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Submitted via 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 NW, Room S-3502
Washington, DC 20210

Re: Regulatory Information Number (RIN) 1235-AA21
Comments in Response to Notice of Proposed Rulemaking (NPRM)—Tip Regulations Under the Fair Labor Standards Act (FLSA)

Dear Melissa Smith:

The National Employment Lawyers Association (NELA) appreciates the opportunity to provide the Department of Labor (DOL or Department) with its views in response to the NPRM regarding the appropriate treatment of employees' tips under the FLSA. The NPRM should be withdrawn immediately. This conclusion is unavoidable because of reports that the Department suppressed internal economic analysis demonstrating the negative impact the proposed rules will have on tipped workers, and because the rules cannot credibly be defended on any other grounds.

NELA is well qualified to comment on the issues identified in the NPRM because it is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated unlawfully in the workplace. NELA members litigate daily in every federal circuit, which provides NELA with a unique perspective on how proposed regulatory changes actually will play out on the ground.

NELA members represent thousands of individuals in this country who are subjected to employer violations of the wage and hour laws. These comments were developed by NELA practitioners with decades of wage and hour experience who are intimately familiar with the issues addressed in the NPRM. These comments should be viewed not as the comments of a single committee or subset of NELA members, but as a distillation of the views of the 4,000 NELA members who represent working people.

In 2011, the Department finally updated its tip credit regulations (issued in 1967) to reflect Congress's amendments to Section 203(m) of the FLSA in 1974. The 2011 regulations incorporated the Department's long-standing position that: (1) tips are the property of the employees who received them; and (2) employers are permitted to take a partial credit for tips received by their workers, but nothing more.

In December 2017, however, the Department issued this NPRM. The proposed rule, if finalized, would represent an about-face of the Department's own 40-plus-year-old, consistently-applied interpretation of the tip credit protections established by Congress in the 1974 amendments. According to the NPRM and the materials that accompanied it, the Department justifies its proposed reversal based on:

(1) The existence of "private litigation involving … tip pooling and tip retention practices;"

(2) The existence of litigation challenging the DOL's authority to apply the tip credit limitations to employers who purport to disclaim a "tip credit;"

(3) That an increased number of states require employers to pay tipped employees a direct cash wage of at least the federal minimum wage, resulting in fewer employers being able to claim the tip credit; and

(4) A desire to allow employers and employees greater "freedom" in setting pay policies.

Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57,395-01, 57,396 (Dec. 5, 2017). None of these reasons are supported by any empirical data, not even the required economic impact analysis. Instead, the Department simply repeats these reasons as if they are self-evident—which, as shown below, they are not—without any analysis of the real world effect this change may have on tipped employees.

Tipped employees comprise a substantial and growing share of America's workforce. These employees will suffer substantial harm if the Department reverses its position in such a reckless—and frankly, dishonest—fashion. None of the reasons cited by the Department justify exposing thousands of tipped employees to an estimated **$5.8 billion pay cut**, which will be borne disproportionally by low-paid female and minority workers.[1] As one waiter put it, "I need tips to pay my bills. All waiters do."[2] The proposed changes are inconsistent with the remedial purpose of the FLSA to protect the wages and living standards of employees. 29 U.S.C. § 202(a). The Department should not shirk its obligation to protect America's working men and women, and therefore the NPRM should be withdrawn.

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[1] Heidi Shierholz, et al., *Employers Would Pocket $5.8 Billion Of Workers' Tips Under Trump Administration's Proposed 'Tip Stealing' Rule*, ECONOMIC POLICY INSTITUTE (Dec. 2017), http://www.epi.org/files/pdf/139138.pdf.
[2] Chelsea Welch, *Tips Are Not Optional, They Are How Waiters Get Paid in America*, THE GUARDIAN (Feb. 1, 2013).

