CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
VICE PRESIDENT, WORKPLACE POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

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The Honorable Cheryl M. Stanton
Administrator, Wage and Hour Administration
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

By electronic submission: http://www.regulations.gov

RE: RIN 1235-AA34--Independent Contractor Status under the Fair Labor Standards Act; Notice of Proposed Rulemaking, 85 Fed. Reg. 60600 (Sept. 25, 2020)

Dear Administrator Stanton:

The U.S. Chamber of Commerce (the "Chamber") presents these comments to the Department of Labor ("the Department" or "DOL") in response to its Notice of Proposed Rulemaking and Request for Comments regarding Independent Contractor Status under the Fair Labor Standards Act (the "FLSA" or the "Act"), ("Proposed Rule").

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system. The confusion regarding whether a worker is properly classified as an employee or an independent contractor has long been a vexing problem for many of our members in many different industries and work settings. This has led to considerable amounts of litigation and other legal actions that the Chamber believes will be reduced by the clarity and definitive nature of the Proposed Rule.

In the Proposed Rule, the Department has provided a contemporary interpretation of the economic realities test that has been long relied upon to determine whether a worker should be classified as an employee or an independent contractor under the FLSA. The Chamber believes the Proposed Rule, with certain modifications as described below, properly focuses on modern, understandable, and meaningful factors. This will benefit workers, consumers, entrepreneurs, independent artists, writers and creators, sole proprietors, businesses of all sizes, and the overall economy.

The Proposed Rule provides long-awaited and much needed structure and clarity to the evaluation of worker relationships under the Act. This proposed rule will be seen in light of significant technological changes that have expanded opportunities for workers to provide goods

and services in relationships that thrive on independence, freedom, and flexibility. However, its full value is its application to a wide array of workplaces and relationships.

The use of, and the need for, independent contractors has dramatically increased in recent years, outside of any impact from the development of on-line platforms. Access to independent contractors is critical in industries where securing talent is increasingly competitive and the talent pool prefers short-term, flexible work arrangements without committing to a single employer. Independent contractors allow companies to build a talent pipeline that can be brought on for short term projects when companies need to mobilize quickly in the wake of new technology developments.[1]

With the expanded use of independent contractors has come an ever increasing need for a clear and predictable approach to properly classifying workers. The Proposed Rule answers that need. Specifically, the Chamber supports the Proposed Rule's focus on two core factors for determining independent contractor status: (1) the nature and degree of a worker's control over the work and (2) the worker's opportunity for profit or loss. To further define these core factors, and thus eliminate any doubt as to how common fact situations in independent worker relationships will be treated under this formulation of the economic realities test, the Chamber identifies common elements of independent relationships that are and are not evidence of a lack of control by a worker over the work performed and of a worker's economic opportunities.

With both the core and additional factors set forth in the Proposed Rule, the Chamber urges the Department to clarify the Proposed Rule's comment that an individual worker's choices made after the signing of a contract with respect to various business decisions determine the worker's initiative or independence. Rather, the rule should focus on the worker's *right* to exercise those entrepreneurial choices. Having the right and choosing whether to exercise it are the signs of a worker's independence, not a particular choice that was made. Additional general comments regarding the treatment of all relevant facts relating to the two core factors are set forth below.

The Chamber also urges the Department review and reconsider the proposed additional factors of "skill required," "permanency of the relationship," and "integrated unit". The Chamber proposes that the Final Rule not include the factor of skill required as a standalone additional factor, but that it be incorporated into the second core factor of a worker's "opportunity for profit or loss." The Chamber further proposes that the Department significantly revise its interpretation of permanency of the relationship and integrated unit. Finally, the Chamber urges the Department to consider the following as additional factors: a worker's right to provide services to competing companies; and as an alternative to whether the worker is part

[1] For example, companies investing in emerging technologies such as quantum computing often partner with staffing agencies to build a pipeline of independent contractors with relevant expertise. Given their niche quality, these skill sets can be challenging to identify on a short timeline. Access to specialty talent allows companies to bring on independent contractors with the necessary skills quickly for projects that are often limited in time and scope. This flexibility is key for businesses to stay competitive in early stage development and encourages continued investment as exploratory technologies do not have predictable timelines.

of an integrated unit, whether the worker is otherwise free to provide the majority of services off the physical premises of the business.

The Chamber agrees with the Department's review of applicable formulations of the economic realities test, and provides further supporting and clarifying guidance here to assist the Department in its stated mission to update and clarify the test for the benefit of workers, businesses, entrepreneurs, consumers, and the economy.

