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Subject: Comments on Proposed Changes to Certification of Pesticide Applicators

To Whom It May Concern:

The Tribal Pesticide Program Council (TPPC) is pleased to submit these comments and recommendations regarding the U.S. Environmental Protection Agency's (EPA's) proposed changes to the existing regulation regarding the certification of applicators of restricted use pesticides (hereinafter "Proposed Rule").¹

INTRODUCTION

The TPPC is an autonomous organization with approximately 45 member Tribes and Tribal organizations. The TPPC is a Tribal technical resource, and program and policy development dialogue group, focused on pesticides issues and concerns. The TPPC assists Indian Tribes in building Tribal pesticide programs, providing pesticide education and training, and researching, developing and presenting a broad range of Tribal pesticide-related issues and concerns. It is important to note that the views expressed by the TPPC may not be agreed upon by all Tribes. There are 567 federally recognized Tribes whose views and circumstances are unique. Hence, "one size does not fit all." As such, it is important that EPA understand interactions with the TPPC do not substitute for government-to-government consultation, which can only be achieved through direct communication between the federal government and Tribes.

The TPPC finds that revisions to the certification of pesticide applicators of restricted use pesticides (RUPs) regulation are necessary and will help insure that applicators, and the public and environment, are adequately protected from the risks associated with RUP use. Yet, the TPPC finds it necessary to provide EPA with its comments and recommendations regarding the following issues regarding the Proposed Rule: state and tribal certification plan requirements, certification of commercial and private applicators, economic impacts of

¹ See Pesticide; Certification of Pesticide Applicators, 80 Fed. Reg. 51356 (August 24, 2015).

Proposed Rule on commercial and private applicators, noncertified applications, minimum age for applicators, and certification options in Indian Country. However, the TPPC prefaces its comments and recommendations by advising EPA about the importance of consulting with Indian Tribes on a government-to-government basis which the TPPC finds that EPA failed to do regarding the Proposed Rule.

TRIBAL CONSULTATION

EPA provides that the Proposed Rule does “not have tribal implications, as specified in Executive Order 13175.”² The rationale for EPA’s finding is that the Proposed Rule does “not require Tribes to implement certification programs,” and for those Indian Tribes that have EPA-approved certification plans (*e.g.*, four in all), EPA claims that the costs to revise such plans to comply with the Proposed Rule would be negligible.

The TPPC strongly disagrees with EPA’s conclusion that the Proposed Rule does not have Tribal implications and finds that EPA does not understand fully the intent behind Executive Order (EO) 13175 as it is not limited to federal actions with financial impacts to Indian Tribes. Specifically, section 1(a) of EO 13175 defines “policies that have tribal implications” as:

[R]egulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.³

The TPPC finds that costs imposed under the Proposed Rule are a real issue to Indian Tribes and are, in fact, not negligible. Further, the Proposed Rule would alter how RUPs are administered by commercial and private applicators in Indian Country. Hence, there will be Tribal implications, both financial and non-financial, for which EPA must engage in government-to-government consultation with Tribes. As such, EO 13175 requires EPA to develop an accountability process to ensure “*meaningful and timely* input by development of regulatory policies that have tribal implications.”⁴ (*emphasis added*). This necessitates that EPA consult with Tribes and their leaders on a government-to-government basis.

Even though EPA finds that the Proposed Rule does not have Tribal implications, EPA claims that it still consulted with Indian Tribes⁵ and identifies its efforts in an April 2010 document, attached to the docket for the Proposed Rule, entitled “OPP Tribal Consultation Revisions to the Certification of Pesticide Application regulation 40 CFR 171” (EPA Document).⁶ The EPA Document indicates that EPA sent one thousand letters of invitation (and fact sheets) to federally-recognized Tribal contacts regarding consultation about the Certification of

² *Id.* at 51400.

³ Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 9, 2000), at <http://www.epa.gov/fedrgstr/eo/eo13175.htm> (last visited on August 29, 2014).

⁴ *Id.*

⁵ Proposed Rule at 51400.

⁶ See <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2011-0183-0029> (last visited December 5, 2015).