I. The Department's Withholding Of Information Exposing The Negative Impact That The Proposed Rule Would Have on Tipped Workers Compels the Immediate Withdrawal of the NPRM

Recent reports indicate the Department actively withheld data confirming the damage workers would suffer under the proposed rule change. According to one article, the Department prepared and then "shelved" economic analysis demonstrating workers would lose **billions** of dollars in wages if the NPRM is finalized and implemented.[3] This is a sufficient reason, standing alone, to justify withdrawing the NPRM immediately. As NELA wrote in a letter[4] to the Department last week, the decision not to share the analysis was improper and flouted several 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 agencies to quantify costs and benefits of their proposed regulations wherever possible.[5]

It is well-settled that "administrative agencies are required to engage in reasoned decisionmaking." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2706, 192 L. Ed. 2d 674 (2015) (internal quotation marks and citations omitted). Therefore, the process by which the Department reaches its "result must be logical and rational." *Id.* "It follows that agency action is lawful only if it rests on a consideration of the relevant factors." *Id.* (internal quotes omitted). Whatever else this means, it clearly prohibits the Department from ignoring (much less actively concealing) economic data that contradicts explicit statements in the NPRM, such as the claims that the Department is "unable to quantify how customers will respond to the proposed regulatory changes" and "currently lacks data to quantify possible reallocations of tips." This fundamental lack of honesty and transparency undermines the integrity of this rulemaking process irreversibly, requiring that the NPRM be withdrawn immediately.

A. Independent Research Supports Data Contained In The Department's Own, Suppressed Analysis, Further Confirming the Department's Conflicting Assertions In the NPRM Are Unsupportable

The NPRM stated the proposed regulatory change would "provide employers greater flexibility in determining the pay policies for tipped and non-tipped employees," and would allow employers to reduce wage disparities between tipped and non-tipped employees. The NPRM provides no factual support to argue that employers need the alleged "flexibility" the change purports to allow, or that this change is otherwise economically necessary for employers.

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[3] Ben Penn, *Labor Department Ditches Data Showing Bosses Could Skim Waiters' Tips,* BLOOMBERG BNA (Feb. 1, 2018), https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses.
[4] NELA Letter to Melissa Smith, Director of the Division of Regulations, Legislation and Interpretation Wage and Hour Division, U.S. Dept. of Labor (Feb. 1, 2018), https://www.nela.org/index.cfm?pg=DOLLetter_NPRM.
[5] *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 restaurant industry employs over 60% of those employees who regularly earn tips.[6] Between 1995 and 2014, employment in the full-service restaurant industry grew by 85%, which is nearly four times the growth (24%) experienced over the same period in the private sector overall.[7] The National Restaurant Association (NRA) identifies itself as the largest food service trade organization in the world. The NRA estimated that in 2017 restaurant sales increased 4.3% over those sales in 2016, reaching $798.7 billion. That growth registered in each different category of restaurant, cafeteria, and lodging facility. The NRA estimates that the 14.7 million restaurant employees represent 10% of the U.S. workforce. The NRA projects continued growth in the restaurant industry in every state in the country, including states that require tipped employees be paid at a rate exceeding the FLSA's minimum wage. The industry's own analysis indicates that these employers do not constitute an industry in need of "regulatory relief."

The Department also argues the regulatory reversal could incentivize employers to reduce wage disparities between tipped and non-tipped employees, and might benefit traditionally tipped employees by incentivizing employers to pay a full cash minimum wage. The NPRM provides no economic analysis to support these assertions. First, employers are free to raise wages of traditionally non-tipped employees without this regulatory change. As to the second point, employers are already required to ensure traditionally tipped workers earn at least the full minimum wage. 29 U.S.C. § 203(m). Thus, the only impact of the proposed regulation would be to free employers to take tips presently received by these employees and use those tips for any purpose. Again, the proposed regulation *does not require* that the seized tips be used for any employee's wages.

Further, the NPRM asserted that the Department has neither examined whether this proposed regulatory change will affect whether and how customers will continue to tip, nor what effects such changes may have on the income of traditionally tipped employees.[8] However, a recent report indicates that the Department *did, in fact, examine this issue, but it suppressed information indicating the potential negative impact these rules would have* on customers' propensity to tip, and therefore on the income of tipped employees. Other available research (in addition to common sense) supports this conclusion as well.