Chamber Research Supports the Proposed Rule

In January 2020, the Chamber published a white paper, *Ready, Fire, Aim*, which examined the history and current makeup of the gig economy[2] along with state efforts to regulate it, and the impact of those efforts.[3] The White Paper analyzes the impact of California's new independent contractor legislation, commonly known as AB5, which imposes new narrow requirements on independent worker relationships, ultimately resulting in workers losing the very flexibility that attracts them to these opportunities, if not the opportunities completely. (Id. at 31-32.) Critics of independent contractor relationships, particularly in the gig economy, rely on the false premise that these workers are misclassified; however, the Chamber White Paper explains that the workers generally do meet existing legal tests for independent contractor status – it is those tests that the opponents believe are flawed. (Id. at 32.)

For all of the reasons set forth in the Proposed Rule at 60636, the Chamber agrees with the Department's conclusion that California's recently-enacted AB5 harms workers, consumers, businesses, and the U.S. economy and should not be considered relevant to determinations of the economic realities test under the Act. Additional support for the Department's conclusions that AB5's "ABC Test" of independence is not appropriate under the Act, and is overly restrictive and hostile to independent work opportunities, are detailed throughout the Chamber White Paper (see, e.g., pp. 31 - 37).[4]

Critics of independent worker relationships and the gig economy point to lack of stability and benefits available to independent workers as a reason for reclassification. The Chamber White Paper observes that this ignores the at-will nature of the vast majority of employment relationships in the United States, and the fact that while independent workers may not have certain benefits available, many would not be eligible for them even if they were employees, given the inconsistent and/or part-time nature of their work. These workers often trade traditional

[2] The Chamber Paper defines the gig economy as "the one-to-one exchange of goods and services between service providers and end-market customers facilitated by virtual-marketplace companies (or "platform holders")." (Chamber Paper at 11.) Paper available at https://www.uschamber.com/report/ready-fire-aim-how-state-regulators-are-threatening-the-gig-economy-and-millions-of-workers

[3] It should be noted that while this paper focuses to a large degree on the gig economy, members of the U.S. Chamber in almost every economic sector have worked with independent contractors to provide goods and services. These arrangements long predate the gig economy.

[4] Proponents of changing the law to include more workers in the employee category also claim that gig platforms' business models are inherently wrong, and that they threaten traditional employment relationships and the social safety net. However, data shows that traditional employment still far outpaces independent worker models, and even businesses that contract with independent workers do have their own traditional employees in roles that suit such a relationship: "Gig companies did not undermine the traditional labor market; they provided new opportunities to workers" (internal citation omitted). (Id. at 32-33.)

benefits of a 9-to-5 job for the flexibility and ability to have more control of the independent work lifestyle. (Id. at 34.)

Many of the recent efforts to modernize worker classification definitions aim to narrow the opportunities available for independent work by significantly restricting the definition of independent contractors.[5] Technological innovation has resulted in new ways to work and do business, and the answer is not to expand the employment relationship definition to fit all relationships between a company and a worker, but to find a balanced test that identifies those workers who are legitimately employees while still preserving the independent contractor option for those who desire it. As part of this balance, the Department must also ensure that actual employment relationships are not improperly converted into independent contractor relationships. The Chamber supports the Department's effort in this Proposed Rule to provide clarity to American businesses and workers with clear, accurate interpretations of the key factors indicating the dependent or independent nature of the worker relationship, within the context of the economic realities test under the Act.

COMMENTS

1. The Proposed Rule's Two Core Factors Provide A Straightforward Framework, and Accurate, Probative Factors to Determine the Economic Realities of Worker Relationships.

Workers and businesses must have an easily understood, unambiguous, updated, and uniform test to determine whether a worker is an employee or an independent contractor under the Act. The Department's straightforward focus on two core factors presents a concise interpretation of "economic dependency" grounded in the Act's statutory definition of "employ" and "employer," consistent with Supreme Court precedent, and well-reasoned courts of appeals' decisions. The Chamber includes three general points relevant to the analysis of both core factors here.

First, given the individualized, fact-based nature of the inquiry, as many court cases have detailed, the Department should specifically direct that evaluations of the core (and additional factors) with respect to any worker relationship must, in fact, analyze the particular worker's relationship with the business and own initiative and entrepreneurship; concepts that cannot be determined by reference to generalizations regarding another worker's relationship with a business.[6] Individualized inquiries regarding specific fact situations will drive the correct answer

[5] As the Chamber White Paper noted, lawmakers can address concerns about gig workers' access to health and other benefits while preserving the independent worker model by, for example, expanding access to benefit systems like association health and retirement plans. (Chamber White Paper at p. 5.) See also, Chamber Statement at pp. 3 - 4, https://www.help.senate.gov/imo/media/doc/Olson3.pdf) in which the Chamber encouraged Congress to "… work with this developing economic activity and enhance the flexibility, portability, and certainty of the retirement system to allow independents to obtain retirement security. Simply put, there should be a focus on enhancing the ability of the participants in this new economy to benefit from their entrepreneurial activities and establish a foundation for their own secure retirement."

