

Marh 18, 2024

Ms. Michelle Paczynski
Office of Policy Development and Research
U.S. Department of Labor
Employment and Training Administration
200 Constitution Avenue NW, Room N-5641
Washington, DC 20210

Re: Employment and Training Administration Proposed Rule: National Apprenticeship System Enhancements [RIN 1205-AC13]

Submitted via www.regulations.gov.

Dear Ms. Paczynski:

I appreciate this opportunity to provide comment on the proposed rule, “National Apprenticeship System Enhancements.”¹

Proposed Rule Summary

The proposed rule imposes new regulations on Government Registered Apprenticeship Programs, or GRAPs. Among its many components, the proposed rule (1) eliminates two current apprenticeship approaches that are alternatives to time-based qualifications; (2) increases the barriers to establishing new apprenticeship programs including by creating new “suitability” standards and by allowing existing apprenticeship programs to prevent competition from new programs by alleging that “splintering” would occur; (3) threatens apprenticeship programs with the potential to be penalized or cancelled based on unverified complaints made by third parties such as unions; (4) asserts new federal authority over state and local apprenticeship standards; (5) imposes many new layers of bureaucracy and burdensome requirements on administrators, sponsors, instructors, and apprentices; and (6) subjects Career Technical Education (CTE) to government regulation.

The proposal’s stated underlying purpose is to:

“[S]trengthen, expand, modernize, and diversify the National Apprenticeship System by enhancing worker protections and equity, improving the quality of registered apprenticeship programs...so that the National Apprenticeship System is more navigable and responsible to current worker and employer needs.”²

¹ U.S. Department of Labor, Employment and Training Administration, “Notice of Proposed Rulemaking; Request for Comments,” *Federal Register*, Vol. 89, No. 11, January 17, 2024, pp. 3118-3298, <https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21454.pdf> (hereinafter ‘proposing release’). See also U.S. Department of Labor Wage and Hour Division, “Notice of Proposed Rulemaking; Extension of Comment Periods,” *Federal Register*, Vol. 87, No. 206, October 26, 2022, p. 6479, <https://www.govinfo.gov/content/pkg/FR-2022-10-26/pdf/2022-23314.pdf>.

² Proposed Rule, p. 3119.

In practice, the rule will raise the costs and administrative burdens of GRAPs and restrict the entry of new GRAPs. It will eliminate two types of existing, and the fastest-growing GRAPs while upending Career and Technical Education (CTE) programs. These steps are all counter to the goals of increasing access to and use of apprenticeships as a successful form of post-secondary education.

Subsequent to publication of the proposed rule on January 17, 2024, President Biden issued an “Executive Order on Scaling and Expanding the Use of Registered Apprenticeships in Industries and the Federal Government and Promoting Labor-Management Forums”.³ This EO seeks to use taxpayer-funded government contracts to reward existing GRAPs and to encourage or require the creation of new GRAPs. This EO undermines the proposed rule’s analysis because the EO alters the landscape of apprenticeship programs, including the supply of GRAPs, the number of apprentices, and potentially the finances of GRAPs. The Department must reanalyze the impact of its proposed rule in light of the new EO, update its proposed rule and economic analysis, and issue a new NPRM that incorporates the existence of this new EO.

Background

The National Apprenticeship Act of 1937 established GRAPs. That Act specified:

*“The Secretary of Labor is hereby 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 National Youth Administration and with the Office of Education of the Department of the Interior...”*⁴

For more than 80 years, the GRAP model has dominated apprenticeship programs in the U.S. That includes the four decades between when the National Apprenticeship Act was passed in 1937 and when the first regulations were promulgated in 1977. Those regulations were subsequently revised entirely in 2008 and amended in part in 2016.

While the GRAP model has been successful in some occupations, its overly burdensome structure and requirements has failed to meet the changing workforce needs as GRAPS are concentrated in only a few industries. A report by Isabel Soto at the American Action Forum notes that while the health care sector accounts for six of ten of the most rapidly growing occupations, health care apprenticeships only make up only one of twenty-five GRAPs.⁵

³ Executive Order 14119, “Scaling and Expanding the Use of Registered Apprenticeships in Industries and the Federal Government and Promoting Labor-Management Forums,” March 6, 2024, <https://www.federalregister.gov/documents/2024/03/11/2024-05220/scaling-and-expanding-the-use-of-registered-apprenticeships-in-industries-and-the-federal-government> (accessed March 18, 2024).

⁴ National Apprenticeship Act, 50 Stat. 664, August 16, 1937, <https://www.govinfo.gov/content/pkg/COMPS-3091/pdf/COMPS-3091.pdf> (accessed March 18, 2024).