Data collected through the Census Bureau's Current Population Survey (CPS), a study by the National Employment Law Project (NELP) and the Restaurant Opportunities Centers (ROC) United, found that waiters and bartenders earn more in tips than they do from what employers pay them as an hourly wage.[9] The median share of hourly earnings that comes from tips accounts

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[6] Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change: Why It's Time to Give Tipped Workers the Regular Minimum Wage*, ECONOMIC POLICY INSTITUTE (July 10, 2014), https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/.
[7] *Id*.
[8] The NPRM recognizes that one of the main reasons that customers tip employees is the customers' belief that bartenders, wait staff, and other workers earn too little. 82 Fed. Reg. at 57,409.
[9] Irene Tung and Teofilo Reyes, *For Waiters and Bartenders, More Than Half of Earnings Are Tips: Wait Staff and Bartenders Depend on Tips for More Than Half of Their Earnings,* NELP & ROC United (Jan. 11, 2018), http://www.nelp.org/publication/wait-staff-and-bartenders-depend-on-tips-for-more-than-half-of-their-earnings/.

for 58.5 percent of wait staff's earnings, and 54 percent of bartenders' earnings.[10] If the proposed regulation is implemented, then employers can take those tips and in return pay these employees only the $7.25 minimum wage. The regulation does not protect these employees from working for the sub-minimum wage, earning tips, and then having the tips that boost their earnings above minimum wage, taken from them by their employer, potentially resulting in a net loss of their current wages.

A 2014 study by the Economic Policy Institute (EPI) and the University of California-Berkeley[11] found that the median wage for waiters and bartenders is $10.11/hour, including tips, a mere $2.86/hour above the current federal minimum wage. The rate of $10.11/hour is $6.37/hour less than the median wage for all hourly employees. The situation is direr for workers of color. Black tipped employees earn a median hourly wage of $9.62/hour, and Latino workers a median average wage of $9.93/hour. Tipped employees have a poverty rate of 12.8%, while non-tipped employees have a poverty rate of 6.5%.

After the Department issued the NPRM, EPI released another report[12] that estimated that the proposed rule change would result in employers pocketing *$5.8 billion* of tips received by tipped workers annually. Of the $5.8 billion in transferred tips, $4.6 billion – or 80% -would be taken from women who work tipped jobs. Their detailed analysis came to this conclusion based on studies which predicted the potential range of $523 million to $13.2 billion in transfers from tipped workers to employers as a result of the proposed regulatory change. The study further noted that the Department is required—but failed—to provide a quantitative estimate of the amount of tips that will be transferred from workers to their employers. We now know that analysis was conducted, but the results were "shelved."

Because the proposed change does not address what an employer cannot do with the tips intended for employees, the proposed change could simply mean employers can pay tipped employees the federal minimum wage and keep the tips customers leave. This would result in a decrease in the wages received by tipped employees, who otherwise would earn above the minimum wage if they kept the tips customers (and Congress) intended them to have.

There are positions that traditionally rely on tips for most of their income. There are others, such as dishwashers and janitors that do not. The Department expresses concern that the current tip rules result in an "unfair" disparity in income between servers and back of the house workers. It is not the Department's role to decide the value of one job is versus another. Moreover, it is difficult to think of another aspect of employment where the Department has become actively involved in supposedly seeking to rectify such a "disparity." If the Department were investigating the sharp rise in CEO pay as compared to the pay of the average line worker, the Department's concern might make some sense.

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[10] *Id.*
[11] *See supra* Note 6.
[12] *See supra* Note 1.

The realistic downside to adopting this rule which purports to attempt to achieve "wage parity" by permitting employers free rein over employee tips is that many employers will simply elect to keep the tips and increasingly pay only the minimum wage to servers who are tipped. Further, employers likely will continue to pay the existing wage for back of the house workers. After all, every employer in operation is already paying a sufficient wage to fill its back of the house worker positions. Thus, employers have no business incentive to raise wages for those workers.

What is not known is how much *less* the tipped employees are willing to work for (because employers are currently prevented from paying less than a set minimum and currently cannot take the tipped employees' tips). Any employer experimentation with the "reallocation" of tips is likely to result in employers determining how much less tipped employees are willing to accept in compensation and/or how much of the employees' hard-earned tips employers can take. The restaurant industry is a thriving, growing industry in the U.S.[13] Changing the existing rule to enable restaurant owners to decrease the wages of many of the nation's lowest paid workers, in an industry that is flourishing—is inconsistent with the mission of the Department. And addressing wage disparities between workers, many of whom are living below the federal poverty level, by diminishing the wages of those who are somewhat better compensated, cannot be viewed as a defensible result.

