

**COMMENTS OF NORTH AMERICA’S BUILDING TRADES UNIONS ON
THE U.S. DEPARTMENT OF LABOR’S PROPOSED PROCESS FOR
RECOGNIZING STANDARDS RECOGNITION ENTITIES FOR
INDUSTRY-RECOGNIZED APPRENTICESHIP PROGRAMS**

RIN 1205-AB85

North America’s Building Trades Unions (“NABTU”) appreciates this opportunity to comment on the U.S. Department of Labor’s Notice of Proposed Rulemaking: Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, published at 84 Fed. Reg. 29970 (June 25, 2019) (“NPRM”). The NPRM sets forth a process for recognizing private Standards Recognition Entities (“SREs”), which will, in turn, recognize and govern Industry-Recognized Apprenticeship Programs (“Industry Programs”).

NABTU is a labor organization composed of fourteen affiliated national and international unions and 288 state and local building and construction trades councils, which together represent more than 3 million men and women employed in the construction industry. In partnership with construction industry employers, NABTU and its affiliates have long sponsored and promoted true apprenticeship training programs (“Registered Programs”) as the most effective mechanism for bringing new workers into our industry, training them to understand all aspects of a trade, and providing them with the skills to safely perform complex tasks under ever-changing conditions. The Registered Programs we sponsor jointly with our construction industry partners comprise one of the largest post-secondary education programs in the country. Together, we operate over 1,600 apprenticeship programs and annually invest \$ 1.3 billion in training programs that have prepared hundreds of thousands of workers for good, middle-class careers.

NABTU and its affiliates therefore fully understand the importance of real apprenticeship training and appreciate the value of expanding this model into new industries. The proposed industry-recognized program, however, falls far short of ensuring that the apprentices in this new system will obtain the high-quality training Congress envisioned in enacting the National Apprenticeship Act (“NAA”), 29 U.S.C. § 50. Instead, by completely ceding the creation of standards and the approval and monitoring of apprenticeship programs to the private sector, the Department of Labor (“DOL” or “the Department”) risks opening the doors to the kind of exploitation that Congress specifically sought to end by passing the NAA.

NABTU seriously doubts the legal validity of the proposed program. Our main concern, however, is with ensuring that, if DOL decides to proceed with this new experimental model, it clearly and permanently exempts the construction industry. Nothing in the proposed regulations requires an Industry Program to provide rigorous in-class and on-the-job training; nothing ensures quality control or effective oversight of the programs; nothing ensures the extensive safety training and other safety precautions required in our high-risk industry; and nothing protects apprentices from exploitative wages or ensures that they will achieve a recognized level of proficiency in their trade when they complete the program. This new program, if permitted in the construction industry, would permit contractors to label as “apprentices” low-wage workers receiving inferior training, and thereby undermine the high standards that the joint labor-management Registered Programs have developed and DOL’s Registered Apprenticeship regulations require.

Since DOL has identified the NAA – or the Fitzgerald Act – as its authority for creating this program, 84 Fed. Reg. at 29970, NABTU will begin by describing Congress’s purpose in enacting that law. We will then describe the standards DOL has implemented to ensure that,

consistent with the Fitzgerald Act, Registered Programs function to safeguard the interests of the apprentices, and why the proposed regulations are inconsistent with DOL's responsibility under the Fitzgerald Act. We will then explain the ways in which we and our construction industry contractor partners have created the country's most robust and extensive apprenticeship system and why, if DOL is determined to go forward with this program, it is critically important that the Department clearly and permanently exclude the construction industry to avoid undermining a program that has been proven to serve apprentices, the construction industry, and the public so well.

I. In Enacting the Fitzgerald Act, Congress Intended DOL to Standardize the Apprenticeship System to Safeguard Apprentices.

The NAA was introduced by Representative William Fitzgerald as H.R. 6205 and labeled “[a] Bill to enable the Department of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to cooperate with the States in the promotion of such standards.”¹ The terms of what became the NAA are simple and straightforward:

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Secretary of Education

¹ *To Safeguard the Welfare of Apprentices: Hearings on H.R. 6205 Before the Subcomm. of the H. Comm. on Labor, 75th Cong. 1 (1937) (hereinafter, “Hearings”), available at <https://babel.hathitrust.org/cgi/pt?id=uc1.aa0009022088&view=1up&seq=7>.*

29 U.S.C. § 50. The legislative history underscores what the language of the NAA clearly states: that Congress intended the federal government to take responsibility for ensuring the welfare of the country's apprentices.

The federal government first became involved in apprenticeships when Executive Order No. 6750-C (June 27, 1934) created the Federal Committee on Apprentice Training ("Federal Committee") "for the purpose of permitting *genuine apprentice training* under the National Recovery Administration codes and, at the same time, *prevent the exploitation of apprentices and the break-down of labor standards.*" 81 Cong. Rec. 2600 (1937) (Memorandum on the Work of the Federal Committee on Apprentice Training) (emphasis added). Prior to "the time that the Federal Committee became active there had been no adequate Federal or State machinery developed to promote uniformity and give protection to employment standards of apprenticeships." *Id.*

The Committee's work underscored the need for the government to step in and standardize and upgrade what the private sector had been calling apprenticeships, and it led Representative Fitzgerald to introduce a bill to make the Federal Committee's work a permanent function of DOL. In introducing the NAA, Representative Fitzgerald made clear to Congress that the bill's purpose was to protect apprentices through standards "set up by the Department of Labor in cooperation with the States." See 81 Cong. Rec. 6632 (1937) (Representative Fitzgerald described the bill as "throwing a cloak of protection around the boys and girls and setting up standards and protecting them.")).

In testimony supporting the bill, members of the Federal Committee described the kind of exploitation they had found rampant in so-called apprenticeship programs, in the absence of any sort of uniform standards. Employers would classify all beginners and helpers as "apprentices,"

exploit their labor, and undercut the wages of the other workers. *Hearings* at 42. As one Committee member described, “It has been customary in some industries to call them apprentices and pay them so-called apprentice wages: but instead of teaching them trades, they teach them to follow one of the minor operations in an industry, so that the employer secured, for the wages of an apprentice, help to do work for which he would otherwise pay the wages commanded by unskilled labor.” *Id.* at 52 (statement of John Frey, AFL representative to the Federal Committee). These young workers never learned a trade, but rather became “specialists” in discrete tasks, or worse, only performed unskilled labor. As a result, they were not equipped to function as full journeyworkers when they finished their “apprenticeships.” *Id.* at 42, 60, 72-73; *see also* 81 Cong. Rec. 2600 (1937) (statement of Rep. Fitzgerald) (Young workers who “agreed to be apprenticed to a trade, to learn all of the different parts, . . . are being exploited on one particular machine. At the end of 4 years’ time, at small wages, these boys and girls went out into the world as specialists, and they were not equipped.”).

The bill was therefore intended to ensure that when young people went “into an apprenticeship they would be treated properly and made good mechanics rather than specialists; and when they come out they [would] be able to prosper.” *Hearings* at 42. The Federal Committee’s representatives from industry, labor, and government agreed that to effectuate that goal, three “minimum standards” should “apply to all areas and to all skilled trades” – standards that “might be likened to a three-legged stool in that if you kick one leg out, the other two would have no important bearing on the improvement of the situation.” *Id.* at 73. First, the apprenticeship must provide a minimum number of hours of continuous employment and related instruction. Committee members stressed the need for a “progressive and controlled job experience with appropriate safeguards,” carefully integrated with “allied school training in

technical subjects,” and all conducted by competent trainers. *Id.* at 24, 40, 63; *see also id.* at 66-67 (statement of Rep. Fitzgerald) (“this proposed bill would . . . give them so many hours of vocational training and so many hours of scholastic training”).

Second, every apprentice must have a contract specifying, among other things, a graduated wage scale (based on a certain percentage of the journeyworkers’ scale), a description of the program, the length of the apprenticeship, and the amount of time spent in classroom instruction and whether such time is paid. *Id.* at 73. Third, each apprenticeship program must have an impartial third-party where apprentices can bring grievances. *Id.* at 74. These minimum standards would protect apprentices and distinguish true apprenticeships from the exploitative “type of short-term learner or helper or beginner or understudy” employment that employers were calling apprenticeships. *See generally id.* at 54-55 (Federal Committee’s Written Statement); *id.* at 71-74 (statement of William F. Patterson, Executive Secretary, Federal Committee).

In short, both the text and the legislative history make clear that the Fitzgerald Act was designed to bring Government oversight to apprenticeship, and that it did so by directing DOL, in concert with the states, to establish minimum standards to protect apprentices from exploitation.

II. DOL’s Standards for Registered Programs Safeguard the Welfare of Apprentices

Following Congress’ direction, the apprenticeship regulations DOL has promulgated to date have all had as their guiding purpose ensuring that apprentices are protected from abuse and properly trained by their chosen apprenticeship program. In 1963, in the first regulations it promulgated under the authority granted by the Fitzgerald Act, the Department required Registered Programs to admit workers on a completely nondiscriminatory basis. 28 Fed. Reg.

13775 (Dec. 18, 1963) (codified at 29 C.F.R. pt. 30). And in 1973, when the Department first set basic apprenticeship standards, its stated purpose was to “set forth labor standards to safeguard the welfare of apprentices.” 38 Fed. Reg. 13894 (May 25, 1973). Until now, all subsequent rulemakings DOL has undertaken to implement the Fitzgerald Act have stayed true to that purpose. *See, e.g.*, 42 Fed. Reg. 10139 (Feb. 18, 1977); 73 Fed. Reg. 64402 (Oct. 29, 2008); 81 Fed. Reg. 92026 (Dec. 19, 2016).

To become a Registered Program for federal purposes, a program must have a written training plan that conforms to the Department’s standards of apprenticeship, meet basic performance requirements, agree to enter into a binding agreement with each apprentice, and satisfy equal employment opportunity standards and certain affirmative action obligations. 29 C.F.R. Parts 29 and 30.

