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March 22, 2018

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Dear Director Mulvaney:

A new report indicates that you worked with Secretary of Labor Alex Acosta to overrule the objections of Neomi Rao, the head of the OMB's Office of Information and Regulatory Affairs (OIRA), in order to suppress an internal Department of Labor (DOL) analysis showing that the DOL's proposed tip regulations under the Fair Labor Standards Act would cost working families billions of dollars. 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 I remain concerned by your reported involvement and your political interference in this rulemaking process. I write to request information about your involvement and knowledge of its handling by DOL and OMB.

In December, DOL proposed a regulation that would rescind its 2011 tipping rule clarifying that tips are the property of the employees who earn them, instead 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."¹ Subsequent news reports revealed that this assertion was false.²

According to yesterday's report, before the proposal was released, Secretary Acosta removed from the proposal an internal analysis of its effects on tipped workers and "convinced [you] to overrule the White House regulatory affairs chief and release a controversial tip-sharing rule without data showing it could allow businesses to skim \$640 million in gratuities."³ The report notes that Office of Information and Regulatory Affairs (OIRA) Administrator Neomi Rao

¹ United States Department of Labor, "Tip Regulation Under the Fair Labor Standards Act (FLSA)," 82 FR 57396 (December 5, 2017).

² 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>.

³ Penn, B. "Mulvaney, Acosta Override Regulatory Office to Hide Tips Rules Data." *Bloomberg Law* (March 21, 2018). Online at: <https://bnanews.bna.com/daily-labor-report/mulvaney-acosta-override-regulatory-office-to-hide-tips-rule-data>.

and her staff “attempted to block the Labor Department from issuing the tip rule regulation” and that she wanted DOL to “reinsert estimated quantifying how much workers could lose out on tips to their bosses...”⁴ You reportedly sided with Secretary Acosta to overrule Administrator Rao and release the proposal without data showing its disastrous effects on tipped workers.

If these reports are true, they indicate an astonishing disregard, on both your and Secretary Acosta’s part, for the importance of evidence-based policymaking and the DOL’s mission to “foster, promote, and develop the welfare of the wage earners of the United States”⁵. Since February 1, when reports of DOL hiding an analysis first became public, I have made repeated requests that DOL provide draft and final analyses of its proposal’s impact and relevant communications with OMB and OIRA.⁶ I also wrote to Administrator Rao requesting information about OIRA’s involvement in the exclusion of DOL’s analysis from its proposal.⁷ Neither DOL nor OIRA has responded substantively to my requests.

You owe the American people an explanation for how and why OMB allowed the DOL to release a proposed rule without an analysis of its effects on workers, despite the fact that not only one existed but that Administrator Rao and her staff reportedly rejected DOL’s initial attempt to issue the proposal without such an analysis. The suggestion that you and Secretary Acosta both overruled your own staffs in order to reach a politically pre-ordained outcome without regard for the welfare of working men and women is deeply damaging to the trust that the American people place in the federal government to use its regulatory power on its behalf, not for lobbyists and narrow corporate interests. In order to begin to restore that trust, I request that you answer the following questions no later than April 5, 2018 so that Congress may investigate your actions and the actions of key DOL and White House officials in this matter.

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?

⁴ *Id.*

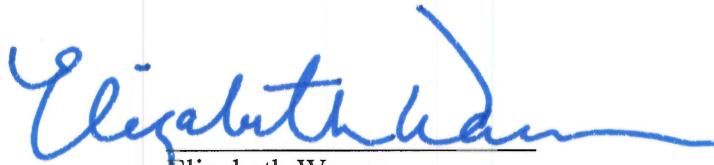
⁵ “Our Mission.” *U.S. Department of Labor* (accessed March 21, 2018). Online at: <https://www.dol.gov/opa/aboutdol/mission.htm>.

⁶ “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).

⁷ “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>.

- e. Were any other OMB officials, including Administrator Rao, 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?
 - a. Executive Order 12866 requires that agencies assess “all costs and benefits” of potential regulations.⁸ 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. Please provide all draft or final versions of analyses conducted by DOL staff of the proposed tip rule’s effects in OMB’s possession prior to February 1; and
4. Please provide all email or other correspondence between OMB and DOL or between OMB and industry groups or trade associations regarding the proposed tip rule.

Sincerely,



Elizabeth Warren
United States Senator

⁸ “Executive Order 12866 of September 30, 1993.” Presidential Documents. *Federal Register* (Oct. 4, 1993). Online at: <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.