To the extent an employer finds the traditional "tipping" system does not lead to an adequate distribution of income, the employer has other options. First, and foremost, the employer can increase the wages of those workers whose lower wages are of concern. Employers also can replace tipping with a service charge.[14] Under this system, a "compulsory service charge" is "added to a customer's bill" and "is included with the employer's gross receipts."[15] Because the service charge is paid as income to the employer, "the employer has complete discretion in choosing the manner in which the compulsory service charge is used, which would include using it to pay" any employee (whether "tipped" or "non-tipped"). *Id.*

Employers reluctant to adopt such a system are likely hoping to avoid the appearance of higher prices, or seek to obtain the benefit of customer generosity based on the assumption that the tip will go to the employees who earned and received them, rather than the employer. *Cf.* 82 Fed. Reg. at 57,408-9 (recognizing many customers tip generously because they assume the tips will be retained by the employees who receive them). As a matter of basic fairness, customers have the right to expect the tips they give to servers will be retained by those workers. Certainly no customer leaves a tip for a server thinking it will go into the manager's bonus pool. Allowing

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[13] Heidi Shierholz, *Low Wages and Few Benefits Mean Many Restaurant Workers Can't Make Ends Meet* ECONOMIC POLICY INSTITUTE (Aug. 2014), http://www.epi.org/publication/restaurant-workers/

[14] *See* Arturo Kassel, *Is Trading Tipping for Service Charge a Win for All*?, The San Diego Union-Tribune (September 7, 2016).

[15] U.S. Dept. of Labor, Wage & Hour Division, Field Operations Handbook (FOH) at 30d03, https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

businesses to give customers the impression that they are leaving tips for an employee, when in fact they are contributing to the employer's profits, is dishonest.[16]

II. The Department's Other Stated Reasons For Reversing Its Position Regarding The Treatment Of Workers' Tips Are Also Unsubstantiated And Unpersuasive

A. The Existence Of Ongoing Litigation To Resolve Conflicting Interpretations Of Agency Regulations Counsels Against Moving Forward With New Regulatory Changes, Not In Favor Of It

The NPRM asserts the existence of significant litigation concerning tip pools and litigation challenging the Department's regulatory authority support the proposed regulatory change. But the Department never explains how either type of litigation supports allowing employers to keep tips intended for employees. To the contrary—that there has been significant litigation regarding tips, the tip credit sub-minimum wage, and tip pools since the 1974 statutory changes indicates that any change permitting employers to keep tips would likely result in increased, not decreased, litigation.

Nor does the Department's reference to employer efforts to challenge the 2011 regulations in litigation justify abandoning America's tipped workers. After all, the Department successfully defended the 2011 regulations in front of the Ninth Circuit Court of Appeals. *Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016), *reh'g and reh'g en banc denied*, 843 F.3d 355 (9th Cir. 2016), pet. for cert. filed (Aug. 1 2016). While it is true that a panel of the Tenth Circuit came to the contrary conclusion in a private FLSA case, *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1162 (10th Cir. 2017), this is evidence of respectful disagreement, not capitulation.

Moreover, because a petition for *certiorari* on this issue is pending, the Supreme Court may soon offer a conclusive answer. And if the Department were to adopt the rule as currently proposed and/or abandon the defense of the 2011 regulations, interested parties on the opposing side are likely to institute their own challenges to Department's reversal on this issue.[17] Given the multi-year investment already made in revising the tip credit regulations and defending them in court, the Department should let the existing judicial challenges run their course and obtain an answer to the question of whose construction of the 1974 amendments will prevail.

