Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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: Proposed rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is proposing to amend the meat, poultry products, and egg products regulations pertaining to the schedule of operations. FSIS is proposing to amend 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. FSIS is amending these regulations to ensure effective and prudent expenditure of Agency budgetary and other resources while administering 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.

DATES: Submit comments on or before September 8, 2010.

ADDRESSES: FSIS invites interested persons to submit comments on this proposed rule. Comments may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov*. Follow the online instructions at that site for submitting comments.
- *Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items:* Send to Docket Clerk, U.S. Department of Agriculture (USDA), FSIS, Room 2–2127 George Washington Carver Center, 5601 Sunnyside Avenue, Beltsville, MD 20705.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2010–0014. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Daniel Engeljohn, Acting Asst. Administrator, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250–3700, (202) 720–2709.

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, respectively. 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.

In November 2005, the Supreme Court of the United States (Court), rendered a decision in *IBP, Inc.* v. *Alvarez,* 546 U.S. 21 (2005), relative to donning and doffing claims brought under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA).

As discussed in *Alvarez,* the FLSA, as amended by the Portal-to-Portal Act, excludes from the calculation of an employee's compensable work time (1) time spent walking to and from the place where the employee performs his principal activity or activities and (2) time spent on activities that are preliminary to or postliminary to the employee's principal activity or activities (29 U.S.C. 254(a)).

In *Alvarez,* the petitioner (IBP) was a large producer of fresh beef, pork, and related products. All production workers had to wear outer garments, hard hats, hairnets, boots, and other gear. Production workers' pay was based on the time spent cutting and bagging meat. In 1999, IBP employees filed a class action suit to recover compensation for pre-production and post-production work, including the time spent donning and doffing protective gear and walking between the locker rooms and the production floor before and after their assigned shifts. The lower courts had concluded that, for these employees, the donning and doffing of unique safety gear, such as chain link metal aprons and plexiglass armguards, are activities that are integral and indispensable to their primary jobs. Accordingly, the lower courts held that donning and doffing of such gear constitute "principal activities" that are compensable under the FLSA. The parties did not dispute this conclusion before the Court *Id.* at (27–30).

The Court then addressed the question of whether compensable time under the FLSA includes: (1) time spent walking between the area where employees don their gear and the production area and (2) time spent walking from the production area back to the area where employees doff their gear. The Court held that this post-donning and pre-doffing walking time is compensable because donning and doffing of required gear are principal activities marking the beginning and end of a continuous workday (*Id.* at 35).

Finally, the Court addressed the question of whether time employees spend waiting to don and doff required gear is compensable under the FLSA. The Court held that time spent waiting to doff gear is compensable under the FLSA because it occurs prior to doffing, which is an employee's last principal activity, and thus during the continuous workday (*Id.* at 37). By contrast, the Court held that time spent waiting to don required gear is not compensable under the FLSA because it occurs prior

to donning, which is an employee's first principal activity, and is thus a preliminary activity under 29 U.S.C. 254(a)(2) (*Id.* at 38).

Under OPM regulations at 5 CFR 551.412(a), a preparatory or concluding activity that is closely related to an employee's principal activities and is indispensable to the performance of the principal activities is compensable under the FLSA when the total time spent in that activity is more than 10 minutes per workday. OPM's regulation only applies to Federal employees, and the determination of which preparatory and concluding activities are compensable is made by agencies. FSIS historically took the position that donning and doffing are not compensable activities, because such activities took less than 10 minutes per workday. In reaching this conclusion, however, FSIS did not include the walking time.

In June 2008, an OPM letter to the National Treasury Employees Union clarified that 5 CFR 551.412 required that time spent at the workplace donning and doffing required gear, including walking time, was to be counted as hours of work.

In August of 2008, the National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL–CIO (the NJC) filed a nationwide grievance under the 2008 Labor Management Agreement (LMA) seeking compensation for donning and doffing activities nationwide for all inspection personnel covered by the bargaining unit. In consideration of the 2008 OPM interpretation of its regulation and the *Alvarez* ruling, the Agency entered into a settlement with the NJC in March 2010.

In light of the foregoing discussion, FSIS has determined it needs to modify its regulations and do so as quickly as possible. Accordingly, FSIS is proposing this amendment to its current regulations and providing for a 30-day comment period.