[6] All relevant evidence must be explored, and there is no threshold or "magic number" or combination of relevant evidentiary facts. Moreover, the relative importance and weight of the facts may change over time as business relationships change over time, and may require individualized examinations at different points, which may alter the conclusions regarding the nature of the relationship during different points in time.

to the question of whether the worker is economically dependent or independent of the business for purposes of the Act.[7] The key question is whether workers are more closely akin to wage earners, who depend on others to provide work opportunities, or entrepreneurs, who create, select, or manage work opportunities for themselves.

Second, the Chamber recommends that the Department fine tune its framework to eliminate any confusion or ambiguity over whether the two core factors have equal weight in the analysis. The Chamber believes the Proposed Rule intends that they do, and to eliminate needless litigation, the Chamber urges the Department to explicitly so state.

Third, the Chamber recommends the Department clarify its statements in the Proposed Rule at page 60622 that the actual practice of workers is more important than what is theoretically possible in a worker's relationship with a business. Specifically, the Proposed Rule states: "[A]n individual's theoretical abilities to negotiate prices or to work for competing businesses are less meaningful if, as a practical matter, the individual is prevented from exercising such rights." The Chamber agrees that if an individual's opportunities to exercise rights to negotiate contract terms, use additional labor and capital in providing services, and also provide services to competing businesses is a practical impossibility because of actions taken by the business it is providing services to, those theoretical rights are less meaningful. However, the Chamber urges the Department clarify that so long as a business does not take actions to foreclose an individual from exercising certain rights, that the individual's choice to not exercise those rights does not diminish their indicia of independence in the relationship.

For both certainty in contracting, and because substantively independence should be measured by the worker's opportunities to affect their profitability and to control the manner and means by which services are performed, a worker who does not exercise a right to compete should still be viewed as in a relationship with indicia of independence. So long as the ability to exercise a right is not frustrated by the business, the individual's voluntary choices in exercising their contractual rights are not determinative of the worker's relationship.

A focus on whether a contractor *has* the opportunity to exercise a right, rather than whether they chose to exercise the right for their own reasons, is consistent with existing legal precedent as well. See, e.g., *Saleem v. Corporation Transportation Group, Ltd.*, 854 F.3d 131, 140 (2d Cir. 2017) (drivers' power to decide "whether to work exclusively for CTG accounts or provide rides for CTG's rivals' clients and/or develop business of their own" showed workers were independent contractors); *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299, 305 (5th Cir. 1998) (when workers "are able to work" for other companies, it points to independent contractor status).

Specific additional comments directed to the two core factors are set forth below.

The Nature and Degree of a Worker's Control Over the Work

The Chamber agrees that the nature and degree of a worker's control over the work is an appropriate core factor in all analyses of whether a worker is economically dependent or

[7] See *Barrantine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (the FLSA requires fact-specific inquiries of individual workers to determine a worker's independence).

independent of a business. "The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728,739 (1981). As the Supreme Court explained in 1947, Congress intended to stop employers with market power from requiring employees who were dependent on them for their livelihood to work for "low wages and long hours … that were detrimental to the health and well-being of workers." *Rutherford Food Corp. v McComb,* 331 U.S. 722,727 (1947). Congress enacted "minimum pay and maximum hour provisions" to stop that practice. *Id.*

That rationale does not apply to independent workers who exert control over the work they perform. As set forth in the Proposed Rule, a worker's right to impact their work schedule (by impacting how much work they do and retaining the right to reject or seek out additional projects, subcontractors, engagements, gigs, or offers) as well as a worker's right to impact the type of work they do, are examples of a worker's control over the work.[8] So too, as the Proposed Rule outlines, is a worker's ability to determine the manner and method of how they choose to complete a result.

The Proposed Rule appropriately recognizes that a worker who works with little to no supervision by the business as to the way in which the worker's services are provided is evidence of control by the worker over the work. That conclusion is not negated by the occasional contact from representatives of the business who may communicate with the worker, and even provide guidance and information, but who do not dictate *how* work must be performed. Where a worker is left with considerable control over the work, the core factor is satisfied (*see* cases cited in Proposed Rule at 60612, fn. 35). Contractual terms with agreed upon results (including quantity and service minimums and final time deadlines) also do not evidence control over the worker in terms of how the work is performed.