⁵ Isabel Soto, “Industry Recognized Apprenticeship Programs and the Biden Administration,” American Action Forum, April 6, 2021, <https://www.americanactionforum.org/insight/industry-recognized-apprenticeship-programs-and-the-biden-administration/> (accessed April 5, 2022).

To help to expand apprenticeship programs and better align them with industry needs, the Trump Administration’s Department of Labor (DOL) created a new Industry Recognized Apprenticeship Program (IRAP) model. IRAPs established a more straightforward process for developing high-quality apprenticeship programs, built on greater employer involvement, with a goal of reaching more workers in high-demand industries. More than 130 IRAPs were created (along with 27 Standards Recognition Entities to recognize and oversee IRAPs), and most of these IRAPs were focused on developing workers for the nursing profession, which faced shortages that have exacerbated in recent years.⁶

In 2021, the Biden Administration rescinded the Trump Administration’s executive order that expanded apprenticeship programs and directed the Department of Labor to “[r]evers[e] industry recognized apprenticeship programs (IRAPs) which threaten to undermine registered apprenticeship programs.”⁷ Despite the Administration’s seeming concern that IRAPS would compete with or “undermine” RAPs, the new model of apprenticeship was most often cropping up in industries that lacked any apprenticeship options and thus were not competing with existing GRAPs.

Organizations across the political spectrum have noted the failure of registered apprenticeship programs to meet workforce demands, particularly due to their overly bureaucratic and burdensome nature. A 2021 Brookings Institution report noted that registered apprenticeships are concentrated in legacy and historically male trades and fail to meet growing demands in the health care and technology industries. The report noted the excessively onerous process for employers to establish apprenticeship programs and concluded that “[a] robust apprenticeship system has the potential to increase earnings and reduce occupational segregation in the labor market.”⁸

A 2017 Harvard study estimated that the number of occupations commonly filled through apprenticeships could nearly triple (from 27 to 74), that the number of job openings filled through apprenticeships could expand eight-fold (to 3.2 million), and that the occupations ripe for apprenticeship expansion could offer 20 percent higher wages than traditional apprenticeship occupations.⁹

Proposed Rule Fails to Show How It Will Expand Apprenticeships

⁶ Ibid.

⁷ The White House, “Fact Sheet: Biden Administration to Take Steps to Bolster Registered Apprenticeships,” February 17, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/17/fact-sheet-biden-administration-to-take-steps-to-bolster-registered-apprenticeships/> (accessed April 8, 2021).

⁸ Annelies Goger and Chenoah Sinclair, “Apprenticeships Are an Overlooked Solution for Creating More Access to Quality Jobs,” Brookings Institution blog, January 27, 2021, <https://www.brookings.edu/blog/the-avenue/2021/01/27/apprenticeships-are-an-overlooked-solution-for-creating-more-access-to-quality-jobs/#:~:text=Apprenticeships%2C%20which%20combine%20on-the,%2C%20and%20problem-solving%20skills> (accessed April 7, 2022).

⁹ Joseph B. Fuller and Matthew Sigelman, “Room to Grow: Identifying New Frontiers for Apprenticeships,” Harvard Business School and Burning Glass Technologies, November 2017, <https://www.hbs.edu/managing-the-future-of-work/Documents/room-to-grow.pdf> (accessed April 7, 2022).

Centuries of economic theory and practice confirm that: 1) competition increases the supply and reduces the price of a given commodity; and 2) government regulations that add bureaucratic procedures, administrative burdens, or increase barriers to entry raise the cost and reduce the supply of a commodity.

The proposed rule directly reduces competition by allowing proprietors of existing apprenticeship programs to prevent competition from entering the market. The proposed rule also adds onerous bureaucratic procedures and administrative burdens and raises the barriers to entry by setting an additional high bar for apprenticeship programs to enter the playing field or remain in the game.

In each of these cases, the Department fails to demonstrate how its proposal will defy the laws of economics and instead will result in the proposed actions having the opposite of their usual economic effects.

Proposed Rule Restricts Competition. Under the proposed rule, individuals and organizations who are not party to that employer or apprenticeship program can file complaints against an employer or a GRAP for alleged misconduct or violations of GRAP regulations.¹⁰ Those allegations could then be used, according to the proposed rule, as a basis for the DOL to deny the application or dissolve the existing apprenticeship programs, even without requiring that the credibility of such charges be verified by the National Labor Relations Board.¹¹ This will allow existing apprenticeship programs and labor unions to prevent new programs from forming and would enable labor unions or others to eliminate existing apprenticeship programs based on mere accusations or noncompliance with minor regulations such as Diversity, Equity, and Inclusion standards. The natural result of making it easier to prevent new apprenticeships and to dissolve existing apprenticeships is to restrict the supply of apprenticeships. The Department's failure to either disprove or grapple with this negative impact on the supply of apprenticeship programs is arbitrary and capricious.