A. Registered Programs Must Have an Organized, Written Plan of Training.

The Department’s requirements for a Registered Program begin with an organized, written plan of training, called the program standards. These standards must contain certain provisions essential to the protection of apprentices and the integrity of apprenticeship programs. All program standards must, for example, describe the scope and nature of the program’s structured in-class and on-the-job training requirements so apprentices understand both the requirements they must meet and the program’s obligations. *Id.* § 29.5(b)(2)-(3). Recognizing the importance of in-class related instruction, the program standards must also require that every instructor be qualified and have training in teaching techniques. *Id.* § 29.5(b)(4). Apprentices are further protected by the Department’s requirement that program standards include a wage progression for apprentices, which must be consistent with the skills the apprentice is acquiring through the training program. *Id.* § 29.5(b)(5). To ensure apprentices work safely while

receiving quality training, programs must also establish a numeric ratio of apprentices to journeyworkers. *Id.* § 29.5(b)(7). Finally, apprentices must be provided with a safe environment in which to learn, safe equipment, and safety training, *id.* § 29.5(b)(9), and with an independent procedure to resolve their disputes with the program, *id.* § 29.12. New programs are initially reviewed for compliance with these requirements, and the Department and State Apprenticeship Agencies (“SAAs”) will refuse to register programs if their written standards fall short. *Id.* § 29.3.²

B. Registered Programs are Routinely Reviewed to Ensure They Meet Performance Requirements.

DOL’s oversight of a Registered Program does not end when the Department approves the program for registration. Instead, apprentices are assured a quality training program through continued rigorous oversight by the Registration Agency (either the Department or SAA). A new program may only be provisionally approved for one year. *Id.* § 29.3(g). After the first year, the Registration Agency must then review the program for quality and compliance with the Registration Agency’s requirements, and if it finds the program is not in compliance, the Agency must recommend deregistration. *Id.* § 29.3(g)(2). In addition, all programs must be reviewed again at least every five years. *Id.* § 29.3(h).

In conducting these reviews, the Registration Agency must consider quality assurance assessments, equal employment opportunity compliance, and program completion rates. *Id.* § 29.6(b)(1). The quality assurance assessment conducted by the Registration Agency is a comprehensive review of a program’s performance, including “determining if apprentices are receiving: on-the-job training in all phases of the apprenticeable occupation; scheduled wage

² SAAs recognized by the Department have non-exclusive authority to determine whether a program meets the standards for recognition. *Id.* § 29.13.

increases consistent with the registered standards; [and] related instruction through appropriate curriculum and delivery systems” *Id.* § 29.2. The Registration Agency next evaluates equal employment opportunity compliance by reviewing records and conducting interviews with apprentices, employees, journeyworkers, and others to complete a comprehensive analysis and evaluation of the program’s equal employment opportunity compliance. *Id.* § 30.13. Finally, the Registration Agency reviews program completion rates in comparison to the national average. For those programs with completion rates falling below the national average, the Registration Agency must provide technical assistance. *Id.* § 29.6(c). Thus, Registered Programs are routinely reviewed closely to ensure they are providing high-quality training and operating to the benefit of the enrolled apprentices. If they are not, the programs may be deregistered. *Id.* § 29.8(b).

C. Apprentices in Registered Programs are Protected by Written Apprenticeship Agreements.

As an additional protection for apprentices, all Registered Programs must execute a written apprenticeship agreement with each participating apprentice, summarizing the steps an apprentice must take to complete the program, the number of classroom hours the apprentice must attend, and the graduated wage scale. *Id.* § 29.7. The agreement must provide that, following a probationary period, the apprenticeship agreement may be cancelled at the apprentice’s request or suspended or cancelled by the program sponsor “for good cause, with due notice to the apprentice and a reasonable opportunity for corrective action” *Id.* § 29.7(h). This provides apprentices with significant protection, without which an apprentice could be terminated from a program for reasons unrelated to the apprentice’s performance, despite the number of years the apprentice invested in the program.

D. Registered Programs are Barred from Discriminating in Selecting and Retaining Apprentices and Must Satisfy Certain Affirmative Action Obligations.

The Department also holds Registered Programs to a high standard for nondiscrimination and affirmative action. Since 1964, the Department has prohibited Registered Programs from discriminating against apprentices. 28 Fed. Reg. 13775 (Dec. 18, 1963). The Department has revised and expanded the equal opportunity and affirmative action requirements applicable to Registered Programs several times. In 2016, recognizing continued obstacles to the full participation of women, people of color, and individuals with disabilities, the Department revised Part 30 to add additional protected groups and to enhance the affirmative action requirements applicable to Registered Programs. 81 Fed. Reg. 92026 (Dec. 19, 2016).

Under Part 30, Registered Programs are prohibited from discriminating against an apprentice or applicant for apprenticeship on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability. 29 C.F.R. § 30.3(a)(1). In addition, Registered Programs must undertake a number of prescribed, proactive activities in support of equal opportunity and affirmative action goals. *Id.* §§ 30.5-30.8. Registered programs also must post and publish an equal employment opportunity pledge informing applicants and apprentices of the program's commitment to equal opportunity and affirmative action, and they must provide anti-harassment training to apprentices and others who regularly work with apprentices, and must implement procedures to address complaints of harassment and intimidation. *Id.* § 30.3(b). Finally, in addition to other requirements, Registered Programs must develop and maintain written affirmative action plans in compliance with specific mandated requirements. *Id.* § 30.4.

In short, in carrying out its obligations under the NAA and establishing and administering the Registered Programs, DOL has established a structure of standards and oversight designed to safeguard apprentices and the apprenticeship system.

III. The Proposed System is Not Authorized by the Fitzgerald Act.

As explained above, both the text and the legislative history make clear that the Fitzgerald Act (a) places responsibility on the federal government, in concert with the states, to establish minimum standards for apprenticeship, and (b) intends those standards to protect apprentices from exploitation. The proposed regulations fail in both regards.

A. The Proposed Regulations Unlawfully Delegate the Department’s Responsibilities to the Standards Recognition Entities.

When, as in the Fitzgerald Act, Congress specifically vests an agency with the authority to administer a statute, the agency may not shift that responsibility to private actors. *Perot v. Fed. Election Comm’n*, 97 F.3d 553, 559 (D.C. Cir. 1996); *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). “An agency delegates its authority when it shifts to another party ‘almost the entire determination of whether a specific statutory requirement . . . has been satisfied,’ or where the agency abdicates its ‘final reviewing authority.’” *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008) (alteration in original) (quoting *U.S. Telecom.*, 359 F.3d at 567, and *Nat’l Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 19 (D.D.C. 1999)). This is precisely what the proposed regulations do.

The proposed regulations shift to the SREs the authority to establish and enforce rules for a new, parallel apprenticeship system. They establish little, if any, “floor” for the requirements SREs may impose on Industry Programs, and provide DOL almost no basis for evaluating either the standards the SREs may establish or the Industry Programs they recognize. The proposed application requires SRE applicants to describe their “policies and procedures” for recognizing,

evaluating and monitoring Industry Programs, but these requirements appear aimed at *process* rather than substance. Nothing on the application or in the proposed regulations requires applicants to specify the actual *criteria* they will use to evaluate Industry Programs.

Although § 29.22(a)(4) of the proposed regulations specifies certain requirements the SREs must ensure its Industry Programs meet, the requirements are framed in the vaguest of terms. Thus, for example, the regulations provide the SREs with complete discretion to make critical determinations at the heart of the apprenticeship program: what constitutes “appropriate classroom or related instruction” and the kind of “structured mentorship opportunities” that would ensure effective on-the-job training. § 29.22(a)(4)(ii), (vi); 84 Fed. Reg. at 30013. The proposed regulations also improperly leave it entirely up to the SREs to approve and monitor the Industry Programs, completely shifting the duty to “safeguard the welfare of apprentices” from DOL to the SREs.

Finally, although delegations by agencies to private entities are lawful if the agency “retains final reviewing authority,” *Stanton*, 54 F. Supp. 2d at 19, the proposed regulations give DOL only minimal oversight. As noted, the SREs have no obligation to disclose their standards (if any) to DOL in seeking recognition in the first instance. Once an SRE is recognized, the Administrator “may” – but is not required to – initiate a review if one of a designated group of stakeholders files a complaint, § 29.26, or if DOL receives information that the SRE is not in “substantial compliance with this subpart” or is incapable of continuing as an SRE, § 29.27(a). 84 Fed. Reg. at 30014. If the Administrator concludes that an SRE is not in compliance with the regulations, the only remedy is to suspend or derecognize the SRE. An agency whose oversight authority is limited to terminating a program does not, however, have “the ‘final reviewing authority’ required to prevent an unlawful delegation.” *Stanton*, 54 F. Supp. 2d at 21 (agency’s

ability to terminate cooperative agreement if dissatisfied with local council's conduct "does not constitute the 'final reviewing authority' required to prevent unlawful delegation").

In sum, by giving SREs the authority to develop and enforce apprenticeship standards, while – at best – providing only the most vague and undefined guidance, and by relinquishing any real authority to review and approve those standards, the proposed regulations, if enacted, would constitute an unlawful delegation of the authority Congress granted DOL in the Fitzgerald Act. *U.S. Telecom*, 359 at 567, 574 (unlawful delegation where agency gave states discretion to interpret undefined terms and vague standard); *Stanton*, 54 F. Supp. 2d at 20 (agency may consider advisory committee's recommendations and enter into cooperative agreements with entities to carry out its obligations, but cannot "completely abdicate its responsibilities"); *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 784 (D.C. Cir. 1998) (D.C. Control Board cannot delegate its congressionally-created governance powers over the D.C. schools to private board of trustees).³

³ Unlike the proposed delegation to SREs, the Department's delegation of authority to SAAs is fully consistent with Congressional intent. See 29 U.S.C. § 50 (directing the Secretary "to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship"); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 330 (1997) ("Congress, in the Fitzgerald Act, recognized pre-existing state efforts in regulating apprenticeship programs and apparently expected that those efforts would continue."); *Shepherd v. Kingsbury, Inc.*, 143 LRRM 2567 (E.D. Pa. 1993) ("Congress clearly envisioned in the Fitzgerald Act that state agencies . . . would oversee apprenticeship standards."); 81 Cong. Rec. 6631-32 (1937). Moreover, the authority the Department has delegated to SAAs is far more limited than what it is proposing to delegate to SREs. For example, (1) SAAs have to comply with specific regulatory standards, leaving them with less discretion; (2) the Department reviews SAAs' rules and regulations for substance, not just process; and (3) the Department retains final authority to register and deregister all apprenticeship programs, including those within the jurisdiction of a SAA. 29 C.F.R. §§ 29.5, 29.8, 29.13.