Pesticide Applicators regulation; on April 7, 2010, EPA held an initial call with the TPPC to inform it about two Tribal consultation calls to be held on April 27 and 29, 2010; and 25 Tribal representatives attended one or both Tribal consultation calls.⁷

The TPPC finds that Tribal consultation regarding the Proposed Rule falls short for at least three reasons. First, the EPA Document fails to indicate to whom the letters of invitation for consultation were sent. Were they sent to Tribal leaders, administrators and/or environmental department directors? This is important information to know in order to determine whether EPA provided Indian Tribes with proper notice about consultation regarding the Proposed Rule. Second, the EPA Document fails to provide proof that the Tribal representatives who participated on the Tribal consultation calls were designated by their respective Tribes to consult with EPA. Absent such a designation, these representatives were likely participating for informational purposes only. Third, the EPA Document addresses Tribal consultation that took place several years ago, long before EPA knew what portions of the Certification of Pesticide Applicators regulation that it was considering revising. How is a pseudo-consultation that occurred more than five years ago timely or meaningful? It isn't! EPA should have invited Tribes to participate in additional government-to-government consultation at a time closer to the Proposed Rule being issued.

The TPPC finds that EPA has not engaged in meaningful government-to-government consultation with Indian Tribes regarding the Proposed Rule. It must do so now, and must also address each of the issues identified in this letter by the TPPC before the Proposed Rule becomes final. The Proposed Rule is complicated, far-reaching, burdensome, and fails to account for the practical differences of states and Tribes that could impact how such governments could or will be able to come into compliance with the rule once it becomes final. Not every Tribe is going to agree with every provision of the Proposed Rule. Members of the TPPC have done their best to conduct outreach with Tribes in their respective regions, but can only do so much when such members must also meet their day-to-day responsibilities as employees of various Tribes and Tribal organizations. Even so, this outreach does not equate to government-to-government consultation with Tribes. This is the responsibility of EPA and government-to-government consultation requires that each individual Tribal government consider the Proposed Rule in its own way.

EPA must develop and implement a comprehensive Tribal consultation plan regarding the Proposed Rule. The consultation process that flows from this plan must take into account previous comments and recommendations made by Indian Tribes regarding the Proposed Rule, but must also seek other input from Tribes going forward with respect to the rule. While Tribes consider government-to-government consultation to be very important, EPA must understand that such Tribes have limited resources and time to expend on such consultation. EPA must make a genuine effort to provide Tribes with any additional resources and assistance that they might require to engage in effective government-to-government consultation. As such, the TPPC recommends some of the following actions to EPA to help it conduct effective government-to-government consultation with Tribes regarding the Proposed Rule:

⁷ *Id.*

1. Develop guidance on how EPA intends to assure that government-to-government consultation meetings with Tribes result in meaningful dialogue rather than simply pro forma consultation;
2. Assign a Tribal liaison to the Proposed Rule who has extensively worked with Tribes on similar issues;
3. Send a letter to each Tribal chairperson with copies provided to appropriate staff (*e.g.*, Tribal administrator, environmental manager) that asks each Tribe how it would like to be consulted on the Proposed Rule. Providing copies to different individuals of authority within the Tribe will provide better assurances that the Tribe is clearly made aware of the Proposed Rule. Asking each Tribe about how it would like to be consulted respects their individual sovereignty and tribal cultures, and helps to insure that true government-to-government consultation occurs.
4. Provide assurances to Tribes that the most senior-level EPA officials will be engaged in government-to-government consultation since they will likely be represented by their highest-level officials such as Tribal chairpersons and/or council members.
5. Provide adequate time to Tribes to review and provide comments concerning the Proposed Rule.

The TPPC is available to provide additional recommendations and help EPA coordinate its government-to-government consultation process with Indian Tribes.

Further, EPA must engage in government-to-government consultation with individual Tribes and not groups of Tribes which might occur as part of an outreach session at a conference or other similar gathering. Such a consultation approach is necessary for a number of reasons. First, it provides for more candid conversations between the individual Tribe and EPA than what would occur otherwise during a group meeting. Second, each Tribe's circumstances are unique and must be treated as such by EPA. A group meeting of Tribes would only give short shrift to these circumstances. Third, most cultural resources information is protected from release under statutory exemptions to the Freedom of Information Act. Discussion of such information by an individual Tribe as part a group meeting of Tribes risks its release to the general public and potentially endangers Tribal cultural sites and practices. Finally, the subject matter may be so unique that government-to-government consultation between the individual Tribe and EPA provides the best opportunity for a resolution to the situation versus a group meeting of Tribes where any number of Tribal issues could be discussed in a finite period of time.

