Unemployment Insurance Directors National Conference, calculated that a construction employee earning $31,200 a year before taxes, plus health insurance but with no retirement benefits, would be left with an annual net compensation of $10,660.80 if he were paid as an independent contractor and maintained the cost of his benefits, including workers compensation but excluding unemployment insurance.[24] This compares to net total compensation of $21,885.20 after federal income tax. This more than 50 percent reduction aligns with the 2019 congressional testimony of Matt Townsend before the Workforce Protections Subcommittee of the House Education and Labor Committee, explaining that employers who classify their construction workers as independent contractor can achieve a 50 percent cost advantage over his business, which uses employees for the same work.[25] These facts offer strong support for SWACCA's assertion that employees who are reclassified as independent contractors do not receive additional compensation from their employers to ensure that take-home pay remains the same.

The NPRM notes the Department's belief that the net impact of the proposed rule on workers' total compensation should be small in either direction, but offers no evidence to support this belief. In contradiction, the NRPM notes:

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[23] *Id.* at 60627.
[24] Tim Crowley, "Worker Misclassification – An Update from Constitution Ave." at page 13, available at http://financedocbox.com/Tax_Planning/77532647-Worker-misclassification.html (accessed October 22, 2020).
[25] Hearing on Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy, Before the Workforce Protections Subcommittee of the House Education and Labor Committee, 116th Congress (2019), available at https://www.congress.gov/116/meeting/house/110019/witnesses/HHRG-116-ED10-Wstate-TownsendM-20190926.pdf (accessed October 22, 2020).

- Employers pay 5.3 percent of employees' total compensation in retirement benefits on average. The Department explains that when a worker shifts from employee to independent contractor status, that worker may no longer receive employer-provided retirement benefits but may choose "alternative investment options."[26] The NPRM offers no statement or support for the notion that employees reclassified as independent contractors would retain this compensation. The evidence offered in these comments strongly suggests that the full cost of retirement benefits is not included in the compensation of independent contractors.

- More than 88 percent of employees have health insurance as compared to roughly 80 percent of independent contractors.[27] This NPRM concludes that independent contractors are less likely to have health insurance coverage. In a vacillating attempt to address this impact, the Department asserted that an employee shifting to independent contractor status who already receives health benefits will not be impacted by losing health benefit eligibility and "employment is not a guarantee of health insurance." The Department makes no effort to quantify the impact of the proposed rule on health insurance coverage. The Department asserts that lower benefits may be offset by increased base pay in order to attract staff because workers consider the full package of pay and benefits when accepting a job, but this assertion is entirely unsupported. The data offered by the NPRM supports a contrary conclusion that reclassification of employees to independent contractors will result in less health insurance coverage of the workforce. The evidence offered in these comments strongly suggests that the full cost of health benefits is not included in the compensation of independent contractors.

- Independent contractors are responsible for an additional 7.65 percent of their earnings in FICA taxes via-a-vis an employee. The Department asserts that any tax-related transfers from employers to workers are likely to be offset by higher wages employers pay to ensure workers take-home pay remains the

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[26] NPRM at 60627.
[27] *Id.*

same, but this assertion is entirely unsupported in the NPRM and contradicted by evidence offered in these comments.

- Employers cover unemployment insurance and workers compensation premiums for their employees. The Department notes accurately that an independent contractor may retain these benefits if the independent contractor chooses to pay for comparable insurance protections, but made no related assertion as to the impact of this shift, and made no attempt to quantify the cost of changes in coverage and whether the net effect is a benefit or a cost to the worker. SWACCA believes this will be a significant loss to workers' total earnings as previously discussed.

- The NPRM's analysis found that five to eight percent of independent contractors report earning less than the FLSA minimum wage rate of $7.25 per hour and 19 to 30 percent of independent contractors work overtime for which they are not compensated.[28] The NPRM does not discuss this data; instead, it states that the Department was unable to determine the cause of these differences. But these data points strongly suggest a negative impact on the earnings of independent contractors as compared to employees.

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The NRPM describes an 11 percent to 14 percent independent contractor wage premium as compared to employees.[29] This wage premium is little more than half of the value of employee benefits, which the NPRM shows as 21 percent of total compensation.[30] Meanwhile, the NPRM asserts that there is a wage premium for independent contractors but also states that it is not always observable at a statistically significant level.[31] The findings of the NPRM, though, show that the wage premium is insufficient to make up for the earnings lost via employee benefits. Thus, the data presented in the NPRM supports a finding that independent contractors earn less than employees. This contradicts the Department's finding that independent contractors earn the same to slightly more than employees.