Proposed Rule's "Suitability" Standards Set Excessively High Bar for Entry. The proposed rule upends the current "suitability" determination standards by which applicants for new apprenticeship programs receive the green light to begin a program. It also requires existing apprenticeship programs to conform to those new "suitability" standard within four years. This will require all current GRAPs that were already deemed suitable by way of local or state apprenticeship standards to conform to an entirely new federal set of suitability standards. In every instance, the new suitability requirements are added burdens, as opposed to simplified or streamlined requirements.

Most significantly, the proposed rule requires all GRAPs to go through a newly established Administrator within the Office of Apprenticeships. GRAPs must prove to the Administrator not only their ability to sufficiently equip apprentices for the given occupation, but the given occupation must: be a standalone, distinct occupation; lead to a "sustainable" career; enable an apprentice to become proficient in the occupation; and include at least 2,000 hours of on-the-job training and at least 144 hours of off-the-job related instruction for every 2,000 hours of on-the-

¹⁰ Proposed rule, pp. 3170, 3181, 3184.

¹¹ Ibid.

job training “in order to obtain proficiency in the occupation.” The latter two criteria, combined with the proposal’s prohibition of competency-based apprenticeship programs appears to replace actual measured competency with assumed competency based only on hours of attendance in on-the-job and -off-the-job instruction.

The standalone, distinct occupation requirement is discussed below in the section on “splintering.”

The rule’s requirement that an apprenticeship program lead to a “sustainable” career is highly problematic. “Sustainable” is entirely subjective. An Administrator cannot predict the future expansion, evolution, or demise of a particular occupation and attempting to do so will unnecessarily restrict apprenticeship growth.

Moreover, “sustainable” as it relates to wages is entirely inappropriate on a national level. Standards of living, and wages—even within a given occupation—vary drastically by state and locality. An occupation that leads to an \$18 per hour wage could be deemed “unsustainable” in Massachusetts where the median hourly wage is over \$28, but \$18 per hour in Mississippi would be above the median of \$17. The federal takeover of suitability standards would lead to one-size-fits-all standards that fail to account for diversity in state and local areas standards of living and workforce needs.

Moreover, just as minimum wage laws serve as a barrier to entry into the workforce—particularly for individuals who are young, less educated, lack English language skills, or have a disability or criminal record—preventing the establishment of apprenticeship programs based on subjective minimum wage and compensation requirements will serve as a barrier to entry into careers.

The “suitability” determination process also requires that the Administrator solicit public comment for at least 30 days.¹² As noted in the proposed rule, this would allow other GRAP providers to critique and call into question the minutia of any aspect of the many detailed procedures and documentation required of GRAP applications.¹³ Anyone wanting to protect themselves from the competition of a new GRAP, or even a community member or business that might have concerns about a new apprenticeship program’s effect on the community—perhaps a reduction in parking spaces or longer waits at fast food restaurants near apprenticeship jobs sites—could submit a comment objecting to the new apprenticeship program.

The Department’s failure to either recognize and account for the new “suitability” standards’ natural reduction in the growth of new GRAPs and decline in existing GRAPs—or else to disprove that added requirements, costs, and roadblocks will reduce growth—is arbitrary and capricious.

Proposed Rule’s “Splintering” Provisions Restrict Adaptation and Modernization. The proposed rule seeks to prevent the “splintering” of apprenticeship programs whereby a new apprenticeship program would develop to train workers in an occupation that shares components of an existing occupation. The proposed rule lays out the issue of “splintering” as “the potential for recognition of an occupation to detract from the successful operation of established programs

¹² Proposed Rule, p. 3150.

¹³ Proposed Rule, p. 3150.

for very similar occupations, and the “excessive partitioning” of an occupation into overly specific job skill sets.”¹⁴

The problem with attempting to prevent so-called “splintering” is that Program Administrators in charge of assessing “splintering” risks and deciding whether or not a new apprenticeship is “suitable” and thus allowed to develop are not able to see the future and know how new occupations might develop or evolve over time.

