

MAJORITY MEMBERS:

ROBERT C. "BOBBY" SCOTT, VIRGINIA,
Chairman

SUSAN A. DAVIS, CALIFORNIA
RAUL M. GRIJALVA, ARIZONA
JOE COURTNEY, CONNECTICUT
MARCIA L. FUDGE, OHIO
GREGORIO KILILI CAMACHO SABLAN,
NORTHERN MARIANA ISLANDS
FREDERICA S. WILSON, FLORIDA
SUZANNE BONAMICI, OREGON
MARK TAKANO, CALIFORNIA
ALMA S. ADAMS, NORTH CAROLINA
MARK DESAULNIER, CALIFORNIA
DONALD NORCROSS, NEW JERSEY
PRAMILA JAYAPAL, WASHINGTON
JOSEPH D. MORELLE, NEW YORK
SUSAN WILD, PENNSYLVANIA
JOSH HARDER, CALIFORNIA
LUCY MCBATH, GEORGIA
KIM SCHRIER, WASHINGTON
LAUREN UNDERWOOD, ILLINOIS
JAHANA HAYES, CONNECTICUT
DONNA E. SHALALA, FLORIDA
ANDY LEVIN, MICHIGAN
ILHAN OMAR, MINNESOTA
DAVID J. TRONE, MARYLAND
HALEY M. STEVENS, MICHIGAN
SUSIE LEE, NEVADA
LORI TRAHAN, MASSACHUSETTS
JOAQUIN CASTRO, TEXAS



COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

VIRGINIA FOXX, NORTH CAROLINA,
Ranking Member

DAVID P. ROE, TENNESSEE
GLENN THOMPSON, PENNSYLVANIA
TIM WALBERG, MICHIGAN
BRETT GUTHRIE, KENTUCKY
BRADLEY BYRNE, ALABAMA
GLENN GROTHMAN, WISCONSIN
ELISE M. STEFANIK, NEW YORK
RICK W. ALLEN, GEORGIA
LLOYD SMUCKER, PENNSYLVANIA
JIM BANKS, INDIANA
MARK WALKER, NORTH CAROLINA
JAMES COMER, KENTUCKY
BEN CLINE, VIRGINIA
RUSS FULCHER, IDAHO
VAN TAYLOR, TEXAS
STEVE WATKINS, KANSAS
RON WRIGHT, TEXAS
DANIEL MEUSER, PENNSYLVANIA
DUSTY JOHNSON, SOUTH DAKOTA
FRED KELLER, PENNSYLVANIA
GREGORY F. MURPHY, NORTH CAROLINA

October 23, 2019

The Honorable Eugene Scalia
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

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

Dear Secretary Scalia:

As Members of the Committee on Education and Labor (the Committee), we write to request the Department of Labor (the Department) provide quantitative estimates of the costs to workers of its proposed regulatory action regarding “dual jobs” and its regulatory alternatives under the above-referenced proposed rule.¹

For nearly three decades, the Department enforced guidance commonly referred to as the “80-20 rule.”² Under the 80-20 rule, an employer may not use a tip credit for an employee’s time spent performing related duties that do not produce tips if such time exceeded 20 percent of the employee’s workweek. That guidance was designed to ensure that employers could not pay workers the tipped subminimum wage for work that a non-tipped worker would normally perform. Tipped employees also do not have an opportunity to earn tips during this time. The Department now proposes to add a provision to its current regulations to allow employers to “take a tip credit for *any* amount of time that an employee performs related, non-tipped duties

¹ Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956 (proposed Oct. 8, 2019).

