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February 12, 2018

The Honorable Neomi Rao  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
1725 17<sup>th</sup> St. NW  
Washington, DC 20503

Dear Administrator Rao:

I am writing seeking information on any role you or your staff may have had in “scrubb[ing] an unfavorable internal analysis” from a December 2017 proposal to rescind an Obama-era regulation ensuring that restaurant and other workers receive the tips that they earn, and to determine how you will address this matter. The rejected analysis reportedly showed that “workers could lose billions of dollars in tips as a result of the proposal.”<sup>1</sup>

According to the report:

Office of Management and Budget’s regulatory review staff was familiar with the data, before the proposed rule was released ... [but] it’s not clear whether OMB Director Mick Mulvaney approved the deletion or whether Neomi Rao ....was involved in the decision.<sup>2</sup>

You have been a proponent of more transparency and economic analysis in the rulemaking process. During your confirmation hearing, you noted OIRA’s role in “ensur[ing] that administrative agencies ... base their decisions on the best possible economic and technical analysis,” and promised to “ensure the continuity of OIRA’s principles ... [and] maintai[n] the integrity of the process.”<sup>3</sup>

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<sup>1</sup> Penn, B., Bloomberg, Labor Dept. Ditches Data on Workers 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>).

<sup>2</sup> *Id.*

<sup>3</sup> Rao, N., United States Senate Homeland Security and Government Affairs Committee (June 7, 2017) (<http://www.hsgac.senate.gov/download/testimony-rao-2017-06-06>)

But if DOL hid a key economic analysis of this proposed rule – and if OMB officials were aware of and complicit in doing so – that would raise serious questions about the integrity of the rule itself, and about your role and the role of other OMB officials in the rulemaking.

In order to address my concerns, I ask that you provide me with the following information no later than February 26, 2018:

1. Prior to February 1, 2018, were you aware of any DOL analyses of the impact of the proposed rule on Tip Regulations Under the Fair Labor Standards Act?
  - a. When did you become aware of these analyses?
  - b. Did you discuss these analyses with any other officials at OMB, DOL, or the White House?
  - c. If so, with whom did you discuss this matter?
  - d. Did you provide any advice or express any views to DOL, other OMB officials, or White House officials about the DOL decision not to publicly release this analysis?
  - e. Were any other OMB officials, including Director Mulvaney, aware of the DOL analysis? If so, when did they become aware, with whom did they discuss this matter, and did they provide any advice or express any views to DOL, other OMB officials, or White House officials about the DOL decision not to publicly release this analysis?
2. Was the OMB role in this decision consistent with the agency mission, with past precedent, and with Executive Order 12866? Experts “told Bloomberg Law that scrapping a completed analysis from a significant proposal would mark a troubling departure from the government’s mission. Agencies and OMB are expected to ensure that all available data are brought to bear during notice-and-comment rulemaking.”<sup>4</sup>
  - a. Is this opinion correct? Is it OMB’s role to ensure that all available data are brought to bear during notice-and-comment rulemaking?
  - b. Why, in this case, did OMB not act to ensure that the DOL analysis was made public prior to the close of the proposed rule’s public comment period?
  - c. Executive Order 12866 requires that agencies assess “all costs and benefits” of potential regulations. How would the DOL rulemaking and your regulatory review be compliant with this provision if it did not include a key DOL analysis of its impact on workers?
3. Did you or any other OMB officials meet with or otherwise communicate with representatives of the restaurant industry or other industries affected by the tip rule, either before or after the rule was officially sent to OMB? Please provide a list of all such meetings, and a brief summary of the agenda and discussion of these meetings. Was the DOL analysis discussed at any of these meetings?


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<sup>4</sup> Penn, B., Bloomberg, Labor Dept. Ditches Data on Workers 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>).

4. I asked Secretary Acosta to delay the end of the notice-and-comment period in response to reports of the hidden analysis, but he has not done so. I have also asked that he withdraw the proposed rule.<sup>5</sup> If DOL hid important information from the public on the impact of this rule, would OMB support its withdrawal in order to give the public time to obtain and understand this information?

I ask that you provide me with answers to these questions no later than February 26, 2018. I also ask that you provide me with all email or other correspondence or records in the possession of OMB related to or including any discussion of the DOL analyses, including any proposal drafts or other correspondence between OMB, DOL, and/or the White House and any outside entity, both prior to and after the publication of the proposed rule in the Federal Register on December 5, 2017.<sup>6</sup>

Sincerely,



Elizabeth Warren  
United States Senator

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<sup>5</sup> Office of U.S. Senator Elizabeth Warren, "Warren Presses Labor Secretary for Answers Following Reports Dept. Hid Damaging Analysis of Proposed Tipping Rule (Feb. 1, 2018) ([https://www.warren.senate.gov/?p=press\\_release&id=2277](https://www.warren.senate.gov/?p=press_release&id=2277))

<sup>6</sup> Wage and Hour Division, U.S. Department of Labor, Notice of Proposed Rulemaking (NPRM): Tip Regulations under the Fair Labor Standards Act (FLSA) (<https://www.dol.gov/WHD/flsa/tipcreditnprm.htm>)