B. The Proposed Regulations Fail to Safeguard Apprentices.

By leaving so much to the SREs' discretion, the proposed regulations completely fail to establish the minimum standards necessary to ensure that industries do not return to the pre-NAA period of exploiting new entrants to the industry, by simply calling them "apprentices," providing limited training, and paying them less than more senior members of the workforce. Nothing in the regulations ensures that apprentices will receive "appropriate classroom or related instruction" or that the "structured work experiences" will be "adequate to help apprentices achieve proficiency." § 29.22(a)(4)(ii); 84 Fed. Reg. at 30013. Nothing requires training by qualified instructors. With regard to the "structured work experiences," nothing requires an apprentice-to-experienced employee ratio that would not only ensure on-going, targeted instruction, but also the level of supervision apprentices need to guarantee their safety. Instead, the regulations simply require "structured mentorship opportunities to ensure apprentices have additional guidance on the progress of their training and employability." § 29.22(a)(4)(vi); 84 Fed. Reg. at 30013. Structured instruction does not involve "opportunities" for "additional guidance." It involves on-going, focused supervision and training by experienced instructors and employees.⁴

⁴ Moreover, the lack of regulations and oversight will open the door for unscrupulous for-profit educational institutions to partner with – or worse, become – Industry Programs and SREs. Institutions like the now-bankrupt Corinthian Colleges are notorious for using deceitful marketing techniques to target low-income individuals to enroll in "career focused" certification programs. These institutions charge exorbitant amounts for low-quality programs that have low completion and job-placement rates. See generally U.S. Gov't Accountability Office, *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud & Engaged in Deceptive and Questionable Marketing Practices* (2010), available at <https://www.gao.gov/assets/130/125197.pdf>; Maura Dundon, *Students or Consumer? For-Profit Colleges and the Practical and Theoretical Role of Consumer Protection*, 9 Harv. L. & Pol'y Rev. 375 (2015) (for-profit college "touted an eighty to ninety percent job placement rate to prospective students, when in reality the placement rate dropped to as low as five percent"), available at https://harvardlpr.com/wp-content/uploads/sites/20/2015/07/9.2_4_Dundon.pdf.

In 1937, the members of the Federal Committee stressed the importance of providing apprentices with graduated wage increases as they honed their skills, and warned against so-called apprenticeship programs that simply used trainees as cheap labor. The proposed requirement that apprentices be paid only the minimum wage is an invitation to return to the pre-1937 situation. Indeed, if applied in the construction industry, permission to pay apprentices the minimum wage for the entire term of their apprenticeship, coupled with the absence of any restrictions on apprentice-to-journeyworkers ratios, would not only permit exploitation of apprentices, but would also flood the construction market with cheap labor.

The regulations also fail to address two of the three “legs of the stool” that the Federal Committee viewed as critical to a real apprenticeship program: a contract with the apprentices and a process through which apprentices can complain about their Industry Program. Instead of a written contract that lays out the obligations of both the apprentice and the Industry Program, the regulations would simply require the Industry Program to give apprentices written notice of the wages they will receive and the circumstances, *if any*, under which those wages will increase, and notice of any “*ancillary costs or expenses . . . (such as costs related to tools or educational materials).*” § 29.22(a)(4)(vii)-(viii); 84 Fed. Reg. at 30013 (emphasis added). There is not even a requirement that an Industry Program provide the apprentices with written notice if it intends to impose any *direct* costs, like tuition.

The proposed regulations do nothing to ensure equal employment opportunity in apprenticeship programs for traditionally under-represented groups, including women, minorities, and people with disabilities. In stark contrast with the Registered Apprenticeship model, the proposed regulations impose no obligations on Industry Programs to take affirmative steps to ensure equal opportunity in apprenticeships. SREs are merely required to have policies

on outreach strategies. Industry Programs, however, are under no obligation to implement such strategies. § 29.22(k); 84 Fed. Reg. at 30013-14.

DOL's passive role in this regard is directly at odds with its longstanding position that, with respect to diversity and inclusion, the Department has a role in ensuring that apprenticeship programs do better. In its 2016 rulemaking initiative to strengthen the affirmative action obligations of Registered Program sponsors, DOL stressed that "enhancements" to affirmative action requirements are critical "because, despite the progress that has been made in some segments of the workforce since the promulgation of the existing part 30, the residual impact of longstanding discrimination continues to exclude historically disadvantaged worker groups from participation" in apprenticeship programs. Apprenticeship Program; Equal Employment Opportunity, 80 Fed. Reg. 68908, 68911 (Nov. 6, 2015).

Given DOL's recognition that disparities in apprenticeship participation "can be successfully addressed by robust affirmative action efforts," 81 Fed. Reg. at 92033, and its commitment to "diversity as a cornerstone of growth in [apprenticeship] expansion efforts," *id.* at 92027, its decision not only to exclude Industry Programs from part 30 requirements, but to impose no affirmative non-discrimination obligations on them at all, is completely astonishing, particularly since it appears that this will leave most Industry Programs free from any legally-enforceable non-discrimination or equal opportunity obligations.

The proposed rule only requires Industry Program sponsors to "affirm[] [] adherence to all applicable Federal, State, and local laws pertaining to Equal Employment Opportunity (EEO)." § 29.22(a)(4)(viii); 84 Fed. Reg. at 30013. It appears, however, that despite this "affirmation," many Industry Programs will not be subject to Title VII of the Civil Rights Act of 1964, which is widely regarded as the most important equal opportunity law due to its broad

coverage, prohibitions and remedies. Specifically, in the apprenticeship context, Title VII appears only to apply to apprenticeship or other training programs *controlled by* joint labor-management committees. 42 U.S.C. § 2000e(n); *id.* § 2000e-2(d), (e), (j).⁵ As such, it is doubtful that Industry Programs sponsored solely by employers will be subject to the same equal opportunity requirements as those set forth in part 30. *See* 29 C.F.R. § 30.3.

By DOL’s own assertion, the agency has a “*compelling interest* in ensuring that its approval of a sponsor’s [registered] apprenticeship program does not serve to support, endorse, or further promote discrimination.” 81 Fed. Reg. at 92034-35 (emphasis added). The same should hold true for programs under the Industry Program system.

Finally, nothing in the proposed regulations provides a means of evaluating and ensuring the quality of the training, the operation of the program, or the credentials an Industry Program intends to provide. In fact, the section entitled “Quality Assurance” grants the Administrator permission to request material in order “to ascertain [SREs’] conformity with the” program’s vague requirements, but only states that the SREs “*should*” provide the requested material, not that they *shall*. § 29.23; 84 Fed. Reg. at 30014.

The Fitzgerald Act simply does not authorize DOL to implement this system, through which the Department is delegating to the private sector the responsibility to “formulate and promote” apprenticeship programs, without providing any baseline standards to ensure that the system’s apprentices are not exploited.

⁵ *See also* U.S. Equal Employment Opportunity Commission, *Coverage of Labor Unions and Joint Apprentices*, https://www.eeoc.gov/employers/coverage_union.cfm (last visited Aug. 23, 2019); U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination Questions & Answers*, <https://www.eeoc.gov/facts/qanda.html> (last visited Aug. 23, 2019) (suggesting that, in addition to Title VII, the Americans with Disabilities Act and Genetic Information Nondiscrimination Act also only apply to apprenticeship and training programs controlled by labor-management committees).

IV. If DOL Proceeds with this Program, It Must Clearly and Permanently Exclude the Construction Industry.

The construction industry is complex and highly dangerous. The proposed program is an untested experiment, for which DOL is providing little guidance. It should not be applied to our industry, where poor training can endanger lives and undermine the quality of the industry, and where a robust and well-proven system already exists.

The construction industry is inherently dangerous. While construction workers comprised approximately 7% of the overall U.S. workforce in 2018,⁶ recent data show that 19% of private-sector workplace fatalities – 971 out of a total of 5,147 reported workplace deaths – were in construction, making the construction fatality rate (9.5) almost three times the rate for all private-sector workers in the U.S. (3.5).⁷ There were also an estimated 198,100 occupational injuries and illnesses reported by private sector construction employers in 2017, which is equivalent to a rate 19% higher than the average of all other private industry sectors (3.1 versus 2.6 per 100 FTEs, respectively).⁸ It is estimated that the risk of acquiring an occupationally-

⁶ U.S. Bureau of Labor Statistics (“BLS”), U.S. Dep’t of Labor, *Labor Force Statistics from the Current Population Survey*, “Table18b: Employed Persons by Detailed Industry and Age” (2018), <https://www.bls.gov/cps/cpsaat18b.htm>.

⁷ BLS, U.S. Department of Labor, *2017 Census of Fatal Occupational Injuries*, “Number and rate of fatal work injuries by industry sector, 2017” (2018), <https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm>; <https://www.bls.gov/iif/oshwc/foi/cfch0016.pdf>.

⁸ BLS, U.S. Department of Labor, *2017 Survey of Occupational Injuries & Illnesses Charts Package*, “Incidence rates and numbers of nonfatal occupational injuries and illnesses by private industry sector, 2017” 3 (2018), <https://www.bls.gov/iif/osch0062.pdf>.

related disease over the course of a 45-year career is 2 to 6 times higher for construction workers than for non-construction workers.⁹

Due to the complexities of the construction industry, it is critical that – as the Federal Committee explained over 80 years ago – apprentices do not learn to perform only specialized tasks, but that they are instead trained to obtain mastery over all of the skills required for the particular occupation. As Professor Peter Philips described,

Construction needs professional craft training because each new building, each new industrial facility, each new road is in many ways a unique, one-of-a-kind, distinctive project. No two projects are exactly alike and most projects differ from each other in myriad ways. The custom character of construction activity requires complex teamwork and professional judgment. The blue-collar workers in construction are at the end of a long line of planning and execution beginning with engineers and architects, followed by project managers, passed to general contractors and subdivided among a host of subcontractors who finally marshal the army of blue-collar workers who actually build the roads and erect the buildings that are the physical layout of the American economy. Many things can go wrong between the initial vision of an owner and the building that rises up from the ground. That is why the workers actually constructing the building (or road or factory) have to know what they are doing and what others intend. This is why construction workers who have completed a certified apprenticeship program are professionals. They have to be able to form their own judgment at the last instance regarding whether the wall is going up right, the wires are being strung correctly, the fixtures are in the right place and whether the hundreds of other decisions and implementations make sense and truly reflect the owner's original vision.¹⁰

Beginning well before the NAA was passed and continuing with DOL's protective standards as a benchmark, the construction industry has developed an extensive, high-quality apprenticeship training system, which has long provided significant training opportunities.