B. The Adoption Of Increased Protections For Tipped Employees In Some States Does Not Justify Reducing The Protections Applicable To All Tipped Employees

The FLSA's sub-minimum tipped wage has not increased since 1991, when it was set at $2.13, 50% of the then-minimum wage. At that point the tipped sub-minimum wage was decoupled from any minimum wage increase. Thus, while the minimum wage increased in

[16] Of course, such policies or practices could be actionable under applicable consumer protection statutes.
[17] Further, if "legal challenges" are a basis for revising regulations, this challenge would support another agency decision to reverse course yet again.

increments to $7.25/hour, the permitted sub-minimum tipped wage is now 29% of the minimum wage. In response to continued Congressional inaction regarding any minimum wage hike in over ten years, a number of states have increased minimum wages in their jurisdictions. Some have also increased the minimum wage required to be paid to tipped employees to a level above $2.13, and a few have prohibited any application of a "tip credit" under state law. 82 FR at 54701.

The Department argues the increase in state law protection for some tipped employees justifies watering down employee protections under the federal law. To begin, the Department concedes approximately 70% of employees work in states that do not have these additional protections. 82 Fed. Reg. at 54,701. *Reducing* workers protections nationwide based on the fact a small percentage of states have *increased* worker protections makes little sense, particularly since "the FLSA contains a 'savings clause' that expressly allows states to provide workers with more beneficial minimum wages … than those mandated by the FLSA itself." *Anderson v. Sara Lee Corp*., 508 F.3d 181, 193 (4th Cir. 2007) (citing 29 U.S.C. § 218(a)). Given that Congress expressly authorized states to adopt laws providing greater protections to their workers, the fact that certain states have done so hardly justifies diminishing the protections provided by the FLSA.

III. The Historical Treatment Of Tips Has Led To Clear, Consistent Support For Considering Tips An Employees' Property And Allowing Employers To Take Only A Limited Tip Credit

A. The U.S. Supreme Court Declined To Resolve Early Challenges To Railroad Employers' Attempts To Appropriate Workers' Tips

In its original form, the FLSA did not address the issue of whether tips received by an employee counted as wages for the purposes of calculating the minimum wage. *See* Pub. L. No. 718, 52 Stat. 1060 (1938). Of course, most of the industries which employ "tipped" workers, such as restaurants, hotels, and beauty salons, were originally exempt from the FLSA's coverage. *Id.* at 1067 (original Section 213(a)(2)). Railroad "Redcaps" (baggage porters) were the primary "tipped occupation" within the coverage of the Act. Harry Weiss & Philip Arnow, *Recent Transition of Redcaps from Tip to Wage Status*, 32 Am. Lab. Legis. Rev. 134, 134 (1942).

In anticipation of the passage of the FLSA, railroad companies sought "methods of avoiding the wage payment of 25 cents per hour to [employees] who got tips." *Id*. at 135. After months of conferencing, the railroad industry "evolved a scheme for counting tips as wages," the "Accounting and Guarantee system." *Id.* Under the system, each employee would report the tips received each day to the employer. *Id*. If the tips reported did not equal at least the minimum wage, the company would pay the employee the difference. *Id.*

However, many railroad officials made it clear that Redcaps who reported less than the minimum wage in tips would be subject to termination for being "either inefficient or dishonest." *Id*. "Afraid of losing their jobs if they showed earnings of less than the minimum, [employees who earned less than the minimum wage] reported the minimum wage even though they were

not able to earn it in tips." *Id.* at 136. Thus, when Redcaps "earned the minimum, they reported the minimum, but they also reported the minimum when they did not earn it." *Id.*[18] The "guarantee" of the minimum wage often "turned out to be an empty promise." *Id.*

Redcaps across the country sued under the FLSA. They argued tips were not wages within the meaning of the FLSA and therefore did not reduce their employers' minimum wage obligations. Employers argued they were entitled to credit all tips received against the minimum wage. After a series of rulings from the lower courts, the U.S. Supreme Court granted *certiorari* "[b]ecause of the importance of the question whether … tips could be treated as payment of the [minimum] wage." *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 390 (1942).[19]

The Supreme Court recognized the "desirability of considering tips in setting a minimum wage, that is whether tips ... should be counted as part of that legal wage, is not for judicial decision." *Id.* at 388-89. The Court, therefore, limited its inquiry to whether Congress intended to preclude employers from crediting tips against the required minimum wage. *Id.* While the Supreme Court concluded the then-present terms of the FLSA permitted the credit, Congress retained the authority to determine whether employers could credit employee tips against the minimum wage. *Id*. Further, the Supreme Court noted that tips were presumptively the property of the employees who received them. *Id*. at 397.