Proposed Amendment to 9 CFR 307.4(c), 381.37(c), and 590.124

FSIS's regulations state that official meat and poultry products establishments, importers, exporters, and official egg products plants shall be provided inspection service, without charge, up to 8 consecutive hours per shift during the basic workweek. The regulations also define the basic workweek as 5 consecutive 8-hour days, excluding the lunch period (9 CFR 307.4(c) and 381.37(c)).[1] For the reasons discussed above, FSIS is proposing to amend these regulations to provide that the 8-hours of inspection service includes the necessary time for inspection program personnel to put on required gear and walk to a work station and the necessary time for inspection program personnel to return from a work station and remove required gear. Any time over those 8 hours is overtime charged to an establishment.

For egg product plants, FSIS's regulations at 9 CFR 590.124 defines 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 necessary time for inspection program personnel to put on required gear and walk to a work station and the necessary time for inspection program personnel to return from a work station and remove required gear. The Agency anticipates that this proposed change is likely to have little application to the work of the Agency's egg product inspection 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

Under this proposal, the most direct cost to the industry would be the overtime fee that the Agency would need to charge establishments for the time FSIS inspection 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 would 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 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 wasting existing capacity.

The actual time FSIS inspection personnel will take to don and doff required gear will vary in each meat and poultry slaughter establishment depending on plant-specific variables. FSIS conducted an on-site study of a sample of establishments to estimate the average time to travel from the donning and doffing location to the inspection station.[2] This pacing data was combined with data that was collected during a donning and doffing timing study, and the estimated time for donning, doffing, and walking is, on average, about 6.5 minutes for poultry inspectors and 12.24 minutes for livestock inspectors. 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 of overtime inspection is $14.73, which, according to the recently proposed fee schedule (74 FR 51800), would increase to $16.71 and $17.21 in FY 2011 and 2012, respectively.[3] These costs are far less than the value of the poultry or livestock an establishment can slaughter in 15 minutes per line.

FSIS calculated costs for the meat and poultry slaughter establishments because slaughter establishments cannot begin operations until Agency inspection personnel are at on-line inspection work stations. Meat and poultry processing establishments and egg product plants would not be affected because those establishments can begin operations without FSIS inspection personnel being at an on-line inspection work station. Furthermore, very-small slaughter establishment typically will not be affected by this rule

[1] 9 CFR 307.4(b) and 381.37(b) provide that the lunch periods may be 30 minutes, 45 minutes, or in any case may not exceed one hour in duration.

[2] Management personnel counted the number of paces from the point in which inspection personnel don and doff equipment and garments to the farthest FSIS inspection station of the slaughter floor using the normal route. To ensure the most accurate results, the numbers of paces were counted twice at each plant before the Agency's Industrial Engineer analyzed the results. The Industrial Engineer calculated time in minutes using the internationally recognized Methods-Time Measurement 1 (MTM–1), published by the MTM Association for Standards and Research.

[3] As proposed in the FSIS Proposed Rule of Changes in Fees for Meat, Poultry, and Egg Products Inspection Services.

because there are no donning and doffing activities for inspection program personnel at such establishments. Because of the nature of how slaughter is conducted in very-small establishments and because many of the inspectors at such establishments are on patrol assignments, inspectors typically drive up to the establishment, go in to 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 SBA size standards.)

FSIS started by calculating the number of inspection personnel that this proposed rule will affect. Agency data show that there are 2,911 inspection 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 personnel, and that the establishments operate 260 days (5 days a week times 52 weeks), the annual cost for one online inspector will be about $4,345 at the FY 2011 rate. The cost to the industry will be about $12.7 million and $13.0 million in FY 2011 and 2012, respectively (*see* Table 1). Given that the annual revenue of meat slaughtering industry alone in 2009 is about $67.2 billion,[4] the overtime cost to the industry is insignificant. If we break down the cost for FY 2011 by establishment size, based on the numbers of inspectors for each SBA size category, it will be $10.5 million for the large establishments, $2 million for the small and $0.065 million for the very small establishments.[5]

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

	Number of inspection personnel	Overtime fee (15 min.)	Daily cost	Number of days	Annual cost (daily × No. of days)
FY 2011	2,911	$16.71	$48,643	260	$12,647,131
FY 2012	2,911	17.21	50,098	260	13,025,561

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,[6] the increased cost per pound due to the overtime fee will be only $0.0001, on average.

