



February 2, 2018

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

Melissa Smith  
Director of the Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
200 Constitution Avenue N.W., Room S-3502  
Washington, DC 20210

Re: RIN 1235-AA21, Notice of Proposed Rulemaking; Tip Regulations Under the Fair Labor Standards Act (FLSA)

Dear Director Smith:

The National Women's Law Center (the Center) writes to demand that the Department of Labor (the Department) immediately withdraw the Notice of Proposed Rulemaking, RIN 1235-AA21, Tip Regulations Under the Fair Labor Standards Act (FLSA).

On February 1, 2018, Bloomberg Law reported that the Department prepared and then concealed economic analysis demonstrating that workers would lose billions of dollars in wages were the above-referenced Notice of Proposed Rulemaking (NPRM) to be finalized and implemented<sup>1</sup>—contrary to explicit statements in the NPRM in which the Department claimed that that it is “unable to quantify how customers will respond to the proposed regulatory changes” and “currently lacks data to quantify possible reallocations of tips.”<sup>2</sup>

This deceptive action violates the Department’s obligations under numerous authorities that govern federal agency rulemaking, including Executive Order 12866, Executive Order 13563, and guidance from the White House Office of Management and Budget, which require that agencies are to quantify costs and benefits of their proposed regulations wherever possible.<sup>3</sup> By deliberately excluding relevant data from the rulemaking record, the Department has abandoned its duty to the American public to ensure a transparent regulatory process that is fair, reasonable, and consistent with the law.

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<sup>1</sup> Ben Penn, *Labor Department Ditches Data on Worker Tips Retained by Business*, BLOOMBERG BNA, Feb. 1, 2018, <https://bna.com/news/bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>.

<sup>2</sup> U.S. Dep’t of Labor, Notice of Proposed Rulemaking, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 82 Fed. Reg. 57,396 (proposed Dec. 5, 2017).

<sup>3</sup> See Exec. Order 13,563, at § 1, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011) (“[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”); see also Exec. Order 12,866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); White House Office of Mgmt. and Budget, Circular A-4, at 18-27 (Sept. 17, 2003).

The Department of Labor’s mission is, at its core, “[t]o foster, promote, and develop the welfare of the wage earners . . . of the United States[.]” The Economic Policy Institute (EPI), which conducted the type of analysis that the Department evidently concealed, estimates that tipped workers in the United States will lose \$5.8 billion dollars in tips each year if the Department’s rule goes into effect—and women will bear the overwhelming share of this loss: \$4.6 billion.<sup>4</sup> We have every confidence that the estimates the Department chose to ignore likewise demonstrate that employees who depend on tips to make a living will lose billions of dollars to their employers. By proceeding with a proposal that will cause substantial harm to working people—and concealing the evidence of that harm—the Department has clearly betrayed its mission with this NPRM.

The Center will submit additional comments detailing our opposition to the Department’s proposed rule, but the deception revealed this week alone is sufficient to demand withdrawal. The federal rulemaking process requires that stakeholders have the opportunity to review the Department’s good-faith economic analysis, including the assumptions underlying it, with adequate time to fully respond to such analysis. For the sake of the integrity of this process, and for the sake of all stakeholders—especially the low-wage working women who will be impacted most significantly—we call on the Department to immediately withdraw this NPRM.

Sincerely,



Emily Martin  
Vice President for Education and Workplace Justice



Julie Vogtman  
Director of Job Quality and Senior Counsel

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<sup>4</sup> HEIDI SHIERHOLZ ET AL., ECON. POLICY INST. (EPI), WOMEN WOULD LOSE \$4.6 BILLION IN EARNED TIPS IF THE ADMINISTRATION’S “TIP STEALING” RULE IS FINALIZED 1 (2018), <http://www.epi.org/files/pdf/140380.pdf>.