EPA must act now in conducting meaningful and timely government-to-government consultation with Indian Tribes regarding the Proposed Rule in order to meet its obligations under EO 13175 and its trust responsibility to Indian Tribes. If it does not, the TPPC finds that EPA will have failed Tribes and set them up for failure under the Proposed Rule.

STATE AND TRIBAL CERTIFICATION PLAN REQUIREMENTS

1. Record Requirements.

a. **Program Reports.** The Proposed Rule provides that a state or Indian Tribe with an EPA-approved plan for certification of applicators of RUPs must provide the following information in its annual report to EPA:

1. Number of new, recertified, and total commercial and private applicators holding certifications by category and subcategory;
2. Any changes to the certification plan not previously evaluated by EPA;
3. Any planned changes to the certification plan; and
4. Number, description, and narrative discussion of enforcement actions taken for incidents involving restricted use pesticides (RUP).⁸

The TPPC must reiterate that “one size does not fit all” in that not every TPPC member, or Tribes in general, find the type and amount of program reporting information required by EPA to be reasonable. Some TPPC members find that the gathering and submission of program reporting information required under the Proposed Rule is not burdensome whereas other such members feel the opposite.

The TPPC recommends that EPA engage in meaningful government-to-government consultation, as discussed in the “Tribal Consultation” section of this letter, regarding the program reporting information required by EPA. This may help EPA understand better the concerns of Indian Tribes and how such concerns can be adequately addressed.

b. **Commercial Applicators.** The Proposed Rule provides that states and Indian Tribes must require commercial applicators to maintain the following records about RUP use:

1. Name and address of person for whom RUP was applied;
2. Location of application;
3. Size of area treated;
4. Crop, commodity, stored product, or site to which pesticide was applied;
5. Time and date of application;
6. Brand or product name and of pesticide applied and EPA registration number;
7. Total amount of RUP applied per application and location;
8. Name and certification number of certified applicator, and name(s) of any noncertified applicator that made the application under the direct supervision of certified applicator; and

⁸ Proposed Rule at 51417.

9. Records related to supervision of noncertified applicators working under their direct supervision of certified applicator.⁹

The TPPC agrees that the aforementioned records should be maintained, but recommends that the Proposed Rule also comply with any of the recordkeeping requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (*e.g.*, 7 U.S.C. §§ 136f, 136i-1) (FIFRA) not included above.

c. **RUP Dealers.** The Proposed Rule provides that RUP dealers will have to maintain the following records:

1. Name and address of each person to whom RUP was distributed or sold;
2. Applicator's certification number, issuing authority, certification expiration data, and categories of certification;
3. Product name and EPA registration number of RUP(s) distributed or sold in transaction, and state special local need registration number on the label of RUP;
4. Quantity of pesticide(s) distributed or sold in transaction; and
5. Date of transaction.¹⁰

The supporting document for the Proposed Rule, entitled "Comparison of the Major New Proposed Protections to the Existing Protection," states that there is "[n]o requirement for dealers of restricted use pesticides to maintain records."¹¹ While this is true, the 2013 EPA FIFRA Inspection Manual already requires the maintenance of such records for a period of 24 months.¹²

2. Implementation Requirements. The Proposed Rule provides that existing certification plans could remain in effect for up to four years after the effective date of the final rule; and that amended certification plans would need to be submitted to EPA for approval within two years of the effective date of the final rule.¹³

As written, the Proposed Rule sets up Tribes to fail. The Proposed Rule holds Indian Tribes to the same timeline as states in submitting their amended certification plans within two years of the effective date of the final rule. States have multiple staff members dedicated to pesticide issues on a full-time basis whereas most Tribes have a limited number of environmental staff (*e.g.*, one or two individuals) who, not only manage pesticide issues, but a number of other environmental issues as well. How can Tribes be expected to meet the same

⁹ *Id.* at 51393.