Benefit of the Rule

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

Regulatory Flexibility Analysis

The FSIS Administrator has made an initial determination that this proposed 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, $4,345 per year for one online 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. If the donning and doffing takes 10 minutes, the annual cost becomes about $2,897 for one inspector (*i.e.,* two-thirds of $4,345.) 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 proposed 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 proposed rule, FSIS will announce it online through the FSIS Web page located at *http://www.fsis.usda.gov/Regulations_&_Policies/2010_Proposed_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 would 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 proposing to amend 9 CFR Chapter III as follows:

[4] 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_U_S_and_its_International_Trade_Edition.html,* as of 7/16/2010.

[5] Among the 2,911 inspectors, 2,410 are for the large establishments, 480 are for the small establishments, and 15 are for the very small establishments.

[6] *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.*

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 necessary time for FSIS inspection program personnel to put on required gear and to walk to a work station, and the necessary 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 necessary time for FSIS inspection program personnel to put on required gear and to walk to a work station, and the necessary 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 necessary time for FSIS inspection program personnel to put on required gear and to walk to a work station, and the necessary 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 necessary time for FSIS inspection program personnel to put on required gear and to walk to a work station, and the necessary 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.

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

Done at Washington, DC, on August 2, 2010.

Alfred Almanza,

Administrator.

[FR Doc. 2010–19346 Filed 8–6–10; 8:45 am]

BILLING CODE 3410–DM–P

ELECTION ASSISTANCE COMMISSION

11 CFR Part 9428

[EAC–2010–0025]

National Voter Registration Act

AGENCY: Election Assistance Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Election Assistance Commission (EAC) seeks comments on proposed changes to its regulations pertaining to the National Voter Registration Act of 1993 (NVRA). Section 9(a) of the NVRA requires the responsible agency to issue regulations for developing a national mail voter registration form and for submitting a biennial report to Congress on the impact of the NVRA. EAC proposes to amend its NVRA regulations to ensure that they are consistent with the Help America Vote Act of 2002 (HAVA) and to make some technical amendments. EAC also invites public comments on additional changes to the NVRA regulations to improve voter registration through the content and format of the Federal form and to change the date by which States are required to submit data to EAC for use in the biennial report to Congress on the impact of the NVRA. EAC will not make any changes to the NVRA regulations until after the November 2010 Federal election. EAC anticipates issuing a final rule pertaining to the regulations necessitated by HAVA. EAC may also issue new regulations about the content and format of the Federal form and the biennial report to Congress based on the comments it receives on the topics discussed in Section VI either in the same final rule or in a separate final rule.

DATES: Comments must be received no later than 5 p.m.. e.s.t. on November 23, 2010.

ADDRESSES: You may submit comments, identified by docket number EAC–2010–0025, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. *Those commenting are strongly encouraged to submit comments via http://www.regulations.gov to ensure timely receipt and consideration.*
- *E-mail: NVRAregs@eac.gov.* Include docket number (EAC–2010–0025) in the subject line of the message. Comments sent via e-mail must include the full name, e-mail address, and the postal address of the commenter. E-mail comments that do not contain the full name, e-mail address, and postal address of the commenter will not be considered.
- *Mail:* Send to "EAC Regulations" at U.S. Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005. Comments sent by mail must include the full name and the postal address of the commenter and be unbound, be on paper no larger than 8.5″ by 11″; and be submitted in duplicate. Comments received via mail that do not contain the full name, e-mail address, and postal address of the commenter will not be considered. Mailed comments will not be accepted in electronic form (floppy disk, CD, etc.).

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All submissions must include the following in the subject line: "Election Assistance Commission National Voter Registration Act Regulations." All comments received will be publicly posted, including any personal information provided. However, EAC will not post comments that contain profanity, vulgarity, threats, or other inappropriate language.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Karen Lynn-Dyson, Director, Division of Research, Policy and Programs or Mr. William P. Boehm, Deputy Director of