Similarly, and importantly, the Proposed Rule's explicit recognition that independent worker relationships that build in compliance with legal requirements, health and safety standards, insurance obligations, as well as other commonly-used contractual terms do *not* evidence control over the worker under the Act (Proposed Rule at 60613) is appropriate. The Chamber submits that the Final Rule should expand this concept to also explicitly state that workers and businesses should not be discouraged from incorporating terms (and audit and other certification processes) into their relationship that support sound, lawful, safe work practices, as those terms, as well, do not evidence control. Examples of such terms may include incorporation of an obligation that the work be performed pursuant to acceptable professional, industry and customer service standards, as well as commonly accepted safety, ethics, licensure and other standards and recommendations (such as compliance with limitations or control imposed or necessitated by law, regulation, order or ordinance).[9] None of these terms, nor

[8] *See, e.g., Karlson v. Action Process Serv. & Private Investigations, LLC,* 860 F.3d 1089, 1094-95 (8th Cir. 2017) (a worker is an independent contractor where the worker decides which assignment to accept, does not report to work at a specific time, or punch a time clock) and *Alexander v. Avera St. Luke's Hosp.,* 768 F.3d 756, 762 (8th Cir. 2014) (a doctor who maintained complete freedom to set his schedule showed independence).

[9] In a number of industries, including financial services, there are requirements arising from statutes, regulations, or agency mandates, often driven by concern for consumer protection, that impose upon businesses an obligation to exercise certain responsibilities with respect to the individuals with whom they contract. These requirements may involve such matters as quality control and restrictions on selling products from other institutions.

compliance with them by the worker, evidence control over the worker *by the business* under the economic realities test under the Act.

There is nothing more helpful to workers and businesses in setting up their relationships, and managing them to conform to legal requirements, than for regulatory bodies and courts to provide specific guidance of the effect of common fact situations on the ultimate classification of the worker as an employee or contractor. To that end, the Chamber urges the Department to include the following specific examples of evidence of control by the worker over the work in the Final Rule:

1) The worker's ability to make decisions with respect to the details of how the work is performed, without prior approval, such as delivery routes to be taken, sequencing of subparts of the work, routines or patterns that must be used, ordering and staging of different aspects of the work, and selection of where the work is performed if the work need *not* be performed in one specific location;

2) Worker control over the type, quality, and amount of supplies to be used (or not used) in performing the work (including where to purchase);

3) Worker control over the type, quality, and amount of tools to be used (or not used) in performing the work (including where to purchase);

4) Worker control over the type, quality, and amount of equipment to be used (or not used) in performing the work (including where to purchase);

5) Worker control over time flexibility that exists regarding the work (including start and end times within windows, for example) in those situations where the result does not demand a specific time frame for performance of the work (and the work is not with respect to a perishable service or product -- such as delivery of an early morning newspaper, immediate pick-up of a rider at a location, delivery of perishable food products, scheduled physical therapy or other personal services involving direct contact with the user, for example); and

6) Worker decision-making as to how much of the work the worker will perform and how much to contract out to others either with respect to the specific work or the worker's overall business operation.

Businesses that comply with these standards do so not to further any interest in controlling the work, but rather to satisfy their legal obligations as regulated entities. The Final Rule should clarify that complying with such regulatory requirements does not indicate control for purposes of evaluating independent contractor status, nor does it make a finding of employee status more likely. Instead, this scenario involves a pass-through of requirements applicable to an industry as a whole and does not implicate the fundamental question of economic dependence for work or whether a person is in business for himself or herself.

The Chamber also recommends that the Department include in the Final Rule specific guidance that the following are *not* indicative of a businesses' control over the work of the worker:

1) The business provides orientation or information sessions about its business practices, information (including customer locations), guidance, or suggestions about the business's products, business, services, customers or operating systems, and training required by law, regulation, order, or ordinance to protect persons and/or property, or to protect a brand;[10]

2) The business exerts control in contract or in fact, regarding the final result to be accomplished by the worker;[11]

3) The business provides customer specifications/details and feedback relating to the work (including requesting confirmation from the worker that the customer feedback has been addressed);

4) The business provides information to the worker with respect to time constraints (such as final completion or final delivery time, range of work hours, or the time work is to be performed or presented if time is of the essence or the service/product is perishable) as well as schedules imposed by the contract or the parties' agreement, or by a customer;

5) Control reasonably necessary, or as agreed as part of the work, with respect to where the work is to be performed;

6) The business's right to enforce contractual obligations;

7) The business secures alternative services in the event of a service or results breach by the worker;

8) The business's provision of emergency or cleaning supplies or other safety equipment to workers and customers in the event of an emergency;

9) Providing customers with estimates of completion time for services requested;

[10] Similarly, no inference of control over the worker's work should be drawn from a business's use of both employees and independent contractors who perform similar or overlapping services or work. Today many companies supplement work performed by employees with services provided by independent contractors, because of a worker's unique expertise or immediate or short term need for additional resources.

