

ELIZABETH WARREN
MASSACHUSETTS

COMMITTEES:

BANKING, HOUSING, AND URBAN AFFAIRS

HEALTH, EDUCATION, LABOR, AND PENSIONS

ARMED SERVICES

SPECIAL COMMITTEE ON AGING

United States Senate

March 22, 2018

UNITED STATES SENATE
WASHINGTON, DC 20510-2105
P: 202-224-4543

2400 JFK FEDERAL BUILDING
15 NEW SUDBURY STREET
BOSTON, MA 02203
P: 617-565-3170

1550 MAIN STREET
SUITE 406
SPRINGFIELD, MA 01103
P: 413-788-2690

www.warren.senate.gov

The Honorable Lamar Alexander
Chairman
Senate Committee on Health, Education, Labor, and Pensions
United States Senate
Washington, DC 20510

Dear Chairman Alexander:

I write to respectfully request that you conduct an oversight hearing as soon as possible on a matter affecting millions of working Americans: the Department of Labor's (DOL) apparent mishandling of its proposed tip regulations under the Fair Labor Standards Act (FLSA).¹ Recent news reports have indicated that political leadership at DOL, including Secretary of Labor Alex Acosta, and the Office of Management and Budget (OMB), including OMB Director Mick Mulvaney, manipulated and hid from the public internal DOL analyses showing that the DOL proposal could cost millions of low-wage Americans billions of dollars in lost wages. I understand that, in its Omnibus legislation, Congress will halt DOL's efforts to allow employers to take their workers' tips. This will solidify legislative protections for tipped workers. But this Committee—and the American public—have a responsibility to identify what went wrong at DOL and OMB during the rulemaking, and to learn the lessons so that future rulemakings are conducted in a fair and transparent fashion.

In December 2017, DOL proposed a regulation to rescind its 2011 tip rule clarifying that tips are the property of the employees who earn them.² DOL instead proposed allowing employers to legally confiscate their employees' tips. The Department's proposal did not include an economic analysis of its effect on tipped workers, stating that DOL "currently lacks data to quantify possible reallocations of tips."³ Subsequent news reports indicated that this assertion was false, and that DOL staff had in fact conducted an analysis of its proposal showing that it would cost workers billions of dollars in lost earnings.⁴

¹ "U.S. Department of Labor Proposal Gives Freedom to Share Tips Between Traditionally Tipped and Non-tipped Workers" [press release]. *U. S. Department of Labor* (Dec. 4, 2018). Online at: <https://www.dol.gov/newsroom/releases/whd/whd20171204>.

² *Id.*

³ "Tip Regulation Under the Fair Labor Standards Act (FLSA)." 82 FR 57396. *U.S. Department of Labor* (December 5, 2017).

⁴ Penn, B. "Labor Dept. Ditches Data Showing Bosses Could Skim Waiters' Tips." *Bloomberg Law* (Feb. 1, 2018). Online at: <https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips>.

According to a new report, after staff performed their initial analysis, “the department’s political leadership ordered new methodologies that progressively lessened the expected impact....”⁵ Ultimately, DOL submitted the proposal without any analysis of its effect on workers to the Office of Information and Regulatory Affairs (OIRA). OIRA Administrator Neomi Rao reportedly rejected that proposal because it did not include such an analysis, at which point Secretary Acosta convinced Office of Management and Budget Director Mick Mulvaney to overrule Administrator Rao and allow the proposal to be released without the analysis.⁶

The misleading approach reportedly taken by Secretary Acosta and Director Mulvaney reveals an appalling disregard for the use of evidence and objective analysis in policymaking, and a lack of interest in the millions of hard-working Americans who rely on the Department of Labor, and this committee, to defend their rights and protect their earnings. The reports raise serious questions about the ability and willingness of Secretary Acosta and Director Mulvaney to objectively and fairly do their jobs.

Since February 1, when reports of the DOL hiding the tip rule analysis first became public, I have made repeated requests to DOL to provide information on this incident.⁷ I also wrote to Administrator Rao requesting information about OIRA’s involvement in the exclusion of DOL’s analysis from its proposal.⁸ Neither DOL nor OIRA has responded to these requests.

This matter falls squarely within the Committee’s jurisdiction, and given its impact on millions of workers, and reports of what appears to be egregious mishandling and political interference by Secretary Acosta and Director Mulvaney, the Committee should hold hearings to determine the facts.

I respectfully request that you conduct an oversight hearing on this rulemaking process. These hearings should include both Secretary Acosta and Director Mulvaney, and the Committee should obtain all relevant documents and communications by DOL, OMB, and White House officials so we are able to determine how exactly DOL and OMB released a tip rule proposal that did not include an analysis of its effects on tipped workers and how DOL and OMB can restore the public’s trust in its rulemaking processes. All members of this Committee, regardless of their policy views, have a strong interest in ensuring that federal agency rulemaking is conducted in an honestly and transparent fashion, based on objective evidence, with the interests of the American public—rather than those of lobbyists and narrow corporate interests—in mind. It is now up to us to determine what went wrong with DOL’s proposed tip rule, who was responsible, and how the

⁵ Penn, B. “Mulvaney, Acosta Override Regulatory Office to Hide Tips Rules Data.” *Bloomberg Law* (March 21, 2018). Online at: <https://bna.com/news.bna.com/daily-labor-report/mulvaney-acosta-override-regulatory-office-to-hide-tips-rule-data>.

⁶ *Id.*

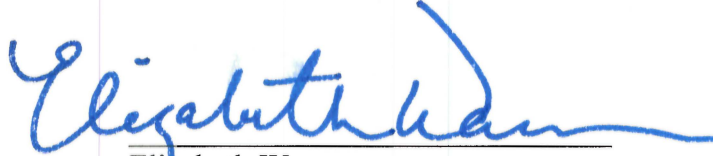
⁷ “Warren Presses Labor Secretary for Answers Following Reports Dept. Hid Damaging Analysis of Proposed Tipping Rule.” *Office of Senator Elizabeth Warren* (Feb. 1, 2018). Online at: <https://www.warren.senate.gov/oversight/letters/warren-presses-labor-secretary-for-answers-following-reports-dept-hid-damaging-analysis-of-proposed-tipping-rule>. See also Warren, E. [Follow-Up Letter to Secretary Acosta Regarding Hidden Tip Rule Analysis” (Feb. 26, 2018).

⁸ “Warren Questions OIRA Administrator Rao on Role in Hiding Damaging Analysis of Department of Labor Tipping Rule Proposal” [press release]. *Office of Senator Elizabeth Warren* (Feb. 12, 2018). Online at: <https://www.warren.senate.gov/oversight/letters/warren-questions-oira-administrator-rao-on-role-in-hiding-damaging-analysis-of-department-of-labor-tipping-rule-proposal>.

Department of Labor can fulfill its mission of “foster[ing], promot[ing], and develop[ing] the welfare of the wage earners, job seekers, and retirees of the United States.”⁹

Thank you for your attention to this important matter and your consideration of this request. I ask that you hold these hearings as quickly as possible.

Sincerely,


Elizabeth Warren
United States Senator

⁹ “Our Mission.” *U.S. Department of Labor* (accessed March 21, 2018). Online at: <https://www.dol.gov/opa/aboutdol/mission.htm>.