B. <u>The 1966 Amendments To The FLSA Instituted Important, Though Ultimately Insufficient Protections For Tipped Employees</u>

After years of investigation and debate, Congress entered the "tips as wages" fray in 1966. At that time, Congress greatly expanded the number of "tipping occupations" within the coverage of the Act by extending the FLSA to restaurant, hotels, and retail and service establishments.[20] Congress noted the "great need for extending the present coverage of the act to large groups of workers whose earnings today are unjustifiably and disproportionately low." S. Rep. No. 89-1487, at 3 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 3002, 3004. Congress also cited evidence of a "significant correlation between poverty earnings and exclusion from the protected provisions of the act." *Id.* Congress therefore determined "[e]xtending the coverage of the act [would] do much to relieve the plight of these 'working poor.'" *Id.*

Congress also sought to limit employers' ability to claim credit for tips received by their workers. The wage paid to a tipped employee was "deemed to be increased on account of tips by any amount determined by the employer, but not by an amount in excess of 50 per centum of the

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[18] *See also,* Mary Anderson, *Tips and the Legal Minimum Wage*, 31 AM. LAB. LEGIS. REV. 11, 13 (1941) ("There is only one effective way out of a situation like this for a worker who desperately needs a job, and that is to report to the employer a greater amount of tips than actually is received.").

[19] By this time, the Accounting and Guarantee system had grown obsolete. In 1940, virtually all of the terminal operators changed to a system of charging a "fee per bag" to customers using Redcaps services and using this charge to pay Redcap wages. Weiss & Arnow, at 138.

[20] *See also* 112 Cong. Rec. 21941 (Sept. 7, 1966) ("I am particularly pleased to report the coverage of tipped employees who have unjustifiably been exempted from [the FLSA.]") (statement of Cong. Powell).

applicable minimum wage[.]" Pub. L. 89-601, 80 Stat. 830 (1966). Employees who could demonstrate they actually received less than this amount in tips could petition the Department for a reduction in the employer's tip credit amount. *Id.*

Thus tip credit provisions represented a compromise between "two diametrically opposite views[.]" 112 Cong. Rec. 11363 (May 25, 1966) (statement of Cong. Dent). On the one hand, employers sought credit for all tips received by employees. *Id.* Employees, conversely, "demanded that no tip allowance be made toward the minimum wage." *Id.* Congress drew a line "as to where the tips are actual earnings and where they are gratuities for extra-good service." 112 Cong. Rec. 11364 (May 25, 1966) (statement of Cong. Pucinski).

However, "any good law can be largely nullified by poor administration,"[21] and approximately a year after the 1966 Amendments, the Department issued regulations suggesting employers could still require employees to "agree" to turn over their tips. 29 C.F.R. §§ 531.52 & 531.55 (1967). [22] Later, the Department issued opinion letters to the same effect. *See, e.g.,* Wage & Hour Opinion Letter WH-251, 1973 WL 36857 (Dec. 26, 1973). At least one court adopted the Department's position and approved an "agreement" whereby tipped employees turned over their tips to the employer. *Hodgson v. Bern's Steak House, Inc.,* No. 70-301-CIV. T, 1971 WL 843, at *7, *9 (M.D. Fla. Oct. 1, 1971).

C. The 1974 FLSA Amendments And Subsequent Decisions Demonstrated Legislative, Executive, And Judicial Support For Employee Ownership Of Tips And A Limited Tip Credit For Employers

In 1974, Congress again amended Section 203(m). In particular, Congress wanted "to make clear the original Congressional intent that an employer could not use the tips of a "tipped employee" to satisfy more than 50 percent of the Act's applicable minimum wage." S. Rep.93-690, at 43 (1973). The revised Section 203(m) required all tips received by tipped employees to "be paid out to tipped employees." *Id.* at 42; *see also Rousell v. Brinker Intern., Inc.*, 2008 WL 2714079, at *5 (S.D. Tex. July 9, 2008).[23]