² This guidance was in effect from December 9, 1988 until January 16, 2009 and again from March 2, 2009 until November 8, 2018. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA 2009-16 (Jan. 16, 2009); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA 2009-23 (Jan. 16, 2009); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA 2018-27 (Nov. 8, 2018).

contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.”³

Executive Order 13653, Improving Regulation and Regulatory Review, requires agencies to “quantify anticipated present and future benefits and costs as accurately as possible” and “select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits”.⁴ Executive Order 12866 requires that an agency propose or adopt a regulation *only* upon a reasoned determination that the benefits of the intended regulation justify its costs.⁵

However, the Department has failed to provide any economic analysis *quantifying* the costs to workers from its proposed codification of the rollback of the 80-20 rule.⁶ The Department states that as a result of this part of its proposal, tipped workers “might lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage.”⁷ The Department notes that its policy shift may also result in declined employment of workers who currently perform non-tipped duties. The Department fails to provide any analysis of regulatory alternatives for the rollback of the 80-20 rule that may be less harmful to workers or to quantify the costs of such alternatives. Without these required analyses, the Department cannot come to any determination that the rule’s benefits justify its costs, as required by law.

We are especially concerned with the Department’s failure to comply with regulatory requirements given the Department’s recent history of withholding and scrubbing an unfavorable economic analysis quantifying the loss of tip income for tipped workers in a prior proposal.⁸ As you know, these actions are currently the subject of an audit by the Office of Inspector General.⁹ We note the Department has yet to comply with multiple requests from the Committee to produce economic analyses of its prior proposal.¹⁰

³ 2019 Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53964 (Oct. 8, 2019) (emphasis added).

⁴ Exec. Order No. 13563, Improving Regulation and Regulatory Review, 3 C.F.R. § 13563 (2011).

⁵ Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (October 4, 1993). The Department has determined that this proposed rule is a “significant regulatory action” under section 3(f) of Executive Order 12866. 84 Fed. Reg. 53967.

⁶ 2019 Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53972 (Oct. 8, 2019).

⁷ *Id.*

⁸ Ben Penn, *Labor Dept. Ditches Data on Worker Tips Retained by Businesses*, Bloomberg Law, (Feb. 1, 2018, 10:03 AM), <https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>.

⁹ Memorandum from Elliot P. Lewis, Assistant Inspector General for Audit, U.S. Dep’t of Labor, Office of the Inspector General, to Bryan Jarrett, Acting Administrator Wage & Hour Div., (Feb. 5, 2018).

¹⁰ *See, e.g.*, Letter from Robert C. “Bobby” Scott et al., Ranking Member, House Educ. & Labor Comm., to R. Alexander Acosta, U.S. Sec’y of Labor (February 2, 2018); Letter from Robert C. “Bobby” Scott, Chairman, House Educ. & Labor Comm., to R. Alexander Acosta, U.S. Sec’y of Labor (April 3, 2019).

It is imperative that the Department provide a transparent analysis to the public for this proposed regulation. We request that the Department respond to the following no later than November 6, 2019.

1. What, if any, draft, interim, proposed, or completed quantitative or economic analysis, including any cost-benefit analysis, was prepared, procured, or otherwise commissioned by the Department in connection with or related to the “dual jobs” provisions of this proposal?
2. What, if any, draft, interim, proposed, or completed quantitative or economic analysis, including any cost-benefit analysis, was prepared, procured, or otherwise commissioned by the Department in connection with or related to the alternative regulatory approaches to the “dual jobs” provisions of this proposal?

We urge the Department to withdraw the “dual jobs” provisions in its proposal unless and until it provides to the public: (1) an economic analysis quantifying the impact the proposed rule will have on workers incomes; and (2) a quantitative analysis of alternative regulatory approaches for these provisions.

If you have any additional comments or questions, please contact Udochi Onwubiko at Udochi.Onwubiko@mail.house.gov or (202) 225-3725. Please send all official correspondence relating to this request to the Committee’s Chief Clerk at Tylease.Fitzgerald@mail.house.gov.

Sincerely,



ROBERT C. “BOBBY” SCOTT
Chairman



ALMA S. ADAMS
Chairwoman
Subcommittee on Workforce Protections



SUZANNE BONAMICI
Chair
Subcommittee on Civil Rights and Human
Services



MARK TAKANO
Member of Congress