For example, the Acronym “IT” for Information Technology applied to very few occupations and job titles 30 years ago, but today, a quick google search reveals dozens of different IT job types. For example, the JobTrain webpage on “Types of IT Jobs” lists, as examples, seven different categories of occupation and 68 different job titles.¹⁵ While the field of IT started out narrow, it has grown and evolved into very distinct roles—such as cloud computing engineer, information security specialist, and software developer—that require different education and experience. The Department’s proposed “splintering” prevention strategy would prevent apprenticeships from serving as a viable education pathway into new and evolving occupations. The Department’s failure to recognize how its “splintering” approach will restrict competition and limit apprenticeship growth is arbitrary and capricious.

Proposed Rule Imposes Litany of Increased Costs and Burdens for GRAPs. Among the proposed rule’s additional regulations and burdens that will raise apprenticeship costs and reduce their supply are:

- Section 29.7 Suitability Standards: In addition to the new “suitability” requirements and procedures described above, new GRAP and existing GRAPs would face additional administrative documentation and paperwork burdens, and program administrators, sponsors, instructors, and apprentices would be subject to new restrictions.
- Section 29.8 Standards of Apprenticeship: Among these provision is a requirement that GRAPS submit a description of their recruitment area for new apprentices in the written program standards they submit to the Registration Agency, with a goal of increasing diversity in apprenticeships. Inherent in the reasoning of this requirement is the notion that the Agency will use such information to require some GRAPs to expand their recruitment efforts and areas at additional cost to the programs.¹⁶
- Sections 29.9-29.19: These sections include: more burdensome apprentice agreements; more bureaucratic program submissions; a new program standards adoption agreement, added qualifications for instructors, new national occupational standards, new national program standards, national guideline standards, added assessment requirements, expanded complaint pathways and timelines, new recordkeeping requirements, and more program reviews.

A February 2024 survey conducted by the Associated Builders and Contractors (ABC) of its members provides an indication of how employers and apprentice sponsors in the construction

¹⁴ Proposed Rule, p. 3147.

¹⁵ JobTrain, “Types of IT Jobs,” <https://www.jobtrainworks.org/career-advancement/it-occupations/types-of-it-jobs/> (accessed March 15, 2024).

¹⁶ Proposed Rule, pp. 3152-3153

industry will respond to the proposed rule.¹⁷ Respondents overwhelmingly believe that the rule will make it more costly and difficult to operate or participate in current apprenticeship programs and will reduce the growth of and participation in new apprenticeship programs.

ABC's survey provided a brief description of components of the proposed rule and asked whether respondents would be more or less likely to respond in a given way in light of that particular component. Some of the ABC survey's questions and responses,¹⁸ as summarized by ABC include:

- 90% of ABC member contractor respondents said they would be less likely to start their own company-run GRAP as a result of the DOL's proposed changes.
- 94% of respondents believe the proposed rule will increase the cost of participating in or starting a GRAP.
- 96% of respondents said new recordkeeping and reporting requirements will make them less likely to participate in or start their own GRAP.
- 72% of respondents said they had personally experienced a government GRAP requirement being weaponized to cut out competition or discriminate against certain GRAPs.
- 70% of respondents thought that the proposal will have a negative impact on Career and Technical Education (CTE) providers with whom they partner and only 1% thought it would have a positive effect (29% responded that they did not know what effect the rule would have on CTEs.)
- 95% of all respondents said apprentice participation and completion in GRAPs is less likely as a result of the DOL's proposal.
- 98% of all respondents said small businesses are less likely to participate or continue participating in GRAPs as a result of the DOL's proposed changes.

Proposed Rule Eliminates Two Types of High-Growth Apprenticeship Programs

The proposed rule effectively eliminates competency based and hybrid apprenticeship programs by mandating a minimum of 2,000 hours of on-the-job training and 144 hours of off-the-job education for every 2,000 of on-the-job training. Eliminating competency-based apprenticeship

¹⁷ Associated Builders and Contractors, "ABC Member Survey Results on the DOL's Apprenticeship Proposed Rule," February 27, 2024, <https://www.abc.org/Portals/1/NewsMedia/Apprenticeship%202024%20Survey%20ResultsFINAL.pdf?ver=ZlqU3pVBiYdHrSPnxgZK3A%3d%3d×tamp=1709048353089>

¹⁸ Associated Builders and Contractors, "ABC Survey: Biden's Proposed Apprenticeship Rule Will Strongly Discourage Construction Apprenticeship Program Participation," February 27, 2024, <https://www.abc.org/News-Media/News-Releases/abc-survey-bidens-proposed-apprenticeship-rule-will-strongly-discourage-construction-apprenticeship-program-participation> (accessed March 14, 2024).

programs is like eliminating in-car driver's tests and granting licenses based on completing a minimum number of hours in the car or in a driver's education classroom. Eliminating hybrid-based apprenticeship programs is like requiring high schools and colleges to disavow tests and grades and base degrees exclusively on classroom attendance and assignment completion.