In light of this amendment and its legislative history, the Department issued an opinion confirming Congress' determination that tips are the property of the employees who receive them. *See* Wage & Hour Opinion Letter (June 21, 1974). The letter recognized the 1974

[21] Mary B. Gilson, *Tips and Social Insurance*, 31 AM. LAB. LEGIS. REV. 67, 70 (1941).
[22] The Department appears to have based its interpretation on a Senate Report related to the 1966 Amendments. S. Rep. 89-1487, at 13 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 3002, 3014 (suggesting employers and employees could "agree that all tips are turned over … to the employer" who would pay the employee the full minimum wage). However, in passing the 1966 Amendments, the House rejected of an amendment proposed by Congressman Goodell which would have permitted this result. 112 Cong. Rec. 11363-11365 (May 25, 1966). But regardless of the proper interpretation of the 1966 Amendments, the 1974 Amendments clarified that such "agreements" are prohibited.
[23] The 1974 Amendments also placed the burden of establishing any tip credit on the employer and required the employer to explain the provisions of Section 203(m) to its employees. *See* S. Rep. 93-690, p. 43; *see also Reich v. Priba Corp.*, 890 F.Supp. 586, 595-96 (N.D. Tex. Mar. 27, 1995).

amendments "would have no meaning or effect unless they prohibit agreements under which tips are credited or turned over to the employer[.]" *Id.* As such, agreements calling for employees to turn over their tips to the employer are illegal. *See, e.g.*, Wage & Hour Opinion Letter WH-386, 1976 WL 41739 (July 12, 1976). This is true "regardless of whether the employer elects to take credit for tips received." *Id.*; Wage & Hour Opinion Letter WH-489, 1978 WL 51435 (Nov. 22, 1978) ("The tip retention requirement of section 3(m) applies regardless of whether the employer elects to take credit for tips received.").

Further, an employer must pay his tipped employees *at least* [the required cash wage] *in addition to tips left them by customers*." *Richard v. Marriott Corp.*, 549 F.2d 303, 305 (4th Cir. 1977) (emphasis added). Several courts invalidated creative "agreements" aimed at avoiding this result.[24]

In sum, since the passage of the 1974 Amendments, Congress, the Department of Labor, and case law confirm that: (1) tips are the property of the tipped employees who receive them; (2) agreements requiring employees to turn over tips to the employer are invalid, and (3) the employer must pay at least the required cash wage *in addition to* permitting employees to retain the tips they receive.

D. The Department's 2011 Regulations Codify Nearly 40 Years of Consistent Practice

In 2008, the Department issued a NPRM indicating its intent to revise its woefully out-of-date tip credit regulations. The Department noted these "regulations were promulgated in 1967," before Congress significantly revised the FLSA's tip credit provisions "to prohibit … agreements" whereby employee "tips would be turned over to the employer, who could then use the tips to pay the minimum wage." Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43,654-01, 43,659 (July 28, 2008). In accord with decades of consistent Department guidance, the 2008 NPRM recognized the 1967 regulations (which "allowed an employer to require employees to turn over all their tips to the employer") were in relevant part "invalidated by the [1974] amendments" to the FLSA. *Id.*

After carefully considering a large volume of comments from a variety of interested parties, the Department harmonized its regulations with the 1974 amendments to the FLSA and longstanding Department practice. *See* Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832-01, 18,841 (Apr. 5, 2011). In particular, the Department determined "Congress deliberately amended the FLSA's tip credit provisions in 1974 to clarify that section 3(m) provides the only permitted uses of an employee's tips—through a tip credit or

[24] *See, e.g., Usery v. Emersons, Ltd.*, 1976 WL 1668, at *2-4 (E.D.Va. Nov. 23, 1976) *vacated on unrelated grounds*, 593 F.2d 565 (4th Cir. 1979) (employer violated the FLSA by paying employees the minimum wage, taking all employee tips, and returning all tips in excess of the minimum wage to its employees); *Donovan v. Tavern Talent & Placements, Inc.*, 1986 WL 32746 (D.Colo. Jan. 8, 1986) (employer violated the FLSA by agreeing to pay employees at least the minimum wage but requiring employees to "tip-back" the minimum wage plus $1 to the employer).

a valid tip pool among only those employees who customarily and regularly receive tips." *Id.* And consistent with "the Department's longstanding position since the 1974 amendments[,]" the Department confirmed the "protections against the use of an employee's tips apply irrespective of whether the employer has elected the tip credit." *Id.*; *see also*, 29 U.S.C. § 4.6(q)(2).