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[28] *Id.* at 60630.
[29] The NPRM at page 60628 states the Department's finding that employees earned an average of $24.07 per hour, self-employed independent contractors earned an average of $27.43 per hour, and other independent contractors earned an average of $26.71 per hour. This data translates to an 11 percent to 14 percent wage premium for independent contractors as compared to employees.
[30] NPRM at 60627.
[31] *Id.* at 60628.

The 11 percent to 14 percent wage premium found by the NPRM is miniscule compared to the 50 percent figure supported by the 2012 analysis of U.S. Department of Labor Unemployment Insurance Tax Chief Tom Crowley and the 2019 congressional testimony of Matt Townsend. These data points conclude that independent contractors earn seven percent to 39 percent *less* than employees.

Finally, the Department finds that currently unemployed workers who become independent contractors due to the proposed rule will experience an increase in earnings, as they currently have no employment-related earnings other than possibly unemployment benefits.[32] The Department states that it anticipates but cannot any potential increase in labor force activity.[33] If the Department cannot quantify a potential increase in labor force activity, it should consider the impact that the proposed rule would have on the earnings offered by potential job opportunities. If a potential increase in labor force activity cannot be quantified, it must be assumed that an increase in independent contractor job opportunities would cause a corresponding decrease in employee job opportunities. Because independent contractors earn less than employees, currently unemployed workers who become independent contractors due to the proposed rule will assume that classification potentially instead of an employee classification, and in that case they will earn less than they would had they been classified as an employee.

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3. The proposed rule would transfer cost to taxpayers through increased reliance on taxpayer-funded social safety net programs.

The misclassification of employees as independent contractors contributes to the tax gap and imposes numerous costs on the economy.[34]

A shift of businesses' use of employees to independent contractors will transfer significant costs from businesses not only to workers but ultimately to taxpayers. The NPRM entirely fails to consider this important aspect of the proposed rule.

An increase in the use of independent contractors as compared to employees will cause a decrease in individuals' coverage of retirement benefit plans, health insurance, workers compensation insurance, and unemployment insurance. Social safety net programs funded by taxpayers will take the place of these programs. Independent contractors will be more likely to rely on social security benefits to cover a larger portion of their retirement income needs. State and federal health insurance programs will take up the burden to provide coverage to uninsured independent contractors. State uninsured workers compensation pools will take

[32] *Id.* at 60628.
[33] *Id.*
[34] James M. Bickley, Tax Gap: Misclassification of Employees as Independent Contractors, Congressional Research Service (March 10, 2011), available at https://www.bradfordtaxinstitute.com/Endnotes/CRS_Tax_Gap_3_10_2011.pdf (accessed October 24, 2020).

up the burden to provide benefits to injured independent contractors. And various alternatives to unemployment insurance, such as the recently created Pandemic Unemployment Assistance (PUA) Program that Congress created in the *CARES Act* for independent contractors, will take up the burden to provide benefits to independent contractors that fall on hard times.

The COVID-19 pandemic is already forcing taxpayers to subsidize the independent contractor model to an unprecedented degree. Since Congress enacted a new, 100% taxpayer-funded PUA regime for independent contractors, more than 11 million allegedly "self-employed" people are availing themselves of it while they are unable to find work.[35]

The NPRM acknowledges that independent contractors are less likely to be covered by benefits such as health insurance. But it fails to discuss the fact that a reduction in employer-provided benefits will increase the risk and burden to taxpayers that they will bear those costs through social safety-net programs. This important aspect of the proposed rule must be considered by the Department.

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III. CONCLUSION

The issue of classifying workers as independent contractors gained critical significance in the construction industry long before anyone spoke of the "gig economy." The Department argues that the proposed rule will clarify how to distinguish between employees and independent contractors, but it will accomplish this by causing fewer workers to be classified as employees under federal law. It will encourage businesses models that use independent contractors instead of employees. And it will undermine the entrepreneurs who create American jobs and provide economic stability for working families by putting them at a disadvantage to those who pass their business risks on to individual workers and the American taxpayer.

Improved clarity and reduced FLSA litigation are laudable goals of the proposed rule that would be better achieved through the codification of the six-factor balancing test to identify employees who are covered by the FLSA and independent contractors who are not. The six-factor balancing test would substantially avoid the negative impacts of the proposed weighted test as described in these comments, and it would maximize net benefits.

[35] Unemployment Insurance Weekly Claims Report, October 15, 2020, available at https://oui.doleta.gov/press/2020/101520.pdf. (accessed October 20, 2020)

SWACCA urges the Department to take all steps necessary to incorporate these comments into its efforts to clarify the question of whether workers are employees or independent contractors under the Act.

Thank you for your consideration and the opportunity to submit these comments.

Sincerely,

Scott Casabona
President

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