

United States Senate

February 1, 2018

The Honorable R. Alexander Acosta
Secretary
Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Dear Secretary Acosta:

I am writing regarding a new report today that Department leadership “scrubbed an unfavorable internal analysis” from a December 2017 proposal to rescind an Obama-era regulation to ensure that restaurant and other workers receive the tips that they earn. According to the report, the rejected analysis showed that “workers could lose billions of dollars in tips as a result of the proposal.”¹

According to the report, you and other senior department officials, along with unnamed White House officials, appear to have been deeply involved in this decision:

Senior department political officials —faced with a government analysis showing that workers could lose billions of dollars in tips as a result of the proposal—ordered staff to revise the data methodology to lessen the expected impact, several of the sources said. Although later calculations showed progressively reduced tip losses, Labor Secretary Alexander Acosta and his team are said to have still been uncomfortable with including the data in the proposal.... They wound up receiving approval from the White House to publish a proposal Dec. 5 that removed the economic transfer data altogether....²

I am alarmed and angry at these reports. If true, they reveal that you and other DOL officials moved forward—and continue to move forward—on this proposal even though you were aware that it would cost workers billions of dollars, and that you acted to hide this

¹ Penn, *Bloomberg*, “Labor Dept. Ditches Data on Worker Tips Retained by Businesses” (Feb. 1, 2018) (<https://bna.news.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>).

² *Id.*

information from the public during the rulemaking process. The report also indicated that key officials at OMB and the White House may have been involved in this decision.³

In addition, if this analysis exists, it would contradict DOL's assertion in the December 5 Notice of Proposed Rulemaking that it was unable to calculate the effects of its proposal on employees' earnings. The proposal claimed that "The Department is unable to quantify how customers will respond to proposed regulatory changes, which in turn would affect total tipped income..." and that "the Department currently lacks data to quantify possible reallocations of tips through newly expanded tip pools..." If today's report is true, and DOL did in fact possess analyses of the proposal's effects on employees' earnings, these public statements were misleading.⁴

In response to this new report, the Department announced this morning that it will "publish an informed cost-benefit analysis as part of any final rule."⁵ But this belated announcement does not address my concerns: it fails to answer key questions about why DOL hid the initial analysis, and the degree to which the DOL proposal has been affected by political interference from top DOL, OMB, or White House officials.

In order to address my concerns, I ask that you provide me with the following information no later than February 15, 2018:

1. Copies of any and all final analyses, and all interim or draft copies of these analyses, prepared by DOL staff assessing the impact of the DOL's December 5, 2017 proposed rule on Tip Regulations Under the Fair Labor Standards Act.
2. A full list of any DOL, OMB, or White House officials that received a copy of any of these final, interim, or draft analyses, and the date that they received these copies.
3. All email or other correspondence or records in the possession of DOL related to these analyses, including any proposal drafts or other correspondence between DOL, OMB, and/or the White House prior to the publication of the proposed rule in the Federal Register on December 5, 2017.⁶

I also ask that you provide my staff with a briefing on this matter no later than February 15, 2018.

Given these outstanding questions, it is essential that you delay the end of the public notice-and-comment period, which is currently scheduled to end in four days. In order to provide informed comment on the proposed rule, the public must be aware of and have access to the Department's analysis of the proposal's effects on millions of American workers, which,

³ *Id.*


⁴ 82 FR 57395, Tip Regulations Under the Fair Labor Standards Act (FLSA) (Dec. 5, 2018) (<https://www.federalregister.gov/documents/2017/12/05/2017-25802/tip-regulations-under-the-fair-labor-standards-act-flsa>)

⁵ Hanna, *POLITICO Pro*, "DOL to Publish Tip Analysis after Comment Period Ends" (Feb. 1, 2018)

⁶ *Id.*

according to one public estimate, may total \$5.8 billion in just one year.⁷ If today's report is true, and you intentionally hid this important analysis from the public, you should withdraw the proposed rule.

Sincerely,



Elizabeth Warren
United States Senator

⁷ Shierholz, Cooper, Wolfe, & Zipperer, *Economic Policy Institute*, "Employers would pocket \$5.8 billion of workers' tips under Trump administration's proposed 'tip stealing' rule" (Dec. 12, 2017) (<http://www.epi.org/publication/employers-would-pocket-workers-tips-under-trump-administrations-proposed-tip-stealing-rule/>)