¹⁰ *Id.*

¹¹ EPA, "Comparison of the Major New Proposed Protections to the Existing Protections." http://www.epa.gov/sites/production/files/2015-08/documents/certification_rule_simple_comparison_chart_7-21-15_final.pdf.

¹² EPA, "Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Inspection Manual," Chapter 11, page 3 (October 2013). See <http://www.epa.gov/sites/production/files/2014-01/documents/fiframanual.pdf> (last visited December 5, 2015).

¹³ Proposed Rule at 51397.

timeline as states to bring their certification plans into compliance when Tribal environmental staff members are already overburdened by their existing day-to-day responsibilities? They can't! If EPA had conducted the requisite government-to-government consultation with Tribes in accordance with EO 13175, it would have learned that the Proposed Rule places an enormous and unfair burden on Tribes when compared to the burden placed on states. The burden to Tribes must still be addressed before the Proposed Rule becomes final. As such, the TPPC recommends strongly that EPA engage in government-to-government consultation with Tribes having certification plans to see how to bring these plans into compliance based on the Tribes' specific circumstances. Further, the TPPC recommends that these Tribes be provided with the necessary financial and technical resources to bring their certification plans into compliance.

CERTIFICATION OF COMMERCIAL AND PRIVATE APPLICATORS

1. Competency of Private Applicators. The Proposed Rule provides that private applicators must meet general core competency standards, similar to commercial applicators, which include label and labeling comprehension, safety, environment, pests, pesticides, equipment, application methods, laws and regulations, responsibilities for supervisors of noncertified applicators, stewardship, and general knowledge of pesticide control.¹⁴

The TPPC supports strengthened competency standards, not only for private applicators, but commercial applicators as well.

2. New Application Categories. The Proposed Rule provides for three new method-specific application categories (*e.g.*, aerial, soil, and non-soil fumigation)¹⁵ and two predator control categories (*e.g.*, sodium fluoroacetate in livestock protection collars and sodium cyanide delivered through M-44 devices)¹⁶.

The TPPC recommends that the Proposed Rule go further by moving chemigation and irrigation applications from best management practices to specific application categories. Inspectors will also require training for compliance inspections of these categories.

3. Certification Period and Standard for Certification. The Proposed Rule provides that commercial and private applicators of RUPs would be required to renew their certification every three years by either passing written exams for each certification held or completing specific training in a continuing education program.¹⁷ Further, commercial applicators would be required to demonstrate continued competency in the core standards and each category in which they intend to maintain their certification.¹⁸

a. Written Exams versus Training. The TPPC is concerned that taking written exams may become the preferred option for applicators based on the time and cost related to in-person and online training courses. However, the TPPC finds that training, and

¹⁴ *Id.* at 51409.

¹⁵ *Id.* at 51372.

¹⁶ *Id.* at 51376.

¹⁷ *Id.* at 51357.

¹⁸ *Id.*

more specifically in-person training, is the best means to learn and retain information important to applicators in the performance of their jobs.

The TPPC recommends that the Proposed Rule provide for a weighted approach that provides a greater emphasis on taking in-person and online courses over taking written exams outside of such courses.

b. Training Burdens. The TPPC is not so much concerned about the renewal period for certifications but the training available to meet such certifications. Some TPPC members have commented that in-person training courses are typically worth three to six continuing education units (CEUs). Applicators must travel many miles to a majority of such trainings where they may be forced stay overnight at a substantial expense with a loss in work productivity, and which are often offered infrequently and at inconvenient times, *i.e.*, specific categories are only offered during certain years, and courses are sometimes offered during busy seasons for applicators. This, in turn, may limit the ability of applicators to attend such training. Further, applicators may be forced to take online courses, thereby losing the opportunity for hands-on training, and may also need to take available courses which don't apply to their specific needs and circumstances.

The TPPC recommends that, before committing to a three-year certification renewal period under the Proposed Rule, EPA consult and work closely with Indian Tribes, states, and other relevant parties to address the aforementioned problems associated with training for applicators and to implement a continuing education program that fits well with a three-year certification renewal period.