Competency-based and hybrid apprenticeships have experienced the greatest growth in recent years, primarily because employers know that apprentices are evaluated based on their skills and competency to perform the occupation instead of just the hours they spent in the program. According to the data provided in the proposal, competency-based apprenticeship programs increased by 197 percent between 2017 and 2022, and hybrid apprenticeship programs increased by 116 percent. Meanwhile, non-competency and non-hybrid apprenticeship programs increased by only 11 percent. Competency based and hybrid apprenticeships expanded from accounting for 9.6 percent of all apprenticeship programs in 2017 to 19.4 percent of all apprenticeship programs in 2022.

This change effectively requires those apprenticeship programs to either convert to traditional apprenticeship programs (adding more hours of training and education and paying apprentices and instructors for the additional hours) or to shut down.

The ABC survey indicates how employers in the construction sector would respond to the elimination of these two increasingly popular apprenticeship programs. The ABC survey asked members, "Would elimination of competency-based and hybrid apprenticeships, as the NPRM proposes, make you more likely or less likely to participate in a GRAP or start your own GRAP?" Three-of-four respondents (75%) said they would be less likely to participate in a GRAP or start their own GRAP while one-in-four (25%) said they would be more likely.¹⁹ The ABC survey noted that of the 41% of its surveyed members who participate in GRAPs 72% are hybrid (45%) or competency-based (27%) programs.

As discussed in the economic analysis critique below, the Department did not acknowledge that eliminating these programs will almost certainly lead to a decline in total programs. Using the ABC survey's findings, a rough estimate of the potential immediate decline plus subsequent lower growth rates caused by the elimination of these two types of apprenticeships could reduce total apprenticeships by 27 percent, which would equal 9,378 fewer apprenticeship programs in 2034 than the Department assumes in its estimates.

Proposed Rule Fails to Demonstrate that it is more Navigable and Responsible to Worker and Employer Needs

The executive summary of the proposed rule states that the Department seeks to create a National Apprenticeship System that "is more navigable and responsible to current worker and employer needs."²⁰

¹⁹ Ibid.

²⁰ Proposed Rule, p. 3119.

For starters, a federal one-size-fits-all suitability determination and set of standards cannot possibly better accommodate unique worker and employer needs than determinations and standards made within communities at the state and local level.

Additionally, similar to the total acreage of a corn maze indicating its ease of navigability, the more-than 180,000 word count of the proposed rule indicates that it is not more navigable to workers and employers.

The proposed rule contains 450 times as many words as the National Apprenticeship Act of 1937 that established the national apprenticeship system and gave the Department authority to promulgate apprenticeship standards. While it is possible for the content of a rule to reduce barriers and burdens and create a more navigable system, the proposed rule almost exclusively adds new costs, processes, and requirements to the system. As indicative of the new measures employers, apprentices, and plan sponsors must take, the proposed rule contains 467 instances of the word “must,” which is more than the entire wordcount of the original Apprenticeship Act (about 400 words).

Moreover, the Department argues that “the advancement of worker protections and equity” are essential and that its rule “would create more safeguards for apprentices to ensure that they have healthy and safe working and learning environments...”²¹ Yet, the Department provides no evidence or examples of how apprentices have been ill-prepared or subject to unsafe conditions because of a lack of the proposed regulations.

The Department failed to demonstrate how all the new requirements imposed on GRAPs will make them more navigable or responsible to current worker and employer needs. The Department should include with each of its proposed additional requirements, an example of how this requirement would affect each of its stated goals, including making the system more navigable.

Proposed Rule Failed Statutory Requirement to

The National Apprenticeship Act “authorize[s] and direct[s]” the Department of Labor 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 National Youth Administration and with the Office of Education of the Department of the Interior...”*²²

The Department does not provide any evidence that the proposed rule has the input and support of employers and labor.

- The Department should include along with each added component, a summary of input from employers and labor detailing how the component will affect them.

²¹ Proposed Rule, p. 3119.

²² National Apprenticeship Act, 50 Stat. 664, August 16, 1937.

The Department does not reveal whether or how it cooperated with State agencies in the formulation and promotion of standards of apprenticeship.

- The Department should explain its coordination with State agencies, including detailing components of the proposed rule that State agencies directly asked for or supported, as well as components of the proposed rule that State agencies expressed concerns about or outright rejected.
- If, as the content of the proposed rule and comments representing state apprenticeship parties suggests, the Department did not cooperate with state agencies, it should rescind the proposed rule as it is in violation of Congress's statutory requirements for the Department to cooperate with state agencies.

The Department does not demonstrate cooperation with the Department of Education (the successor of the Office of Education).