[11] As the IRS has recognized with respect to analysis of this issue, "Virtually every business will impose on workers, whether independent contractors or employees, some form of instruction (for example, requiring that the job be performed within specified time frames). …. the weight of 'instructions' in any case depends on the degree to which instructions apply to **how the job gets done** rather than to the **end result**." (bold in original) Training Materials: Independent Contractor or Employee? https://www.irs.gov/pub/irs-utl/emporind.pdf pp. 2 -8 (October 30, 1996).

10) Providing business identification on uniforms or business logo (for example on a vehicle);[12] and

11) The business provides the worker suggestions, recommendations, guidance, and/or tips that are not mandated but informational relating to the services or results the worker provides.[13]

In contrast, a business that retains the right to direct and control the means and details by which the result is accomplished, without reference to applicable customer or legal requirements—that is, controlling *how* the work shall be done—does exercise control over the worker, thereby favoring an employment relationship. Any such determination, as noted above, requires a review of the facts and circumstances of the relationship.

Finally, the Chamber encourages the Department to move the discussion of the opportunity to perform similar services for other companies to a standalone factor in the additional factor analysis (see alternative discussion as a separate additional factor *infra*).

The Worker's Opportunity for Profit or Loss

A worker's opportunity for profit or loss based on initiative or investment is an appropriate core factor (Proposed Rule at 60613). As described below, the Chamber provides some suggested additional illustrations and slight revisions to the Proposed Rule's treatment of the worker's opportunity for profit or loss.

Specifically, the Chamber encourages the Department to consider: (1) including additional illustrative examples of a worker's initiative or investment that impacts a worker's opportunity for profit or loss, to provide more clarity to workers, businesses, and reviewing courts as described *infra*; and (2) including guidance that a worker's business acumen should be interpreted broadly to include acumen relevant to the wide range of entrepreneurial opportunities (such as sales, managerial, customer service, marketing, distribution, communications, and other professional, trade, technical, and other learned skills, in addition to other unique business abilities and acumen, including acumen that impacts a worker's ability to profitably run their own independent business).

The Chamber offers the following additional examples of a worker's initiative or investment that may impact a worker's profit or loss, for inclusion in the Final Rule:

1) The worker's own decision-making with respect to the details and means by which they make use of, secure, and pay helpers, substitutes, and related labor or specialties to assist their business or in the direct provision of contracted-for services;

[12] For decades, in light of increasing concerns about safety, regulatory bodies have recognized that businesses must provide customers with some assurance about the identification of individuals they interact with personally or in their homes or workplaces. The wearing or displaying of a business's identification is a neutral factor as it relates to alleged control over the worker. See IRS Manual at 2-13.

[13] Suggestions that are not mandatory are not instructions. See IRS Manual at 2-12.

2) The worker's own decision-making with respect to the details and means by which they purchase, rent, or otherwise obtain and use tools in their business or in the direct provision of contracted-for services (including, for example, the choices in terms of where or from whom they purchase tools, the quality of tools purchased amongst available choices, and the volume and price of various individualized worker purchases of tools) especially when the cost of the tools are not reimbursed directly by the business;

3) The worker's own decision-making with respect to the details and means by which they purchase or otherwise obtain and use supplies in their business or in the direct provision of contracted-for services (including, for example, the choices in terms of where or from whom they purchase supplies, the quality of supplies purchased amongst available choices, and the volume and price of various individualized worker purchases of supplies) especially when these supplies are not reimbursed directly by the business. Examples of such business expenses may include postage and delivery, advertising, insurance, rent and utilities, repairs and maintenance, payment to accountants and other business consultants, and travel expenses;

4) The worker's own decision-making with respect to the details and means by which they purchase, rent, or otherwise obtain and use equipment in their business or in the direct provision of contracted-for services (including, for example, the choices in terms of where or from whom they purchase equipment, the quality of equipment purchased amongst available choices, and the volume and price of various individualized worker purchases of equipment) especially when these supplies are not reimbursed directly by the business especially when the cost of equipment is not reimbursed directly by the business;

5) The worker's initiative and decisions they implement in connection with their own performance of services through higher service fees, incentives, charges, and other ways;

6) The worker's initiative to invest in the development of skills, competencies, and trades (including education, training, license fees, certifications, professional dues, and classes) is also relevant to demonstrating initiative in expanding profitability and opportunity for a worker;

7) The worker's expertise in delivery of services/products that result in enhanced profits, for example through tips and other incentives as a result of providing quality customer service;

8) The worker's losses incurred as a result of customer complaints or other charges where the worker's results were below customer or contractual expectations and obligations;

9) The worker's flexibility to choose amongst work opportunities offered that impact profits and losses;

10) The worker's contractual or other losses if they do not provide the accepted services or the worker provides substandard services, and are engaged to provide time-sensitive, often perishable services and products; and

11) The worker's avoidance of liquidated damages charges or indemnification obligations in the parties' agreement relating to various provisions, including material breaches of the parties' agreement.