⁹ K. Ringen et al., *Risks of a lifetime in construction. Part II: Chronic occupational diseases*, 57 Am. J. Ind. Med. 1235 (2014) (included in the Appendix to these comments).

¹⁰ Peter Philips, *Wisconsin's Prevailing Wage Law: An Economic Impact Analysis* 8-9 (2015) (hereinafter "Philips, *Wisconsin's Prevailing Wage Law*") (included in the Appendix to these comments).

- A. The Construction Industry has Developed an Extensive, High-Quality Apprenticeship Training System, which Meets and Exceeds the Department's Minimum Standards.

Recognizing the value of Registered Programs in training workers to operate safely in this complex industry, building trades unions and their partner contractors have developed high-quality apprenticeship programs. More than two-thirds of all civilian registered apprentices are trained in the construction industry,¹¹ and seventy-four percent of construction apprentices are trained in the building trades' joint labor-management training programs.¹² As stated, our affiliates' joint labor-management committees spend nearly \$1.3 billion annually to fund training in nearly 1,600 training centers across the country.

To maintain the quality of this training system and to ensure compliance with the Department's standards for Registered Programs, many of our affiliates and their industry partners have created national joint labor-management organizations that, among other activities, develop model standards for use by local joint labor-management apprenticeship training committees. The plumbing and pipefitting industry was among the first to register an apprenticeship program, and one of the first industries to create a national joint training organization.¹³ That organization, the International Pipe Trades Joint Training Committee, continues in existence today, developing model standards for use by local Joint Apprenticeship

¹¹ See *infra*, note 30.

¹² Susan Helper et al., *The Benefits and Costs of Apprenticeship: A Business Perspective*, Case Western Reserve University and U.S. Department of Commerce 65 (2016) (hereinafter "2016 Commerce Department Report"), available at <https://files.eric.ed.gov/fulltext/ED572260.pdf>.

¹³ Robert W. Glover & Cihan Bilginsoy, *Registered Apprenticeship Training in the US Construction Industry*, 47 Education and Training 337, 343 (2005) (included in Appendix to these comments).

Training Committees. See ETA Bulletin FY 2011-14.¹⁴ Similarly, the International Brotherhood of Electrical Workers and the National Electrical Contractors Association created the National Joint Committee on Apprenticeship Standards in 1941. The same year, that Joint Committee developed its first DOL-approved model standards for local apprenticeship programs. Among the goals of those model standards was to encourage local unions and contractors to “resist the . . . temptation to dilute these standards in favor of a shortcut in turning out ill-equipped workers.”¹⁵ Most of NABTU’s other affiliated unions followed suit in the post-World War II years, as the Registered Program system expanded in the construction industry. For example, the Bricklayers created their model standards in 1945, the Boilermakers in 1959, the Plasters and Cement Masons in 1960, and the Operating Engineers in 1962.

NABTU’s affiliated unions now all have national organizations devoted to the continued development of model guideline standards for use by local joint labor-management apprenticeship training committees. These standards are developed in cooperation with the Department, and once they are “certified” by DOL, the local apprenticeship programs use them as guides to develop local standards for approval and registration. See ETA Bulletin FY 2012-07 (explaining the approval process for National Guidelines for Apprenticeship Standards and National Standards of Apprenticeship).

The model guideline standards developed by building trades unions and contractors ensure the protection of apprentices and compliance with Department requirements by including the key provisions discussed above, including those: (1) detailing in-class and on-the-job training

¹⁴ See Employment Training Administration, U.S. Department of Labor, ETA Bulletin (hereinafter “ETA Bulletin”), available at <https://www.doleta.gov/OA/fitzact.cfm>.

¹⁵ Grace Palladino, *Dreams of Dignity, Workers of Vision* 205 (2d ed. 2016).

requirements; (2) setting out the wage progression applicable to apprentices, which is typically tied to the journeyworker rate in the applicable collective bargaining agreement; (3) providing for periodic review of apprentices; (4) setting out appropriate journeyworker-to-apprentice ratios intended to protect the safety of apprentices and to ensure apprentices receive quality on-the-job training; (5) providing for mandatory safety training for apprentices; (6) requiring that instructors are subject matter experts who receive training in educational methods;¹⁶ (7) providing an independent procedure to resolve disputes between apprentices and the program; and (8) ensuring nondiscrimination in the operation of the program and affirmative action in the selection of apprentices. *See, e.g.*, ETA Bulletins FY 2011-09 (Finishing Trades Institute), FY 2011-14 (International Pipe Trades), FY 2011-23 (Operating Engineers National Training Fund), FY 2011-25 (Electrical Industry), FY 2011-27 (Plasterers and Cement Masons), FY 2012-08 (Iron Workers), FY 2012-11 (Elevator Industry), FY 2012-16 (Outside Electrical Industry), FY 2012-21 (Residential Electrical Industry).

B. The Construction Industry's Registered Apprenticeship System has Yielded Tangible Benefits.

The construction industry's sophisticated and well-regulated apprenticeship system has yielded tangible benefits for the apprentices, the industry and the public. In the past 10 years, 494,000 apprentices have graduated from building trades apprenticeship programs, a number that would have been higher had it not been for the Great Recession.¹⁷ Given DOL's and each

¹⁶ Indeed, each of NABTU's affiliates and their contractor partners provide extensive instructor training programs, which are designed to increase instructors' proficiency in instructional techniques and materials and to acquaint instructors with the philosophy and principles of education, especially trade, industrial, and technical education. *See, e.g.*, Glover & Bilginsoy, *supra* note 13, at 343.

apprentice program's strict requirements, these graduates are uniquely prepared to succeed in the construction workforce.

The completion rates from these Registered Programs generally meet or exceed those in the country's community college systems. For example, the completion rate for Registered Programs in Michigan is higher than the graduation rate for all but two of that state's public community colleges, and, on average, those who complete one of NABTU's affiliates' apprenticeship programs earn more than those receiving an associate's degree, without incurring burdensome student debt. In addition, while veterans account for 3% of Michigan's population under the age of 55, they make up 6% of registered apprentices in the state.¹⁸

The enhanced EEO requirements for Registered Programs – which DOL based on “established national best practices,” 80 Fed. Reg. at 68909 – have given rise to innovative efforts by the building trades to ensure that Americans from all backgrounds can gain entry into established construction Registered Programs. State and local NABTU building and construction trades councils and their community partners have established more than 150 apprenticeship readiness training programs across the U.S. that focus on creating pathways to Registered Programs for women, people of color, and veterans. Of the 4,800 individuals who have successfully completed a Building Trades apprenticeship readiness program since 2016, 70% were from communities of color and 22% were women. Sixty percent of apprenticeship readiness program graduates have been placed in Building Trades Registered Programs. Overall,

¹⁷ In February 2010, the national construction unemployment rate was 27.1%. Since there is no way to train apprentices without the opportunity for on-the-job training, the number of construction industry apprentices necessarily plummeted during the recession.

¹⁸ Public Sector Consultants Inc., *Benefits of Michigan Apprenticeship Programs* 1 (2017), <https://publicsectorconsultants.com/wp-content/uploads/2017/05/Benefits-of-Apprenticeships-FINAL-April-2017.pdf>.

in the past 10 years, NABTU and our signatory contractors have invested over \$100 million in outreach efforts targeting under-represented communities.

As ardent supporters of the military, NABTU, its affiliates and their contractor partners have developed programs to facilitate the transition of military personnel into their joint labor-management apprenticeship programs. Helmets to Hardhats, a program created by NABTU and various contractor associations, assists veterans and members of the military, Reserves and National Guard to find training in joint labor-management Registered Programs, which prepares them for quality careers in the construction industry. In the last sixteen years, over 33,000 service members have successfully transitioned from the military into our Registered Programs through Helmets to Hardhats. In addition, NABTU's affiliates, in conjunction with Helmets to Hardhats, have also established their own individualized programs. For example, the United Association of Plumbers and Pipefitters created the United Association Veterans in Piping Program; the Sheet Metal, Air, Rail and Transportation Workers established the SMART Heroes Program; and the International Brotherhood of Electrical Workers formed the Veterans Electrical Entry Program. These programs, partnerships between the unions and their contractor associations, provide service men and women free training before they leave the military, either on military bases or at apprentice training facilities across the country, and then grant the graduates of these programs direct entry into the joint labor-management apprenticeship programs when they separate from military service.

The construction industry's joint labor-management Registered Program system has also been extremely successful in addressing the hazards and complexities of the construction industry. Because there are significantly more apprenticeship programs in states with prevailing wage laws than in those without, the impact of the building trades' major investment in

apprenticeship training can be seen by comparing the performance of the construction industry in these two sets of states.¹⁹

Construction worksites in prevailing wage states are safer than in states without those laws. Recent research shows that repeals of prevailing wage laws were associated not only with an increase in the prevalence of injuries, but with an increase in severity as well, due in part to the lower investment in the kind of safety training provided in apprenticeship programs.²⁰ In fact, not only is training itself critically important in ensuring worker safety in construction, “where challenges and the work environment can change rapidly,” but “trainer competency and workplace requirements for training are equally significant in assuring worker safety and providing a positive safety culture.”²¹ Mandatory safety training provided by instructors who are required to meet a high level of competency is one of the hallmarks of Registered Programs.

¹⁹ For example, in 2012, states with prevailing wage laws had 65% more enrolled apprentices and 60% more graduating apprentices per hour of work than states without prevailing wage laws. Robert Bruno & Frank Manzo, *The Impact of Apprenticeship Programs in Illinois: An Analysis of Economic and Social Effects* 3 (2016), available at https://ler.illinois.edu/wp-content/uploads/2015/12/PCMR-ILEPI-ImpactofApprenticeshipPrograms_NewCover.pdf; see also Frank Manzo & Kevin Duncan, *An Examination of Minnesota’s Prevailing Wage Law Effects on Costs, Training, and Economic Development* 12-13 (2018), available at <https://midwestepi.files.wordpress.com/2018/07/mepi-csu-examination-of-minnesotas-prevailing-wage-law-final.pdf> (summarizing research documenting an average of 40% decrease in the rate of apprenticeship training after repeal of prevailing wage laws); Peter Philips, *Kentucky’s Prevailing Wage Law: An Economic Impact Analysis* 2 (2014), available at <http://www.faircontracting.org/wp-content/uploads/2014/02/Kentucky-Report-2014-Philips.pdf>. (“Prevailing wage law repeals lead to a loss of registered apprenticeship training and a corresponding loss of skills and income.”).