IV. Rather Than Attempting To Duck The Negative Impact Of Implementing the Proposed Rules, The Department Should Avoid Causing Serious Problems By Withdrawing The NPRM

Since 1974, the Department has recognized that the rule contained in the 2011 regulations was *necessary* if the 1974 amendments were to have any meaning or effect. *See* Wage & Hour Opinion Letter (June 21, 1974). Otherwise, an employer could circumvent the limitations created by Congress by simply "paying" a wage equal to the minimum wage and then confiscating all its employees' tips. *Id.* Thus, the Department is fully aware that an employer's ability to use tips cannot be separated from the debate on the correct application of Section 203(m).[25]

But in the current NPRM, the Department attempts to avoid the "circumvention issue" by treating it is a separate debate, rather than the fully-foreseeable (indeed, inevitable) consequence of its proposed rule. 82 Fed. Reg. at 57,402, n. 14. While the Department suggests it "will consider" additional guidance to address employer use of tips to achieve a tip credit greater than that permitted by Section 203(m), such "possible" action (at some unknown point in the future) ignores reality. As even courts that have been otherwise sympathetic to the Department's proposed regulation have recognized, dollars are fungible. *See Cumbie v. Woody Woo, Inc.*, 2008 WL 2884484, at *6 (D. Or. July 25, 2008) ("a dollar saved in wage payments is a dollar earned for other expenses"). Therefore, even if an employer purports to use employee tips to pay rent rather than wages, the employees' tips fund the employer's ability to pay wages, even if in excess of the tip credit permitted by Congress.

The Department's proposed revision penalizes employers for taking the tip credit. While the FLSA permits employers to subsidize their minimum wage obligations claiming a "tip credit" against their minimum wage obligations equal to more than 70%, the employer is required to ensure the workers' total earnings, with tips, *always* meet or exceed the minimum wage. 29 U.S.C. § 203(m). Whenever tipped employees' earnings fall short, employers must pay the difference. *Id.* In other words, employers are *always* obligated to be certain the tipped employees make at least the minimum wage.

Under the proposed rule, an employer taking a tip credit limits its "upside" to the amount of the tip credit, or to the tips the employee receives, whichever is less. *Id.* In contrast, the employer who elects not to take a tip credit has an unlimited "upside" since, according to the Department's proposed view, the limitations in Section 203(m) would not apply. This is wholly

[25] This problem is not new. Once employers discovered "a stream of money th[at] flowed with mechanical regularity into the pockets of their servants, they sought means of diverting it into their own tills." Courtney Kenny, *Jhering on Trinkgeld and Tips*, 32 L. Q. REV. 306, 313 (July 1916).

inconsistent with a statute designed to limit, rather than expand, employer use of employee tips. *See* S. Rep. 93-690 at 43.

V. Conclusion

The proposed revisions to the tip credit regulations are contrary to the will of Congress as expressed in the 1974 amendments to the FLSA. They are also contrary to decades of guidance from the Department itself. The Department would be wrong, both legally and as a matter of policy, to reverse course on this issue. The 2011 regulations offer the correct, and consistent, view that tips are the property of the workers who earn them and can only be used for the limited purpose permitted by 29 U.S.C. § 203(m). The Department should not abandon its obligation to protect the lowest paid workers in America. Instead, given its withholding of information exposing the negative impact of the proposed rule change, the Department should withdraw its NPRM and commit to defending the 2011 regulations.

Finally, as we completed these comments, we learned that the Department's Office of Inspector General has initiated an audit into this rulemaking process. We firmly believe that the Department should withdraw the NPRM, however, if it does not, it should extend the Notice and Comment Period until at least 15 days after the OIG issues a final report of its audit.

The integrity of the process demands full disclosure of what happened in this highly-suspect rulemaking process and that all stakeholders have adequate opportunity to develop their comments taking into account *all* of the facts and data relevant to the proposal and the process.

Respectfully Submitted,

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