4. Continuing Education Units (CEUs). The Proposed Rule provides that commercial applicators would need to earn six CEUs covering core requirements and six CEUs per category of certification; and private applicators would need to earn six CEUs covering general private applicator certification requirements and three CEUs per category of certification.¹⁹ Further, commercial and private applications would need to earn at least half of their required CEUs in the 18 months preceding expiration of their certification.²⁰

Echoing what the TPPC stated earlier, there are problems with the current continuing education programs for applicators. The Proposed Rule makes this more difficult by establishing core requirements and specific category CEU requirements that some existing and prospective applicators might find too burdensome to meet, such as needing to complete six CEUs versus three, causing them to forego being applicators and thereby creating a possible shortage of applicators.

The TPPC recommends that EPA ensure sufficient numbers and types of courses are available to applicators, throughout their respective jurisdictions and regions, if applicators are expected by EPA to meet the certification requirements identified under the Proposed Rule. Further, EPA should reconsider whether it needs to increase the number of required CEUs from three to six. Finally, the TPPC finds that tracking completion of 50% of an applicator's CEUs in

¹⁹ *Id.* at 51390.

²⁰ *Id.*

the last 18 months of his or her certification period will be hard to achieve. As such, the TPPC recommends that the Proposed Rule require applicators to meet an annual CEU requirement instead.

5. Non-Reader Option for Private Applicators. The Proposed Rule provides that there will no longer be a “non-reader” option for private certified applicators of RUPs who can’t read, nor will they receive “grandfather” status under the Proposed Rule if they are already certified.²¹

Much like the program reporting requirements for states and Tribes with EPA-approved plans for certification of applicators of RUPs, one does not fit all, *i.e.*, not every TPPC member, or Tribes in general, have adopted the same position regarding private applicators who can’t read. Some TPPC members find that, because a non-reader applicator is already certified, his or her status should be grandfathered under the Proposed Rule, allowing him or her to continue as a certified private applicator, provided that he or she meets all other certification renewal requirements. Other TPPC members find that it would be difficult for a non-reader applicator to comply with the law. However, one option might be to grandfather the applicator under the Proposed Rule as an operator or handler.

As stated earlier, the TPPC finds that EPA must engage in meaningful government-to-government consultation, as discussed in the “Tribal Consultation” section of this letter, and whether EPA should allow existing non-reader private applicators to continue to serve as certified applicators.

ECONOMIC IMPACTS OF PROPOSED RULE ON COMMERCIAL AND PRIVATE APPLICATORS

The TPPC finds that the Proposed Rule comes with an expensive price tag, not only for Tribes with certification plans, but also for commercial and private applicators required to comply with such plans. Further, the Proposed Rule fails to accurately account for, in its economic impact analysis, the full cost to commercial and private applicators to comply with the rule. Specifically, the Proposed Rule provides that the annual cost to commercial applicators would be \$27.4 million, or \$66 per commercial applicators; and \$19.5 million, or \$40 per private applicator.²² These financial figures account for annual license renewals only. They fail to take into consideration license recertification costs (*e.g.*, tuition, mileage, and lodging in some cases).

The TPPC recommends that EPA conduct a more thorough economic analysis that includes these license recertification costs and any other costs to commercial and private applicators, and Tribes with certification plans, so they are fully informed about the costs of the Proposed Rule and can decide how to proceed (*e.g.*, Tribes might decide to forego having certification plans, and/or commercial or private applicators might decide not to continue to be applicators).

NONCERTIFIED APPLICATORS

²¹ *Id.* at 51371.

²² *Id.* at 51365.

The Proposed Rule provides that, in order for a noncertified applicator to work under the direct supervision of a certified applicator, he or she would have to complete annual training on safe pesticide application training and protecting himself or herself and others from pesticide exposure, or training required for handlers under the Worker Protection Standards (WPS); or pass an exam on the general standards of competence for commercial pesticide applicators.²³ Noncertified applicators satisfying one of the training requirements would be required to renew their qualifications annually, and such applicators passing the core exam would be required to renew their qualifications every three years.²⁴

Assuming that noncertified applicators are a necessity (*e.g.*, some Tribes don't find them as such), the TPPC agrees that noncertified applicators should satisfy one of the training requirements or pass a core exam in order to work under the direct supervision of a certified applicator. However, the TPPC finds that a noncertified applicator taking a core exam should be required to demonstrate his or her competency as frequently as an applicator who takes training. As such, the TPPC recommends that noncertified applicators choosing to take a core exam should be required to pass it annually.