²⁰ Zhi Li et al., *The Effect of Prevailing Wage Law Repeals and Enactments on Injuries and Disabilities in the Construction Industry*, *Public Works Management & Policy* 14 (2019) (included in the Appendix to these comments).

²¹ Henry Miller et al., *An Analysis of Safety Culture & Safety Training: Comparing the Impact of Union, Non-Union, and Right to Work Construction Venues*, 6 *OnLine Journal for Workforce Education and Development* 1, 2 (Fall 2013), <https://pdfs.semanticscholar.org/b9df/f8c4f85ebbf6d0cf298ba2f03625f3e0c3d7.pdf>.

In addition, workers in prevailing wage states are, on average, 14% more productive than in non-prevailing wage states. The productivity differential – although most marked on public works projects – applies on private sector jobs as well, as the pool of skilled labor is available across the sectors.²² The increased productivity makes complete sense: As discussed, to be productive, construction employers need workers who are “skilled and flexible enough to apply their trades to individual projects that differ from one job site to another,” *i.e.*, workers who have been trained “in the fundamentals of the trade as well as specialized skills.”²³ Construction employers accordingly benefit from apprenticeship training that results in the “certification of the worker as a qualified journey worker, and sustains a relatively homogenously skilled labor force that reduces information and search costs.”²⁴

The investment that our affiliates and their contractors have jointly made in the Registered Apprenticeship system has also yielded long-term financial advantages for the apprentices, for the industry and for the public at large. Although the estimates range in magnitude, there is no question construction workers who complete their apprenticeships have a far more direct route to the middle class than those who do not. For example, DOL estimates that registered apprentices who complete their program earn approximately \$300,000 more

²² Philips, *Wisconsin’s Prevailing Wage Law*, *supra* note 10, at 1.

²³ Cihan Bilginsoy, *Wage Regulation and Training: The Impact of State Prevailing Wage Laws on Apprenticeship* 3-4 (2003), available at https://www.researchgate.net/publication/23696701_Wage_Regulation_and_Training_The_Impact_of_State_Prevailing_Wage_Laws_on_Apprenticeship/link/546e1d140cf2b5fc176041ec/download.

²⁴ *Id.*

during their career than non-apprenticeship workers.²⁵ An Illinois study focusing just on construction Registered Programs found that apprentices who completed the program increased their earnings by \$3,442 annually, or by \$199,850 over their projected tenure in the trades (accounting for out-of-pocket expenses).²⁶ And when looking at the impact on the economy at large, in Illinois, where joint labor-management construction apprenticeship programs make up 99.2% of all privately-funded apprenticeship expenditures, the “economic return on investment from these construction programs is \$9.14 per dollar spent on worker training,” or, if tax revenues and savings in unemployment compensation, food stamps and other welfare costs are taken into account, \$10.98 per dollar invested.²⁷

Given the proven value of the construction industry’s Registered Apprenticeship system, DOL should be seeking to preserve it, not to undermine it. Permitting the proposed and completely untested Industry Programs in our industry would, in fact, create a huge incentive for those construction contractors that are seeking to cut corners and reduce their costs to turn away from the Registered Programs, to the detriment of workers – in terms of wages, safety and quality of training – and ultimately, of the industry at large, which is sorely in need of workers with greater, not lesser, skills. It would also disserve the interests of prospective construction workers – including transitioning military service members and members of underserved communities – who, unable to tell the difference between an Industry Program and a Registered

²⁵ DOL Apprenticeship Toolkit, Frequently Asked Questions, <https://www.dol.gov/apprenticeship/toolkit/toolkitfaq.htm#2e> (last visited Aug. 15, 2019). Although DOL’s estimate is based on all registered apprenticeship programs, the overwhelming majority of such programs are in the construction industry and the majority of those programs are building trades apprenticeship programs.

²⁶ Bruno & Manzo, *supra* note 19, at 21.

²⁷ *Id.* at 19.

Program, could easily be duped into signing up for programs lacking the protections that Registered Programs promise. And this system could easily make the better-skilled apprentices graduating from Registered Programs less competitive, since they would face an industry flooded with lower paid “apprentices.”

In the NPRM and in its recent Training and Employment Notice (“TEN”), DOL has stated its intent “to create a parallel apprenticeship system . . . without undermining the pre-existing successful efforts.” TEN 30-18 Change 1 at 11 (June 25, 2019); *see also* 84 Fed. Reg. at 29980 (intent is to “establish[] a parallel apprenticeship system that avoids undercutting the current Registered Apprenticeship system where it is widespread”). The only way to avoid “undercutting the current Registered Apprenticeship system” in the construction industry, which DOL acknowledges is the most widespread of any existing system, is to permanently prohibit SREs and Industry Programs in the construction industry.

C. DOL Should Eliminate the Formula for Determining Which Sectors Provide “Significant Registered Apprenticeship Opportunities.”

Rather than clearly and permanently excluding the construction industry from the proposed system of Industry Programs, DOL has proposed a “deconfliction” formula for determining whether a sector offers “significant registered apprenticeship opportunities.” § 29.31; 84 Fed. Reg. at 30015. The formula is illogical and unnecessary, and should be eliminated.

DOL has already acknowledged that the construction industry provides significant apprenticeship opportunities. 84 Fed. Reg. at 29980. By DOL’s own calculations, in each of the past five years, the construction industry has averaged approximately 48% of all federal registered apprentices, or approximately 144,000 apprentices in the federal system alone. *Id.* at 29981 n.19. DOL concedes that these numbers underestimate the full extent of construction

industry apprenticeship opportunities, since they do not include data from many of the SAA states. These numbers also understate the construction industry's contribution to the apprenticeship system by including the military in its calculation.

The military's registered apprenticeship system simply is not comparable to private sector programs. "While civilian apprentices are trained mainly for skills they would not otherwise develop, [the U.S. Military Apprenticeship Program (USMAP)] mainly documents skills that are developed in the normal day-to-day activities of service members." *USMAP Implementation Study* at 6.²⁸ As a practical matter, *all* service members are "apprentices." They all receive classroom instruction in their specific occupation, followed by progressive on-the-job training with intensive supervision and coaching. *Id.* at 6, 10. The only difference between service members who enroll in the USMAP and those who do not is that the enrolled apprentices "document the mix of work experiences on various tasks that are part of their normal assignment," in exchange for which they receive "credentials that will be recognized by civilian employers." *Id.* at ii; *see also* 84 Fed. Reg. at 29981 (USMAP "provides a credential to members of the U.S. military based on their military training and experience").²⁹ The number of service personnel who register as apprentices in the military therefore says nothing about the scope of the military's training program. Instead, it just measures the number of military personnel who have agreed to document their routine in-class and on-the-job training. *USMAP*

²⁸ Urban Institute and L&M Policy Research, *The United Services Military Apprenticeship Program (USMAP): Implementation Study and Feasibility of an Impact Study* (2016) (hereinafter "*USMAP Implementation Study*"), available at [https://www.dol.gov/asp/evaluation/completed-studies/The_United_Services_Military_Apprenticeship_Program_\(USMAP\).pdf](https://www.dol.gov/asp/evaluation/completed-studies/The_United_Services_Military_Apprenticeship_Program_(USMAP).pdf)

²⁹ Although the USMAP Implementation Study found that some registered apprentices received added hours of specialized training, the additional amounts were "modest." *USMAP Implementation Study* at 35.

Implementation Study at vi. Accordingly, in calculating a particular industry’s proportionate representation in the Registered Apprenticeship system, DOL should only take into account the number of apprentices in *civilian* Registered Programs, *i.e.*, those that provide new entrants to a field with a greater degree of training than they would ordinarily obtain. By that measure, the construction industry provides 70% of Registered Program opportunities.³⁰

There is therefore absolutely no question that the construction industry provides “significant” apprenticeship opportunities. And as long as the Industry Program system is not permitted to undercut the construction industry’s existing Registered Apprenticeship system, there is no reason to believe that it will become any less robust, regardless whether other industry sectors become more active in this arena. As discussed below, DOL itself has stated that, even with its proposed expedited process for Industry Programs to transition to Registered Programs, the Department does not anticipate many programs will seek registration, 84 Fed. Reg. at 29977-78, a proposition we question. But while an increase in the number of non-construction Registered Apprenticeship opportunities in other industries may mean that the *proportion* represented by the construction industry could diminish, there is no reason to believe it would mean fewer opportunities in the construction sector – *i.e.*, that the Registered Apprenticeship opportunities in construction sector would be any less “significant.”

In short, the formula DOL is proposing for purposes of “deconfliction” serves no useful purpose. DOL has stated its intent to avoid undercutting the current Registered Apprenticeship system “where it is widespread,” and even with its underestimate of the scope of the construction

³⁰ See 84 Fed. Reg. at 29980-81 nn.18-19 (Construction’s 144,000 federal registered apprentices averaged 48% of the federal program, and the military’s 94,000 averaged 32%; total federal registered apprentices therefore averaged approximately 300,000 during this period; subtracting the military’s apprentices would leave 206,000, of which construction’s 144,000 apprentices would represent 70%).

industry's programs, DOL has identified construction as a sector where the system is unquestionably "widespread." DOL should therefore permanently exclude the construction sector from the proposed Industry Program system.³¹

D. DOL Must Describe "Construction" to Convey More Clearly the Full Scope of the Industry's Widespread Apprenticeship System.

To fully insulate the construction industry's widespread and well-established Registered Apprenticeship system from this new, experimental program, DOL must give SREs and Industry Programs clear notice of the scope of the exemption. DOL proposes to "only recognize SREs that seek to recognize Industry Programs in *sectors* without significant registered apprenticeship opportunities." 84 Fed. Reg. at 29980 (emphasis added). It would do so by looking at "federal registered apprentices from prior years by *sector*, [using] pertinent North American Industry Classification System (NAICS) codes." *Id.* (emphasis added). In the proposed "deconfliction" regulation, the proposal states that, "[t]he Department will only recognize Standards Recognition Entities that seek to recognize Industry Programs in *sectors* without significant registered apprenticeship opportunities." *Id.* at 30015 (emphasis added).

