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United States Senate

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

Dear Secretary Acosta:

I write to express my ongoing concerns about reports that you personally acted, in conjunction with Office of Management and Budget (OMB) Director Mick Mulvaney, to hide an analysis of the Department of Labor's (DOL) tipping rule showing that the proposal would result in hundreds of millions of dollars being stolen from tipped workers by their employers. I understand that, in its Omnibus legislation, Congress will halt your efforts to allow employers to take their workers' tips. This will solidify legislative protections for tipped workers. But you and Director Mulvaney nevertheless owe the American public—and the workers who your proposed rule would have ripped off—an explanation of this botched rulemaking process.

In December, DOL proposed a regulation that would overturn its 2011 tip rules clarifying that tips are the property of employees,¹ and, instead, allow employers to legally confiscate the tips that their employees earn, which one analysis has indicated could have cost workers nearly \$6 billion dollars in take-home pay per year.² DOL's proposal included estimates of the costs that its proposal would save businesses, but it did not include an estimate of the loss in workers' earnings that it would cause, stating that DOL "currently lacks data to quantify possible reallocations of tips."³ But subsequent press reports have revealed that that assertion was false.

According to yesterday's report, before you released that proposal, you removed from the proposal an internal analysis of its effects on tipped workers and "convinced OMB Director Mick Mulvaney to overrule the White House regulatory affairs chief and release a controversial

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 Shierholz, H.; Cooper, D.; Wolfe, J.; & Zipperer, B. "Employer would pocket \$5.8 billion of workers' tips under Trump administration's proposed 'tip stealing' rule." *Economic Policy Institute* (Dec. 12, 2017). Online at: <https://www.epi.org/publication/employers-would-pocket-workers-tips-under-trump-administrations-proposed-tip-stealing-rule/>.

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

tip-sharing rule without data showing it could allow businesses to skim \$640 million in gratuities.”⁴ The report notes that Office of Information and Regulatory Affairs Administrator Neomi Rao and her staff “attempted to block the Labor Department from issuing the tip pool regulation” and that she wanted DOL to “reinsert estimates quantifying how much workers could lose out on tips to their bosses...”⁵ Instead of including the analysis in your proposal, you reportedly convinced Office of Management and Budget Director Mick Mulvaney to overrule Administrator Rao and release the proposal without data showing its disastrous effects on tipped workers. Even before you removed the analysis from the proposal entirely, “the Department’s political leadership ordered new methodologies that progressively lessened the expected impact.”⁶

You have refused to answer questions from Congress about this matter. After the initial February 1 report that DOL leadership buried the analysis, I asked repeatedly that you provide copies of the Department’s internal analyses and relevant communications with OMB and The White House.⁷ You have failed to comply with my request.

Your actions during this rulemaking process reveal a lack of regard for the requirements of the rulemaking process, for the principle that policy should be based on objective evidence and analysis rather than pre-ordained, politically motivated handouts to corporations, and, most importantly, for your basic obligation as Secretary of Labor to “foster, promote, and develop the welfare of the wage earners of the United States”⁸.

You have damaged the public trust in your ability to fairly and honestly perform your duties as Secretary of Labor and severely compromised the rulemaking process. To address this matter, I reiterate my request that you provide me with the following information no later than April 5, 2018 so that Congress may investigate your actions and the actions of key OMB and White House officials in this matter:

1. All copies of draft and final versions of all analyses by DOL staff assessing the impact of DOL’s proposed Tip Regulations Under the Fair Labor Standards Act;
2. All email or other correspondence between DOL and OMB, including Director Mulvaney and OIRA Administrator Rao, regarding the proposed tip rule;

⁴ Penn, B. “Mulvaney, Acosta Override Regulatory Office to Hide Tips Rules Data.” *Bloomberg Law* (March 21, 2018). Online at: <https://bna.news.bna.com/daily-labor-report/mulvaney-acosta-override-regulatory-office-to-hide-tips-rule-data>.

⁵ *Id.*


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

3. All email or other correspondence between DOL and industry groups or trade associations regarding the proposed tip rule; and
4. 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.

Sincerely,



Elizabeth Warren
United States Senator