Conversely, the Chamber provides the following examples of fact situations which are neutral in the analysis of whether the worker controls their profits and losses, for inclusion in the Final Rule:

1) The business pays the worker by the hour where it is customary in the particular business/trade to do so (*e.g.,* attorneys, physical trainers);

2) The business sets the price of goods and services offered by a worker to customers where the worker controls the amount of time, date and place they provide the services as well as the amount of services they choose to provide and the price is set to facilitate the time sensitive transaction as a result of the time sensitive or perishable nature of the service the customer desires. *See, e.g.* WHD Opinion Letter FLSA 2019-6 at 9 - 10; and

3) The business's facilitation of payments from the customer to the worker.

As described above, the Chamber supports the Department's second core factor of a worker's opportunity for profit or loss based on initiative or investment, and encourages the Department to consider the above suggestions to strengthen and clarify its meaning.

2. The Below Suggested Revisions Would Strengthen the Proposed Rule's Additional Factors Analysis.

As described in detail below in this section and in section three, the Chamber provides recommended revisions, deletions, and additions to the Proposed Rule's three additional factors—skill required, permanence of the relationship, and whether the work is part of an integrated unit of production.

<u>Skill Required Should Be Incorporated into the Core Factor of Opportunity for Profit or Loss.</u>

The Chamber recommends that the Department reconsider keeping skill required as a stand-alone factor as it is directly relevant to the second core factor of a worker's opportunity for profit or loss and should be included in that analysis. Maintaining this as a stand-alone factor will negatively impact workers who desire the flexibility and freedom to provide services as an independent worker in providing certain services that in and of themselves may not require specialized or formal education programs or training.

Given the expansive nature of today's independent work opportunities that encompass a far wider array of individuals who may not possess a skill that is a part of traditional learned

profession or trade, but instead is the culmination of managerial, logistical, and customer service skills and initiatives and judgment -- a focus on "the amount of skill required" separate from a worker's initiative that impacts the worker's profits is an unnecessarily restrictive view of independent work currently being performed in the U.S. economy (Proposed Rule at 60615).

For example, marketing consultants, designers, drivers, and technology specialists, to name a few types of independent workers, may be self-taught or hold innate abilities that do not require a "skill" recognized in the Proposed Rule. While they may or may not have a degree, or formal training, those workers under this formulation would be determined to not have satisfied the amount of skill required factor, yet their work and the worker's initiative in developing their own business and other skills may be key to their opportunities to provide these services to businesses and to controlling the means and manner of work they perform.

For these reasons, the Chamber believes this factor is inappropriately weighted against independent workers who may possess enormous initiative and business acumen that drive the profitability and success in their independent work relationships, even though they do not have a traditionally recognized specialized skill. For example, in the case of a driver who does not need a specialized skill in driving *per se* to pick up a rider and transport the rider to the rider's destination, that lack of a traditionally recognized specialized skill does not impact the driver's unique abilities to control their work and their profits as a result of their business acumen and other traits. It likewise does not measure one's independence. Independence may exist irrespective of a specialized skill.

Many independent workers, are able to multi-home (provide services to multiple clients by moving back and forth to different apps that are open at the same time) during the same week, day, or even hour. For example, workers who use rideshare company and other delivery company apps demonstrate their independence not only by choosing when, whether, where, and how long to work, but also by toggling back and forth between different platforms to promote themselves and seek opportunities. Considering skill required without reference to a worker's acumen, initiative, and judgment is out of step with today's economy and the available flexible work opportunities enjoyed by so many workers that have been made possible because of the lack of barriers to entry into these relationships (including not requiring prior development of specialized skills).

As the Department described recently in WHD Opinion Letter FLSA 2019-6 (April 29, 2019) (holding that workers using a platform to connect them with customers were independent contractors under the Act, and their exercise of managerial discretion and lack of training weighs in favor of independent contractor status) whether a worker has a learned or specialized skill is irrelevant in determining whether they are economically dependent on, or controlled by, any particular business whose app they use to find customers. Accordingly, consideration of a worker's skill level is more appropriately seen as contributing to a worker's opportunity for profit or loss than being a stand-alone factor.

<u>Permanence of the Relationship Should Be Eliminated or Substantially Revised.</u>

The Chamber submits that the permanence of the relationship factor should be revised or eliminated. As currently drafted, the factor will have the unintended effect of unnaturally

separating independent workers from productive, positive business relationships with businesses, without providing any insight into the ultimate question of independence.

Contracts of a specific duration, even multi-year contracts, are not evidence of permanence or indicative of dependent relationships. They are evidence that, unlike the vast majority of employment relationships, the parties' relationship is one that begins and ends on specific dates, and does not continue indefinitely. Similarly, contracts that are renewed, or parties that enter into multiple successive agreements do not provide insights into whether the parties' relationship is one in which the worker is economically dependent on the business. The length of contractual relationships provide insights into the beneficial nature of the relationship between a worker and a business and nothing more.