Yet, in stating that it will not accept applications from SREs in the construction industry, DOL has proposed an abbreviated description of that industry sector, stating that it will not accept applications from SREs for programs that "equip[] apprentices to provide labor whereby materials and constituent parts may be combined on a building site to form, make, or build a structure." *Id.* at 29981 n.22. To ensure that the exemption fulfills DOL's goal of "preserving

³¹ If DOL nonetheless has some as-yet unarticulated reasons for assuming that other industry sectors may, in the future, develop more significant Registered Apprenticeship opportunities and for wanting to maintain a process for insulating *those* industries from the Industry Program system, NABTU proposes that DOL revise the deconfliction provision, § 29.31(b), to define "a sector with significant apprenticeship opportunities" as (i) construction; (ii) the military; and (iii) any other sector that meets a proportional or numerical threshold.

well-established registered apprenticeship programs in construction,” *id.*, NABTU urges DOL instead to utilize the description of the construction sector in the NAICS Manual, which provides a fuller picture of the activities encompassed by our industry: “Activities in this sector are erecting buildings and other structures (including additions); heavy construction other than buildings; and alterations, reconstruction, installation, and maintenance and repair.” NAICS Manual 19 (2017).³²

DOL drew the language in the NPRM from the Eighth Circuit’s decision in *Union Asphalts & Roadoils, Inc. v. MO-KAN Teamsters Pension Fund*, 857 F.2d 1230, 1234 (8th Cir. 1988). In seeking to define the “building and construction industry” for purposes of the Employee Retirement Income Security Act (“ERISA”), the Eighth Circuit turned to the National Labor Relations Act (“NLRA”), and particularly, to the National Labor Relations Board’s (“NLRB’s” or “Board’s”) decision in *Carpet, Linoleum, and Soft Tile Local Union No. 1247*, 156 NLRB 951, 959 (1966) (*Indio Paint*). The Administrative Law Judge in *Indio Paint* was grappling with whether an employer whose employees installed carpets, among other tasks, was an “employer engaged primarily in the building and construction industry,” for purposes of NLRA Section 8(f), 29 U.S.C. § 158(f). In a decision endorsed by the Board, the ALJ found that Congress used the term “building and construction industry . . . ‘in the traditional sense in which [they are] customarily used in common parlance’ as well as technical industrial parlance.” *Indio Paint*, 156 NLRB at 957 (quoting *Animated Displays Company*, 137 NLRB 999, 1021 (1962)). He therefore proceeded to survey a series of traditional and technical sources.

The ALJ began with the U.S. Department of Commerce’s *Construction Review*, Vol. 3 (1957 Suppl.), which defined construction work to include the following:

³² Available at https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

Construction covers the erection, maintenance and repair (including replacement of integral parts), of immobile structures and utilities, together with service facilities which become integral parts of structures and are essential to their use for any general purpose. It includes structural additions and alterations. Structures include buildings . . . and all similar work which are built into or affixed to land Construction covers those types of immobile equipment which, when installed, become an integral part of the structure and are necessary to any general use of the structure. This includes such service facilities as plumbing, heating, air-conditioning and lighting equipment

Indio Paint, 156 NLRB at 957-58 (alterations in original).

The ALJ then turned to the Standard Industrial Classification (SIC) Manual, the precursor to the NAICS system, which defined construction to “include[] new work, additions, alterations, and repairs.” *Id.* at 958. And the ALJ also reviewed various court decisions. Based on all of this, the NLRB “adopted a broad definition of construction work[,]” which not only “subsumes the provision of labor whereby material and constituent parts may be combined on the building site to form, make, or build a structure[,]” but also “encompasses employers that make repairs to, and replace integral parts of an immovable structure,” among other things. *Cajun Co.*, 349 NLRB 1031, 1033 n.4 (2007) (citing cases reaching back to *Indio Paint*).

The Board has continued to cite *Indio Paint*, the 1957 edition of the Construction Review, and more recent versions of the SIC Manual in describing its “broad definition of construction work.” *Cajun Co.*, 349 NLRB at 1033 n.4; *F.H.E. Services*, 338 NLRB 1095, 1098 (2002); *Carpenters (Rowley-Schmlingen)*, 318 NLRB 714, 715 (1995) (citing the definition of construction in the then-current SIC Manual as including “new work, additions, alterations, reconstruction, installations and repairs”); *South Alabama Plumbing*, 333 NLRB 16 (2001); see also 29 U.S.C. § 158(e) (construction industry exception to the NLRA’s prohibition of restrictive subcontracting – or “hot cargo” – agreements applies to work “done at the site of the construction, alteration, painting, or repair of a building, structure, or other work”).

The Board has, moreover, recently reaffirmed that its “broad definition of construction work” is consistent with the NAICS Manual’s description of the construction sector. Earlier this month, the Board issued a notice of proposed rulemaking that, among other things, would change the rule regarding the circumstances under which a representation election may move forward under provisions of the NLRA that apply only to employers and unions in the “building and construction industry.” 84 Fed. Reg. 39930, 39938-39 (Aug. 12, 2019). In analyzing the impact of its proposed rule under the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601, the Board stated, “the proposed [rule] is only relevant to construction-industry small employers and labor unions because Section 8(f) of the Act applies solely to such entities in the building and construction industries. *These construction-industry employers are classified under the NAICS Sector 23 Construction.*” *Id.* at 39954-55 (emphasis added).

The description of construction proposed in the Department’s NPRM does not clearly convey the wide array of activities the NLRB recognizes as included within the building and construction industry. In fact, it omits a key part of the formulation used by both the Eighth Circuit and the NLRB: that construction “*subsumes* the provision of labor whereby material and constituent parts may be combined on the building site to form, make or build a structure.” *Union Asphalts*, 857 F.2d at 1234 (emphasis added); *Indio Paint*, 156 NLRB at 958; *compare with* 84 Fed. Reg. at 29980 (omitting the term “subsume”). To “subsume” means “to include or place within something larger or more comprehensive: encompass as a subordinate or component element.” See Merriam-Webster On-Line Dictionary, <https://www.merriam-webster.com/dictionary/subsume> (last visited Aug. 23, 2019). It does *not* mean “limited to.” If DOL truly intends to rely on ERISA and the NLRA, it must revise its proposed description to make clear that these are tasks that the industry “includes.” A condensed description that, by its

terms, lists only some aspects of the industry would not serve the interests of the SREs seeking DOL's recognition, the Industry Programs seeking the SREs' recognition, or the stakeholders in the construction industry seeking to safeguard their existing programs.

Using the definition of the construction *sector* in the current NAICS Manual would more clearly convey the industry's breadth: "Activities in this sector are erecting building and other structures (including additions); heavy construction other than buildings; and alterations, reconstruction, installation, and maintenance and repairs." NAICS Manual at 19. As just explained, the NLRB has affirmed that the NAICS system accurately describes its own understanding of the scope of the building and construction industry. It is, moreover, the NAICS description to which DOL turned to estimate the cost impact of the Proposed Rule in all industries, including the construction industry.³³ And it is the description DOL used to determine the significant number of apprenticeship opportunities provided by our sector. 84 Fed. Reg. at 29980 (percentage based on NAICS code).³⁴ It should also be the description DOL uses to describe the sector in which it will *not* permit Industry Programs.

³³ The NPRM utilized the Small Business Administration's ("SBA's") Small Business Size Standards to estimate the impact of the proposed rule on small entities for all industries, including the construction industry, which in turn, categorizes industries according to their NAICS descriptions. See 84 Fed. Reg. at 29999 nn. 48-49; Exhibit 28 (Construction), *id.* at 30009.

³⁴ DOL explained that it was looking to ERISA and the NLRA instead of the NAICS system because "deciding whether an SRE seeks to recognize programs in construction based on an applicant-supplied NAICS code would be under protective because NAICS codes are a function of an entity's primary business activity, and some entities (or consortia of entities) that would train apprentices for construction work do not have construction as their primary activity." *Id.* at 29981 n.22. This concern is easily addressed by focusing not on the industry sector which the *applicant* primarily occupies, but instead, on the sector of "the occupations apprentices are actually trained for." *Id.* An SRE seeking to recognize Industry Programs for occupations utilized in "erecting buildings and other structures (including additions); heavy construction other than buildings; and alterations, reconstruction, installation, and maintenance and repairs,"

E. SRE Applicants Must be Required to Detail the Occupations and Credentials Relating to the Industry Programs They Seek to Recognize.

To ensure that SREs are not recognizing Industry Programs in the construction industry, the application form must require them to disclose specific information about both the occupations for which they are seeking to recognize Industry Programs and the credentials apprentices will obtain. The current version requires the applicant to “list the industries, occupations and all credentials relating to programs your organization is seeking to recognize,” and to affirm that the organization will not recognize programs in the construction industry (utilizing the definition from *Union Asphalts*, discussed above). Section I, “Scope of Apprenticeship Program(s),” 84 Fed. Reg. at 30016 n.1. The form also requires the applicant to provide more specific information about the occupations and credentials, but *only* for “sectors where independent credentials exist and are not issued by the program.” Section III.D, “Occupations and Occupational Credentials,” *id.* at 30018. To advise the applicant more clearly of the nature of the construction industry exclusion, and to enable DOL, the panel of reviewers and concerned stakeholders to confirm that the SRE will not be recognizing programs in the construction industry, the application must be modified in three respects.

First, the form must put applicants on notice of the full breadth of the construction industry exemption by requiring them to affirm that they will not recognize programs in the construction sector, described to include “erecting buildings and other structures (including additions); heavy construction other than buildings; and alterations, reconstruction, installation, and maintenance and repairs.”

would be seeking to recognize programs in the construction industry, and – regardless of the industry sector in which the entity primarily operates – it would be precluded from doing so.

Second, each SRE applicant must be required to disclose the O*NET Code for every occupation for which it seeks to recognize an Industry Program, and each Industry Program must be required to list the O*NET Code for each occupation for which it intends to provide training. The Bureau of Labor Statistics has matched O*NET Codes with NAICS Codes.³⁵ In particular, the NAICS construction industry sector encompasses and is cross-referenced to job activities in O*NET Code occupations starting with 47, as well as an array of other non-47 occupations. By checking the O*NET Code of the occupation(s) for which a prospective SRE seeks to recognize Industry Programs or an Industry Program seeks to provide training, the SRE, Industry Program, DOL and/or interested stakeholders could easily determine whether the prospective program seeks to train for occupations in the construction industry. This approach would carry out DOL's stated intent of avoiding being "under protective," by "focus[ing] on the occupations apprentices are being trained for, [which] is the most direct method of preserving well-established registered apprenticeship programs in construction." 84 Fed. Reg. at 29981 n.22.