- The Department should explain its cooperation with the Department of Education and how that cooperation influenced the proposed rule. For example, the Department should explain how the Department of Education view's each of the proposed rule's components as either positively or negatively affecting: education costs, the availability and uptake of apprenticeship programs, and skilled workforce shortages.

Proposed Rule Provides Flawed Economic Analysis

Executive Order 13563²³ requires agencies to “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs.”²⁴ The Department's economic analysis fails the “reasoned determination” test because it relies on flawed statistical methods, includes assumptions that are counter to economic reality, neglects to consider many costs, and fails to provide an explanation for excluding such costs.

Estimates Based on Short and Irregular Time Period. The proposed rule estimates the number of total apprenticeship programs, new programs, competency-based programs, and hybrid programs based on the annual average change between 2017 and 2022. This time period is insufficiently short as it does not include a full, ordinary business cycle. The last business cycle, from trough to trough, lasted 11 years, from 2009 to 2020. Apprenticeship programs have existed for many decades, and since 2008 under the most recent comprehensive apprenticeship regulation. The Department should have used data back through at least 2008 to project future apprenticeship growth.

Moreover, the short time period used in the analysis included a global pandemic that almost certainly hindered new programs and a DOL rule that allowed for new types of Industry Recognized Apprenticeship Programs (IRAPS) that encouraged new apprenticeship formation by

²³ Which, in turn, by its terms supplements Executive Order 12866 of September 30, 1993.

²⁴ The White House, “Executive Order 13563—Improving Regulation and Regulatory Review,” January 18, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

providing a less burdensome pathway to establishing apprenticeship programs. Use of a deficient and irregular time period as the basis of future projections is arbitrary and capricious.

Annual Averages Are Not the Best Fit. The proposed rule does not justify its use of annual average changes over the 2017 to 2022 period to project forward future numbers of total apprenticeship programs, new programs, competency-based programs, and hybrid programs. Average level changes are most practical when average annual growth rates are relatively stable over time. Percent growth rates are most practical when the change is affected by another proportional factor, such as a growing population, or when a new factor such as a change in technology or regulation opens or closes doors.

The historical data used to project forward trends includes significant variation in annual changes in level and growth rates. For example, new apprenticeships grew by as much as 23 percent per year (515) and contracted by as much as 6.5 percent per year (-164). Competency-based programs surged over the time period, growing by 18 percent to 32 percent (269 to 426) per year. And Hybrid programs grew between 6.7 percent (133) and 32 percent (315). Each type of program followed unique trends, such as competency-based programs increasing at an increasing level and declining rate, and hybrid programs increasing at a decreasing rate and decreasing level. Both levels and growth rates should have played a role in projecting forward future trends. Failing to acknowledge the starting point and recent trajectory to shape future trends is arbitrary and capricious.

Estimates Ignore the Prior Existence and Subsequent Cancellation of IRAPs. In the interim period between the dates used to calculate annual averages and the dates to which those annual averages are projected forward, the current Administration issued an Executive Order to cancel new IRAP programs and to undue existing IRAPs. Other than three instances in which the Department cites to similar estimate methods used in the Department's IRAP rule, this proposal does not acknowledge either the prior existence of or the Biden Administration's cancelling of IRAP programs, both of which affected the supply of apprenticeship programs and apprentices. The Department's failure to acknowledge the role of IRAPs is an unacceptable omission, rendering the analysis arbitrary and capricious.

Analysis Fails to Recognize Impact of Rule's New Requirements on Supply of Apprenticeships. One of the stated goals of the proposed rule is to "expand," or increase the supply of registered apprenticeship programs. Yet, the rule's analysis does not mention any consideration of how the proposed rule will increase the supply and the analysis does not project any additional expansion beyond the historical trend over the past 5 years. If the Department believes the proposed rule will increase the supply of apprenticeship programs, it should have specified through which mechanisms it would increase the supply, and the Department should have included analysis that projects future growth (beyond historical growth) as well its methodology behind that analysis. That analysis should have been provided alongside a baseline projection of apprenticeship programs absent the changes contained in the proposed regulation.

Analysis Fails to Recognize Consequences of Increased Restrictions and Anti-Competitive Practices on Supply of Apprenticeship Programs. The Department's economic analysis repeatedly mentions that components of the rule will impose new administrative burdens and additional requirements. It contains 83 instances of the word "burden[s]," 467 instances of "must,"

and 892 instances of “requirement.” The Department’s estimates (which exclude many relevant cost increases) acknowledge more than \$1 billion in added costs over 10 years. Economic theory and evidence demonstrate that, all else equal, higher costs on producers reduce the quantity supplied. Yet, the Department does not acknowledge or include in its economic analysis the impact of additional costs and requirements on the supply of apprenticeship programs.