The IRS has recognized that with respect to the factor of permanence: "If a business engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence of their intent to create an employment relationship." IRS Training Manual at p. 2-27.

The appropriate focus is the indefiniteness of the relationship, not the length of the relationship, as set forth in the Proposed Rule at 60615 - 60616. The two concepts of indefiniteness and long-term nature of relationships are different—the first relevant, the second a neutral fact that should be disregarded. As the IRS described, independent workers and businesses enter into long-term contracts and contracts that are renewed regularly due to superior service, competitive costs, or the lack of alternative service providers, and that these relationships are not evidence of the permanence of the relationship or employee status. The IRS concluded that there are legitimate reasons why businesses and independent contractors' relationships may consist of one long-term or a number of separate consecutive contracts of specific duration. (*Id* at 2-22).

Courts and agencies have long viewed the parties' use of a written agreement, with terms that are reflective of business relationships as evidence of the intent of the parties, and the permanence of their relationship. *See, Illinois Tri-Seal Prods., Inc. v. United States,* 353 F.2d 216, 218 (Ct. Cl. 1965) (the contractual designation of the worker is "very significant in close cases"). As a result, the Chamber requests that the Department revise the Proposed Rule to state that independent contractors and businesses that enter into one or more contracts of a specific duration do not demonstrate permanence of the working relationship and provide evidence of the independent nature of the relationship.

Relationships between workers and businesses that respect the contracting structure and contain elements of independent business relationships should be considered in a revised Additional Factor that looks at the relationship of the parties. Instead of a focus on the amount of work performed by the worker or the length of two contracting parries' relationship, the Chamber encourages the Department to consider the parties' intent in terms of the nature of their relationship, including: the existence of a written agreement between the parties, a specific term length to that agreement (a beginning and end date), an agreement that states the rights and obligations of both parties, that is entered into voluntarily by both parties, and relationships where workers select as many or few offers of work or "gigs" as indicative of independence.

The Integrated Unit Factor Should Only be Retained if Modified.

The Chamber urges the Department to review and either delete or revise, consistent with the below comments, the Additional Factor described in the Proposed Rule as to whether the work is part of an integrated unit of production.

First, the Chamber notes that the Proposed Rule properly rejects reliance on whether a worker's services are "integral" to, or an essential part of, a business. In today's economy independent workers provide services in all aspects of the economy and all aspects of individual businesses, including core and non-core functions, as well as in the same or different lines of business. The Department needs to provide specific guidance relevant to both traditional businesses as well as companies that provide a platform or marketplace for workers to be matched with potential customers looking for services the worker offers. Both traditional businesses and gig economy companies can operate as a platform or marketplace to serve potential customers.

The guidance provided in the Proposed Rule is not helpful for determining whether a function performed by a worker is part of an integrated unit. This factor needs review and clarification to ensure that it does not unnecessarily stymie independent relationships that may form subparts of a specific unit and reflect the impact of technological change on consumer preferences and worker demand for expanded, flexible economic opportunities. The Proposed Rule should expressly recognize that multi-sided platform companies that connect customers with potential independent workers are distinct entities, and that workers are not engaged in an integrated "production" of services to the customer as a result of their access to the opportunity on the app, and the app's functioning for the benefit of the worker and the customer (facilitating communications, information, and payments). Similar recognition should be given to traditional businesses that are structured to manufacture and/or provide a platform of products or services that are distinct from those working independently with that business to broker customer relationships. These platforms must be recognized as operating outside of an "integrated process" involving the worker and also not as hiring entities of the independent worker.

Multi-sided platforms have been recognized as distinct entities by the Supreme Court, regulatory agencies, and economic literature. *See, e.g.*, *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2280, 585 U.S. — (2018) (discussing two-sided transaction platform); *see also* David S. Evans, Matchmakers: The New Economics of Multisided Platforms (2016); Hagiu, Andrei and Julian Wright, "Multi-sided platforms" International Journal of Industrial Organization 43, no. 1 (2015): 162-174 (hereafter, Hagiu and Wright (2015)), pp. 162-163; Evans, David S. and Richard Schmalensee, "Markets with Two-Sided Platforms," Issues in Competition Law and Policy 667, ABA Section of Antitrust Law 2008, 667-693, p. 667.

Platforms are not part of an integrated unit with the worker who provides the actual service, and the Final Rule should so state. In illustration, a ridesharing platform provides a market for drivers and riders to find each other. When a driver accepts a ride request and transports the rider, that is not part of one continuous integrated process. Rather, viewed properly, these are distinct functions: the platform business provides the match, and the driver performs the transportation service via a platform for the customer, not the platform, and is not part of an integrated unit or production line of the platform company.