Third, rather than simply disclosing the "policies and procedures" the SRE intends to use to evaluate and monitor its Industry Programs' "occupations and occupational credentials," each SRE applicant must be required to provide the following information:

- The specific industry(ies) for which it will be recognizing programs;
- The occupation(s) within that/those industry(ies) for which the programs will provide training;
- The O*NET Code for each such occupation (as described above);

³⁵ See BLS, U.S. Department of Labor, *Employment Projections Data*, "Table 1.9 2016–26 Industry-occupation matrix data, by industry" (2017), <https://www.bls.gov/emp/tables/industry-occupation-matrix-industry.htm>; see also O*NET OnLine, Browse by Industry (Construction), <https://www.onetonline.org/find/industry?i=23&g=Go> (last updated August 6, 2019).

- The name of the credential(s) for which the program will provide training;
- The organization issuing the credential(s) (whether it is the program or an entity outside the program); and
- Average time required to obtain the credential.

Only with this degree of detail can DOL and the public be assured that SREs are complying with the prohibition on recognizing Industry Programs in the construction industry.

V. The Proposed System Lacks Transparency and Important Mechanisms for Public Engagement.

In stark contrast to the Registered Apprenticeship model, the application process for both SREs and Industry Programs lacks transparency and blocks all public participation. Under the Registered Apprenticeship model, the states perform a role analogous to that of SREs: they approve apprenticeship programs. To gain DOL's approval for its SAA, a state must submit a state apprenticeship law – whether instituted through statute or regulation – that conforms to the requirements of 29 C.F.R. Parts 29 and 30. 29 C.F.R. § 29.13(a)(1). The regulations also require SAAs to submit all proposed modifications in legislation, regulations, policies and/or operational procedures that are planned or anticipated. *Id.* § 29.13(b)(9).

Because state legislative and rulemaking processes are observable by the public, they are transparent. These processes provide the public with important opportunities to weigh in, whether through hearings, town hall meetings, public comments or other forms of advocacy. No such mechanisms exist in the Industry Program model. A prospective SRE may quietly file an application with DOL, and gain DOL's approval, without public notice or participation. Moreover, the proposed regulations emphasize that an applicant does not waive its right under FOIA Exemption 4 to challenge the public disclosure of information contained in its application. 84 Fed. Reg. at 30020.

The proposed process by which SREs will recognize Industry Programs is equally problematic. SREs must inform the Administrator within 30 days *after* recognizing an Industry Program, § 29.22(a)(2); 84 Fed. Reg. at 30013, but the public will only get notice of the Industry Programs recognition annually, § 29.24; 84 Fed. Reg. at 30014 (“The Administrator will make publicly available a list of [SREs] and the Industry Programs they recognize.”). There must be greater transparency and an opportunity for both the Administrator and the public to weigh in with relevant information *before* an SRE approves an Industry Program.³⁶

NABTU recommends that the proposed regulations be modified to provide, first, that DOL post each SRE application on its website, and provide the interested public with 60 days to comment before the review panel meets to consider an application. Second, the regulations should require SREs to post, on the DOL’s website, any application for an Industry Program, and provide the interested public with 60 days to comment before recognizing an Industry Program. This level of transparency is critical, not only to ensure the quality of the prospective SREs and Industry Programs, but to enable the interested public to verify that the program will not be providing training for an occupation in the construction industry.

VI. The Department Should Withdraw its Proposed Expedited Registration Plan for Industry Programs.

³⁶ Under the Registered Apprenticeship model, many SAAs hold public meetings in which prospective sponsors must present their programs for approval and recognition. In New York, for example, all new applications for registration of programs must be posted on the state labor department’s website and the public is given 30 days to submit written comments. 12 NYCRR 601.4(g). Such applications are then discussed at public meetings, which are recorded and made available on the department’s website. In Maryland, the Maryland Apprenticeship and Training Council (MATC), holds public meetings that are advertised on its website to discuss new applications and proposals from existing programs to revise standards. Detailed minutes from those meetings are made available online. Maryland Department of Labor, MATC, <https://www.dllr.state.md.us/employment/appr/apprcouncil.shtml> (last visited Aug. 24, 2019). Many other SAA states, including Nevada, Rhode Island, and Louisiana, follow similar procedures.

In addition to establishing a process for recognizing SREs and Industry Programs, the Department proposes to create an expedited process for recognizing Industry Programs as Registered Programs. Under this process, an Industry Program would be registered by the Office of Apprenticeship as a Registered Program “within 60 days of the Administrator’s receiving all information necessary to make a decision.” 84 Fed. Reg. at 29978; *accord* § 29.25, 84 Fed. Reg. at 30014. The NPRM states that the expedited process “does not alter the requirements for registered apprenticeship programs.” 84 Fed. Reg. at 29977. Because the requirements are not altered, “the Department [does not] anticipate that apprenticeship programs that have chosen not to register to date would now seek to do so under this section.” *Id.* That logic is flawed. By creating an artificial timeline by which an Industry Program’s application must be approved or disapproved, the proposal creates an unwarranted advantage for Industry Programs and an incentive for applicants for Registered Programs to try to game the system by first becoming an Industry Program.

As set forth above, Industry Programs under the proposal will lack most of the hallmarks of Registered Programs. Indeed, there is nothing about Industry Programs that make them any more suited for registration than any other applicant seeking to become a Registered Program. Yet, by creating a new 60-day period by which the Administrator must approve or disapprove an Industry Program’s application for registration, the Department gives Industry Programs an advantage in the application process.

The 60-day period by which the Department must act on an Industry Program’s application to be a Registered Program is also much too short. When a Registered Program merely wants to make a modification or change to its program, the regulations provide for the Department to approve or disapprove the change within 90 days. 29 C.F.R. § 29.3(i). Review of

a proposed change to an already approved program is a much less complex administrative task than determining whether a never-before approved program meets the requirements for registration under Parts 29 and 30. NABTU urges the Department to abide by its statement that the proposal “does not alter the requirements for registered apprenticeship programs” and withdraw its proposal for an expedited process for Industry Programs to become Registered Programs.

VII. The Complaint Procedure for Reporting Complaints Against SREs is Insufficient.

The Department’s proposal includes a procedure for reporting complaints against SREs. Under this procedure, a complaint may be submitted by: (a) an apprentice, (b) the apprentice’s authorized representative, (c) a personnel certification body, (d) an employer, (e) a Registered Program representative, or (f) an Industry Program. § 29.26; 84 Fed. Reg. at 29978, 30014. The complaint must be in writing and must be submitted “within 60 days of the circumstances giving rise to the complaint.” *Id.*

The Department’s list of those who may file a complaint is under-inclusive. Although any employer is allowed to submit a complaint, there is no process for a labor organization to do so unless the labor organization is the apprentice’s authorized representative. NABTU and its affiliates intend to be vigilant in protecting their Registered Programs against intrusion from Industry Programs. An employer that wants to complain about an SRE operating in the construction industry may do so. Yet, labor organizations such as NABTU, its affiliates and their local unions that sponsor Registered Programs, cannot. The proposal should be changed to ensure that labor organizations have standing to bring a complaint against an SRE irrespective of whether the particular labor organization is the authorized representative of an apprentice in the applicable Industry Program.

The procedure's statute of limitations period is also much too short. Under the proposal, SREs will theoretically regulate Industry Programs much as the Department currently does with respect to Registered Programs. As an administrative agency, the final actions of the Department may be challenged under Section 704 of the Administrative Procedures Act, 5 U.S.C. § 704. The limitations period for challenging the Department's actions with respect to a Registered Program is six years. *Sendra Corp. v. Magaw*, 111 F.3d. 162, 165 (D.C. Cir. 1997); 28 U.S.C. § 2401. We are not suggesting a limitations period of that length, but the proposed 60-day period should be no less than six months. *See, e.g.*, 29 U.S.C. § 160(b) (providing for a six-month limitations period in which a party may file an unfair labor practice under the NLRA).

The limitations period should also be amended to clarify that the time for submitting a complaint does not begin to run until the complainant knows, or should have known, of the circumstances giving rise to the complaint. *See, e.g., NLRB v. Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977) (the six-month limitation period does not start to run until “the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]” (alteration in original) (quoting *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962))). The “discovery rule” is a well-settled doctrine that should apply here. Under the doctrine, the accrual of a cause of action is delayed until the complainant has “discovered it.” *Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010). The discovery rule arose in fraud cases and has long been recognized. Without the rule, “the law which was designed to prevent fraud’ could become ‘the means by which it is made successful and secure.’” *Id.* at 644 (quoting *Bailey v. Glover*, 88 U.S. 342, 349 (1875)). As stated above, NABTU and its affiliates will police Industry Programs to help ensure that they do not intrude into the construction industry. Under the proposed rule, for example, an SRE may falsely affirm that it will not

recognize programs in the construction industry. Or, an SRE may recognize an Industry Program that does not satisfy the regulations' minimal criteria in January, but the public would not be aware of the recognition until the SRE publishes its annual list of recognized Industry Programs, § 29.22(j); 84 Fed. Reg. at 30013-14, which could be long past the current proposed sixty-day limitations period or even the six-month period suggested by NABTU. The time to challenge a program that has been recognized contrary to the regulations should not run from "the circumstances giving rise to the complaint," § 29.26; 84 Fed. Reg. at 30014, but rather from the time the claimant discovers, or in the exercise of reasonable diligence should have discovered, the circumstances giving rise to the complaint. Any other rule would reward an SRE's concealment of wrongdoing.

VIII. The Proposed Rule Should be Designated a 'Major Rule' Under the Congressional Review Act.

The Congressional Review Act ("CRA") requires an agency implementing a new rule to first report to Congress whether the regulation is a "major rule." 5 U.S.C. § 801(a)(1)(A). The CRA defines a "major rule" as any rule that the Administrator of the Office of Information and Regulatory Affairs ("OIRA") of the Office of Management and Budget ("OMB") finds has resulted in or is likely to result in (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign enterprises in domestic and export markets. 5 U.S.C. § 804(2).