The Department also fails to acknowledge or include in its economic analysis the effect of anti-competitive practices, such as allowing third parties to object to and prevent the establishment of new programs. It is arbitrary and capricious for the Department to omit basic economic science that higher costs for producers and veto capability by competitors lead to lower supply.

Spillover Economic Impacts Ignored. This proposal’s anti-competitive practices and regulatory restrictions and burdens will drastically increase the cost and reduce the supply of registered apprenticeship programs. This will have implications for labor shortages, skills gaps, workers’ earnings, and education costs. It is arbitrary and capricious for the Department to not even mention these potential direct economic costs of its proposed rule.

Estimates of CTE Apprentices Lacks Documentation. The proposed rule completely upends existing CTE programs, newly subjecting them to federal regulations and required minimum hours. The Department’s analysis provides insufficient basis for its estimates regarding new CTE Apprentices. The Department’s cost estimated are based on the estimated number of new apprentices who are projected to enter registered CTE apprenticeship programs, but the Department’s projections of new apprentices is based on registered apprenticeship programs that are distinct from current CTE programs.

Estimates Leave Out the Impact of Canceling Two Types of Fast-Growing Apprenticeship Programs. As discussed above, the proposed rule eliminates competency-based and hybrid apprenticeships, requiring that they instead conform to traditional hours-based GRAP models. Eliminating competency-based and hybrid programs should lead to a 100 percent reduction in those particular programs with a slight uptick in traditional GRAP programs. Yet, the Department estimates that competency-based and hybrid programs—which can no longer exist in anything similar to their current form under the rule—will stay in business and continue on their current trajectory, including increasing by 145 percent over 10 years.²⁵ The Department estimates that the programs it renders extinct will account for 59 percent of all apprenticeship expansions between 2022 and 2034 (6,660 out of a total of 11,304).

One of the ABC survey questions asked members, “Would elimination of competency-based and hybrid apprenticeships, as the NPRM proposes, make you more likely or less likely to participate in a GRAP or start your own GRAP?” Three-of-four respondents (75 percent) said they would be less likely to participate in a GRAP or start their own GRAP while one-in-four (25 percent) said they would be more likely to participate in or start a GRAP.²⁶

²⁵ Proposing release, pp. 3230-3231.

²⁶ Associated Builders and Contractors, “ABC Survey: Biden’s Proposed Apprenticeship Rule Will Strongly Discourage Construction Apprenticeship Program Participation.”

These responses suggest that, within the construction-industry, roughly 25 percent of current competency-based and hybrid programs would migrate to traditional GRAPs and the other 75 percent would be eliminated. The Department's estimates say that, "There are currently an average of 3,459 programs that have occupations that are competency-based and 2,794 registered apprenticeship programs that have occupations that are hybrid," which equals a total of 6,253 affected programs.²⁷ If 75 percent of these programs shut down and 25 percent migrated to traditional GRAPs, this would lead to a one-time decline of 4,690 apprenticeship programs.

Moreover, because traditional GRAPs have been expanding much slower than competency-based and hybrid apprenticeship programs, total growth in apprenticeship programs would decline considerably. Using the Department's estimates of annual apprenticeship program growth and subtracting out 75 percent of the growth in competency-based and hybrid programs would bring the annual program expansion down from 942 per year to 526 per year. Combined with the initial loss of 4,690 programs, the elimination of competency-based and hybrid programs alone would result in 9,378 fewer apprenticeship programs (27 percent lower) than the Department estimates. Moreover, it would take 10 years just for total apprenticeship programs to recover from the loss of competency-based and hybrid programs and reach the same total number as in 2024.

The ABC survey response that I used in this example analysis, demonstrating a 75 percent loss of competency-based and hybrid programs, may not be the appropriate ratio, but there will be some significant portion of loss. The Department's failure to account for a loss of some of these programs is arbitrary and capricious and refutes the Department's economic analysis.

Moreover, when estimating the costs of its proposed rule, the Department failed to acknowledge the compensation and operational cost of paying apprentices and instructors for additional hours of on-the-job and off-the-job instruction. Using the Department's projections for the total number of apprentices in 2025-2034, and multiplying that by the ratio of the Department's projections for the percentage of apprenticeships that are competency-based or hybrid and thus subject to additional hours requirements, each 100 additional hours of instruction that current competency-based and hybrid programs must include in order to become a traditional GRAP would add \$4.7 billion in costs for apprentices alone. If competency-based and hybrid programs had to add 700 hours of total instruction, this would equal \$32.3 billion in additional compensation for apprentices between 2025 and 2034.