Recently, the Department restated the position it has held "[f]or more than 40 years" that matchmaking services can exist without creating an employment relationship. *See* Field Assistance Bulletin No. 2018-4, "Determining whether nurse or caregiver registries are employers of the caregiver (July 13, 2018) ("Bulletin"). Here the Department concluded that nurse or caregiver registries are not employers when they "match" people who need caregiving services with caregivers who provide the services. (Bulletin at 1.)

And, in a 2019 Opinion Letter, the Department analyzed the relationship between a company that provides "an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation," as well as other services. The service provided by operation of a software platform "uses objective criteria to match consumers to service providers." *See* FLSA 2019-6 (April 29, 2019) (the "Opinion Letter"). Consistently, the Department concluded that the company was not the employer of the service providers, as the company "does not receive services from service providers, but empowers service providers to provide services to end-market consumers. The service providers are not working for [the company]'s virtual marketplace; they are working for consumers through the virtual marketplace. They do not work directly for [the company] to the consumer's benefit; they work directly for the consumer to [the company]'s benefit. " *Id*. at 7. Similarly, the National Labor Relations Board *"NLRB") Office of General Counsel ("OGC") was asked "for advice as to whether drivers providing personal transportation services using [a company's] app-based ride-share platform were employees… or independent contractors" and concluded that the drivers were independent contractors. *See* NLRB Office of General Counsel Advice Memorandum (April 16, 2019) (the "OGC Advice Memorandum").

Here, the Proposed Rule describes these platform companies as "intermediary companies" whose business operations with the worker providing services terminates at the point of connecting the independent worker to consumers, and do not extend to the independent worker's actual provision of services. (Proposed Rule at 60617.) To eliminate any confusion, an explicit expression that the platform is not analogous to a production line is essential.

While the Chamber agrees that this factor should move away from the concept of importance or centrality, it nonetheless is concerned that the focus of the newly framed inquiry on the "integrated production process" is not helpful to assessing a worker's independence and will likely lead to litigation unless clarified as described above.

For these reasons, the Chamber further proposes that if the Department retains this factor, it adds an alternative way to meet this factor, consistent with the manner in which a number of state laws have done to accommodate the myriad different independent worker relationships that serve consumers directly. The Chamber proposes that the Department include the phrase, "or, alternatively, that the worker is performing work, the majority of which is performed off the physical premises of the business." This alternative path provides the same type of insight into whether the worker is integrated into the work of others at the Company, without confusion as to how to define an integrated unit. Should the Department accept this comment, the Chamber encourages the Department to further make clear that a worker's performance of services to customers referred by the business outside of all premises of the business (for example, on open roads) is not an extension of the geographic location of the business. States have differed on

deciding this question leading to confusion and different outcomes in different states despite identical facts.

3. A Worker's Opportunity to Work for Others or Vary Work Volume is an Appropriate Additional Factor of Dependence/Independence

Worker flexibility is evidence of independence. *See, e.g., Saleem v. Corp. Transp. Grp., Ltd.,* 854 F.2d at 141-143 (holding a worker's opportunity or ability to simultaneously provide services to multiple entities demonstrates "considerable independence"). The Chamber urges the Department to consider whether a worker has the opportunity to simultaneously work for multiple businesses or vary work volume as an additional stand-alone factor of dependence/independence. This additional factor should particularly examine whether workers continue to have opportunities to work for others or to vary significantly or impact the volume of work provided to the entity. These facts evidence control by the worker of the worker's opportunity to work for others. However, use of this factor should be limited. For example, it should be made clear that the factor would not apply to highly-regulated or licensed professionals where a business limits or prohibits a worker's opportunities for reasons related to state or federal regulations or protection of proprietary, confidential, or consumer personal information. It also would not apply, for example, where legitimate business reasons may cause a business to require a contracting individual or company not to perform similar services for competitors, but has no restrictions preventing the contracting party from engaging in other business activities.

4. The Department Should Adopt the Proposed Rule, Consistent with The Proposed Clarifications, Revisions and Additions Described Above.

For the foregoing reasons, and as modified consistent with the Chamber's comments above, the Chamber urges the Department to adopt its Proposed Rule to provide consistency to the Department's FLSA enforcement scheme. The Proposed Rule is a balanced approach, necessary to ensure workers and businesses have an updated, understandable, and definitive standard for determining employee or independent contractor status using the economic realities test under the Fair Labor Standards Act. The Proposed Rule will benefit workers, consumers, businesses, and the economy as a whole.

Respectfully submitted,

Vice President, Workplace Policy
Employment Policy Division

Outside Counsel
Camille Olson
Richard Lapp
Larry Lorber

Seyfarth Shaw, LLP
233 S. Wacker Drive
Chicago, Illinois 60606-6448