The NPRM states that OIRA has designated the proposed "rule as not a 'major rule' as defined by 5 U.S.C. § 804(2)." 84 Fed. Reg. at 29981. However, OIRA's designation is based

on the Department's failure to appropriately estimate the proposal's effect on the economy and is therefore erroneous.

Executive Order 12866 ("E.O. 12866") requires the Department to submit all planned regulatory actions to OIRA for review, along with an analysis of the rule's projected impact on the economy. Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1994). OIRA then determines whether the planned action is a "significant regulatory action," and if so, whether it amounts to a "major rule." *Id.* As specified in the CRA, and under the analytic principles set forth in E.O. 12866, "[i]f any undiscounted benefit, cost, or transfer estimate is at least \$100 million in at least one-year . . . , then OIRA will designate the rule major." Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum M-19-14, *Guidance on Compliance with the Congressional Review Act* 6 n.23 (Apr. 11, 2019).

The Department's economic analysis must take all "significantly affected entities" into account, and assess the rule's costs against the "future state of the world in the absence of the rule[.]" *Id.*; see also Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-4 (September 17, 2003). Although it "may sometimes be difficult to quantify," the Department "should provide quantitative analysis when reasonably possible[.]" OMB Memorandum M-19-14 at 7. As set forth in the NPRM, DOL's economic analysis failed to consider the significant costs Industry Programs will incur under the proposed rule, and instead erroneously found that such costs are non-quantifiable. 84 Fed. Reg. at 29994.

The Department estimated that in the program's first year, it will receive 270 SRE applications, 203 of which it will approve. *Id.* at 29983. The Department further estimated that each SRE will approve and monitor ten Industry Programs, for a total of 2,030 recognized Industry Programs. *Id.* at 29984. The Department estimated that, in the first year, each SRE and

Industry Program will have a Training and Development Manager (“Training Manager”), at a cost of \$113.16 per hour (which includes wages, fringe benefits, and overhead), and it based its estimate of the program’s overall costs almost entirely on the discrete actions it anticipates the SRE and Industry Program Training Managers will take. *Id.* at 29985-93.

DOL estimated the SREs’ Training Managers would perform the following tasks:

- (1) SRE Rule Familiarization (2 hours);
- (2) Application Submission (33 hours and 10 minutes);
- (3) Resubmitting Applications (16 hours for 15% of SREs);
- (4) Requests for Administrative Review of Denial (60 hours for 1% of SREs);
- (5) Notification of Substantive Changes (10 hours for 50% of SREs);
- (6) Review, Recognition, and Validation of Industry Program Applications (12 hours x 10 Industry Programs) (12 hours per program seeking recognition);³⁷
- (7) Informing DOL of Industry Program Recognition or Termination (30 minutes);
- (8) Providing Additional Data to DOL (2 hours for 10% of SREs);
- (9) Disclosure of Credentials that Apprentices will Earn (30 minutes);
- (10) Quality Control of Industry Programs (80 hours); and
- (11) Provide Performance Data on Industry Programs (30 hours).

Id. at 29986-89. Thus, the Department concluded that, at most, an SRE will need to expend only 354.6 hours annually to review, approve or disapprove, and provide oversight to ten Industry Programs.

³⁷ The Department assumed “the vast majority of programs seeking recognition would be recognized,” *id.* at 29988, and did not include any estimate of time Training Managers would spend reviewing applications they ultimately rejected.

In estimating the costs to the Industry Programs, the Department declined even a cursory attempt to quantify the costs related to their actual development and operation. Instead, the Department's cost estimate for Industry Programs only included:

- (1) Rule familiarization (1 hour of Training Manager time);
- (2) Provision of Performance Data to the SRE (3 hours of Training Manager time);
- (3) Disclosure of Wages to Apprentices (5 minutes of Training Manager time);
- (4) Disclosure of Ancillary Costs to Apprentices (5 minutes of Training Manager time);
- (5) SRE's Application Fee (\$3,000); and
- (6) SRE's Annual Fee³⁸ (\$500).

Id. at 29998. The proposed rule accordingly quantified only four hours and ten minutes annually, plus \$3,500 in fees, as the cost of operating an Industry Program.

The activities DOL has quantified obviously represent only a small fraction of an Industry Program's responsibilities under the proposed rule. For example, under § 29.22, each Industry Program will be responsible for:

- (1) Developing an apprenticeship program and curriculum;
- (2) Applying to SREs;
- (3) Training apprentices for employment in jobs that require specialized knowledge and experience and involve the performance of complex tasks;

³⁸ See *id.* at 29993 (DOL estimated \$500 as the average annual fee an Industry Program would pay to an SRE).

- (4) Providing structured work experiences, and appropriate classroom or related instruction adequate to help apprentices achieve proficiency and earn credential(s);
- (5) Ensuring that, where appropriate, apprentices receive credit for prior knowledge and experience relevant to the instruction of the Industry Program;
- (6) Providing apprentices industry-recognized credential(s) during participation in or upon completion of the Industry Program;
- (7) Providing a safe working environment for apprentices that adheres to all applicable Federal, State, and local safety laws and regulations;
- (8) Providing apprentices structured mentorship opportunities to ensure apprentices have additional guidance on the progress of their training and their employability;
- (9) Ensuring apprentices are paid at least the applicable Federal, State, or local minimum wage;
- (10) Adhering to any applicable Federal, State, and local laws pertaining to Equal Employment Opportunity (EEO); and
- (11) Submitting complaints regarding SREs, as necessary, under § 29.26.

Id. at 30013-14.

The Department completely failed to consider any of those costs, asserting that it “was unable to quantify the potential costs of apprenticeship programs that would be established under this proposed rule.” *Id.* at 29994. Yet, the Department was able to provide data on the typical costs of Registered Programs, from which it could easily have extrapolated some estimates. The

NPRM cites a 2016 Department of Commerce apprenticeship study noting that apprenticeship programs range in cost from approximately \$25,000 to \$250,000 per apprentice. *Id.* As acknowledged in that study, there are a number of “large fixed costs of setting up and maintaining an apprenticeship program,” all of which new Industry Programs will incur.³⁹ Had DOL attempted to use its experience with Registered Programs to assess the costs of Industry Programs in even two obvious regards, its estimate of the rule’s annual effect on the economy would have increased dramatically.

First, although the Department relied on its past experience with Registered Programs to inform its cost estimates in other areas,⁴⁰ it refrained from doing so to calculate the projected cost-per-apprentice for Industry Programs. Instead of using the 2016 Commerce Department Report to estimate a cost-per-apprentice, the agency states that “additional costs could not be quantified due to a lack of data.” 84 Fed. Reg. at 29998. However, as demonstrated by comparing the following two tables, even if DOL were only to attribute a cost-per-apprentice of \$5,000 – 20% of the Department of Commerce’s lower estimate for Registered Programs – for an estimated ten apprentices per Industry Program, the costs and impact on the economy would increase by more than \$100 million in the first year:

³⁹ See 2016 Commerce Department Report, *supra* note 12, at 20-23 (noting fixed costs including curriculum development, equipment purchases, staff time spent on setup, overhead and management, classroom space, and recruitment).

⁴⁰ See 84 Fed. Reg. at 29984 (“To estimate the number of Industry Programs, the Department looked at the number of programs in the registered apprenticeship system in relevant contexts and, based on those data and related considerations, estimated that each SRE would recognize approximately 32 Industry Programs” over a five-year period).

DOL's Estimated Cost per Industry Program (See NPRM Exhibit 9, 84 Fed. Reg. at 29999)								
Year	Rule Familiarization	Performance Data Collection	Disclosure of Wages and Costs	SRE's Fees	Cost per Apprentice	Total Cost	Industry Programs	Cost per Program
1	\$229,715	\$689,144	\$3,675	\$7,105,000	0	\$8,027,535	2,030	\$3,954

Adjusted Estimated Cost per Industry Program – Including Cost-per-Apprentice								
Year	Rule Familiarization	Performance Data Collection	Disclosure of Wages and Costs	SRE's Fees	Cost per Apprentice (\$5,000 x 10)	Total Cost	Industry Programs	Cost per Program
1	\$229,715	\$689,144	\$3,675	\$7,105,000	\$101,500,000	\$109,527,534	2,030	\$53,954

Second, Industry Programs will obviously have staffing requirements, even a conservative estimate of which would raise the overall costs far beyond the Department's estimates. For example, if each of the predicted 2,030 new Industry Programs hired just one full-time employee at the cost of \$50 per hour (far less than the NPRM's estimated \$113.16 per hour for a Training and Development Manager), the cost of the rule to Industry Programs alone would increase to over \$190 million per year.⁴¹ What's more, this conservative estimate does not include other foreseeable expenses, like equipment purchases, classroom space, and recruitment.

The Department's failure to account for these and similar costs produced an unrealistic forecast of the proposed rule's effect on the economy. Because the establishment of Industry Programs is the main focus of this initiative, any analysis that ignores the costs incurred by Industry Programs to develop and operate their programs cannot truly predict the proposed rule's effect on the economy. A comprehensive analysis that accounts for the cost to prospective and

⁴¹ The 2016 Commerce Department Report, cited by the Department, noted that, "[m]ost of the firms in the study dedicated at least one staff member to manage their programs." *Supra* note 12, at 21.

recognized Industry Programs would show that the Department’s proposed rule is a ‘major rule’ as defined by 5 U.S.C. § 804(2).

CONCLUSION

In partnership with construction industry employers, NABTU and its affiliated unions have built an extensive network of high-quality Registered Programs, which have prepared hundreds of thousands of workers for good-paying, solid careers in the construction industry. The evidence is clear that these programs have yielded tangible results for program participants, for the industry and for the public at large. The proposed new apprenticeship system would have none of the hallmarks that make the Registered Programs so successful and none of the protections that guard apprentices against exploitation. Permitting construction industry employers to take advantage of this watered-down version of apprenticeship by providing workers with lower quality training at minimum pay rates would completely undermine the Registered Programs.

The NPRM makes clear that while seeking to create a parallel apprenticeship system, the Department intends to “avoid[] undercutting the current registered apprenticeship system where it is widespread.” 84 Fed.Reg. at 29980. If DOL decides to go forward with this new system, it can only avoid undercutting the construction industry’s well-established and widespread Registered Programs by clearly and permanently keeping the Industry Program outside the construction sector.