MINIMUM AGE OF APPLICATORS

The Proposed Rule provides that commercial and private applicators must be at least 18 years old; and noncertified applicators, under the direct supervision of a commercial or private applicator, must be at least 18 years old.²⁵

WPS provides that handlers and early-entry entry workers involving pesticide applications must be at least 18 years old; provided, however, immediate family members working on family farms need only be 16 years old.²⁶ The TPPC finds a significant disconnect that a 16 year old involved with pesticide applications could be in compliance under WPS, but in violation of the Proposed Rule, based simply on his or her age. The TPPC agrees with the family farm exception and recommends that the Proposed Rule provide an exemption for an immediate family member who is a private applicator working on his or her family farm.

CERTIFICATION OPTIONS AVAILABLE TO INDIAN COUNTRY

1. Tribal-EPA Agreement. The Proposed Rule provides that Indian Tribes may enter into agreements with EPA to recognize certifications issued under other EPA-approved certification plans (*e.g.*, state, Tribal, or Federal) without having to enter into state-Tribal cooperative agreements with the entities of these EPA-approved plans.²⁷ The TPPC supports this approach. However, it has three concerns for which it requires a response from EPA.

²³ *Id.* at 51380.

²⁴ *Id.*

²⁵ *Id.* at 51357.

²⁶ "Pesticides; Agricultural Worker Protection Standard Revisions; Final Rule." 80 Fed. Reg. 67496, 67525 (November 2, 2015).

²⁷ Proposed Rule at 51395.

a. How would a state know whether a Tribe had an agreement with EPA to recognize the certification of the state? The Proposed Rule appears to be silent on this matter.

b. What entity would claim jurisdiction on Tribal fee lands under a Tribal-EPA agreement? This has been a real issue for a TPPC member who also has a state applicator's license. The TPPC member has been prevented from applying pesticides on Tribal fee lands in aquatic situations because the state, for which he has a license, will not cover him under its National Pollutant Discharge Elimination System because the fee land is Tribal land (*e.g.*, not trust land). EPA will not cover his application of pesticides because it claims the land is under the jurisdiction of the state. Hence, he is unable to apply pesticides on the Tribal fee land.

c. Under a Tribal-EPA agreement, which entity's RUP list will be adopted? The RUP list for a state and EPA will not necessarily be the same. The TPPC finds that one list will have to control, but is uncertain about which one. Complicating the situation is how a RUP will be treated if it is on Tribal trust land. The TPPC member identified above has indicated that a pesticide he uses is not an RUP under the EPA list, but once he is on fee lands of the Tribe, the pesticide is considered an RUP on the state list.

2. Federal Certification Plan. The Proposed Rule provides that EPA may administer a Federal certification plan for applicators in Indian Country (must meet or exceed proposed standards), and that EPA may include multiple Tribes and geographic areas under a single plan.²⁸

The TPPC does not support a federal certification plan that would cover applicators using RUPs in different, non-contiguous parts of Indian Country. Instead, the TPPC supports the existing EPA plan for the certification of applicators of RUPs with Indian Country which provides "[t]he certification on which the Federal certificate will be based must be from a State or Tribe with a contiguous boundary to the relevant areas of Indian country."²⁹ Further, the existing EPA plans indicates that EPA regional offices have little discretion in allowing Federal certification under the final EPA plan based on valid certifications from nearby states or Tribes not directly contiguous to the Indian Country area at issue.³⁰ Finally, the TPPC questions whether the EPA would even have the time and resources to oversee a federal certification plan.

CONCLUSION

In summary, the TPPC is pleased to provide the aforementioned comments regarding the Proposed Rule. If EPA should have any questions of the TPPC, please feel free to contact the TPPC via e-mail at fc Corey@micmac-nsn.gov.

Respectfully Submitted,

²⁸ *Id.*

²⁹ "Final EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides within Indian Country; Notice of Implementation." 79 Fed. Reg. 7185, 7187 (February 6, 2014).

³⁰ *Id.*

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