These estimates assume an hourly total compensation cost of \$20 for apprentices. These estimates do not include the additional costs of compensating instructors or the additional operational expenses of the extra training.

The Department's failure to include the undeniable costs of additional hours of instruction for current competency-based and hybrid programs to convert to traditional GRAPs is arbitrary and capricious and renders the Department's economic analysis blatantly inaccurate.

²⁷ Proposing release, p. 3235.

Proposed Rule Fails to Consider Alternatives

The Department fails to consider many other burdens that the rule would impose on society, including a less capable workforce, higher employer costs, fewer education options and higher education costs, and impacts on the availability and cost of services that could be performed by apprenticeship-trained individuals.

The Department also failed to consider alternatives that would have imposed fewer new costs and regulations on apprentices, employers, and program sponsors. One such alternative was the IRAP model that was quickly expanding before the Biden Administration cancelled it.²⁸ The proposed rule provides no mention of IRAPs other than citing to similar methodology used in the IRAP rule. The Department neither claims that such a model was unsuccessful or harmful to workers nor considers such a model as an alternative. It is arbitrary and capricious for the Department to fail to consider the IRAP model as an alternative or additional pathway to apprenticeship expansion.

Proposed Rule is Now Outdated and Must be Reevaluated, Reanalyzed, and Replaced with a New NPRM

On March 6, 2024—49 days after the Department published the proposed rule and 12 days before the end of the comment period—President Biden issued an “Executive Order on Scaling and Expanding the Use of Registered Apprenticeships in Industries and the Federal Government and Promoting Labor-Management Forums”.²⁹

This EO uses both the carrot and stick of taxpayer dollars to reward existing GRAPs and encourage the creation of new GRAPs, thus altering the financial structure and supply of certain GRAPs, as well as the potential number of apprentices. For example, a company that seeks a government contract and which does not currently have an apprenticeship program may no longer be able to compete for that contract without participating in a GRAP and may choose to participate in a GRAP. This would increase the number of participating employers, and potentially the number of apprentices compared with what the Department included in its analysis.

Consequently, the President’s EO on apprenticeships invalidates the existing analysis of the proposed rule. The Department must reevaluate how its proposed rule will interact with the new EO, reanalyze the impact of its proposed rule in light of the new EO, make any changes to its proposed rule and economic analysis, and replace the current proposal with a new NPRM.

²⁸ To promote maximum apprenticeship growth and fairness in application of the law, the IRAP apprenticeship structure should not have exempted any industries, such as it did the construction industry. A future revival of the IRAPs should not exclude any sectors.

²⁹ Executive Order 14119, “Scaling and Expanding the Use of Registered Apprenticeships in Industries and the Federal Government and Promoting Labor-Management Forums.”

Conclusion

The Department should withdraw the proposed rule and consider alternatives that would—based on economic theory and sound evidence—better meet the Department’s stated objectives to expand apprenticeship programs, and that would lead to more benefits than costs for apprentices, employers, plan sponsors, and the economy as a whole.³⁰ For starters, the Department should revisit the IRAP model that had been growing in high-demand fields such as nursing prior to the current Administration’s cancellation of IRAPs.

The rule is premised on the notion that current GRAP models fail to adequately and safely train apprentices for occupations, but the Department provides no specific evidence of how individuals, employers, or industries have been ill-prepared or subject to unsafe conditions because of a lack of the proposed regulations.

Furthermore, while the rule aims to expand apprenticeship programs and estimates 48 percent growth in apprenticeships between 2022 and 2034, the Department provides no evidence for how its proposed rule will generate such growth. To the contrary, the proposed rule will almost certainly lead to a decline in the total number and growth rate of apprenticeships and the Department failed to acknowledge this alternative and highly probable outcome. For these reasons the proposed rule is arbitrary and capricious.

The proposed rule also violates Executive Orders 13563 and 12866, the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. The Department’s economic analysis is exceedingly deficient as it violates basic standards of forecasting, ignores massive new costs, and baselessly assumes outcomes in the opposite direction of economic evidence. The proposed rule contains no meaningful considerations of alternatives.

And finally, the Department’s proposed rule and economic analysis are also outdated and inaccurate pursuant to President Biden’s issuance of a March 6, 2024 Executive Order on apprenticeships that alters the fundamental landscape of apprenticeship programs.

Respectfully submitted,

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³⁰ The White House, “Executive Order 13563—Improving Regulation and Regulatory Review,” January 18, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

³¹This comment is submitted in my personal capacity, with my title provided for informational purposes only.