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COALITION ON HUMAN NEEDS

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February 5, 2018

Ms. Melissa Smith

Director, 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: Notice of Proposed Rulemaking, ***Tip Regulations Under the Fair Labor Standards Act (FLSA)***, 82 Fed. Reg. 57,395 (December 5, 2017), RIN 1235-AA21

Dear Director Smith:

These comments are submitted on behalf of the [Coalition on Human Needs](http://www.chn.org), (CHN) an independent non-profit organization made up of more than one hundred national-scope groups, including human service providers, faith organizations, labor, civil rights, policy expert and other advocacy organizations concerned with meeting the needs of low-income people by protecting and improving federal programs and policies. CHN has focused throughout its 37-year history on a range of policies aimed at increasing stable access to jobs with good pay and benefits.

CHN wishes to associate itself with comments submitted by the National Employment Law Project and the Economic Policy Institute, two expert organizations that are members of CHN and whose analyses are cited here.

The Coalition on Human Needs strongly opposes the proposal to rescind parts of the 2011 Final Rule regarding the tip credit. We support the 2011 Final Rule's clarification that tips are the property of the employee, consistent with the Fair Labor Standards Act and the 1974 legislation¹ amending it. As clearly understood for decades, the law prohibits employers from taking employees' tips except for the narrowly defined tip credit.

The proposed rule not only violates this provision of law by allowing employers to confiscate tips for a wide variety of purposes unrelated to worker pay, but it does so

without making public an analysis of the likely impact of this rule change on tipped workers. The lack of such an analysis should be enough to cause the Department to withdraw this NPRM. Press accounts² that an analysis was done and was suppressed make it urgently necessary for this proposal to be withdrawn until the Office of the Inspector General can investigate; no rule proposal should be considered that is not accompanied by the required analysis.

Tipped workers rely heavily on tips; a recent analysis³ by the National Employment Law Project and Restaurant Opportunities Center United found that wait staff and bartenders receive more than half their earnings in tips. Even counting tips, median wages for these employees are only \$10.11 per hour. Further, even under current regulations, it is known that FLSA violations are widespread, because credit cards are used in as many as two-thirds of dine-in restaurants and one-half of fast food meals⁴. In 2014, the Department of Labor returned more than \$6.8 million in wages and damages to over 1,000 employees at the restaurant chain Chickie's and Pete's⁵ because the employer retained 60 percent of an illegal "tip pool" to which employees were required to contribute their own cash (even if customers paid by credit card). With enforcement against such illegal practices difficult, the Department of Labor should be doing all it can to publicize the law's requirements that tips belong to the workers, and that pooling of tips can only be among workers who receive tips, and not extended to "back-of-the-house" workers whose pay does not include tips. Instead, this proposal would exceed the law by allowing employers to keep tips, with no requirement beyond ensuring that workers earn the federal minimum wage. The NPRM acknowledges that by rescinding the tip regulations it could allow employers to "circumvent the protections of section 3(m)...[by] utilizing its employees' tips towards its minimum wage obligations to a greater extent than permitted under the statute for employers that take the tip credit."⁶ It is certainly not enough for the Department to contemplate the undermining of worker protections made more likely by this proposal with only the speculation that "additional guidance" should be issued in the future. Any final rule offered by the Department must prohibit employers from using workers' income from tips to unlawfully pay the employer's share of the minimum wage under section 3(m).

Despite the reluctance of the Department to include an analysis of the impact of rescinding the rule on worker income, such an analysis could be done using DOL economists' usual methods. Economists at the Economic Policy Institute (EPI) have replicated those methods and determined that tipped workers will lose \$5.8 billion a year in tips.⁷ In their analysis, none of the confiscated tips money would result in increased pay for other nontipped workers, since restaurants are already paying them a wage high enough to attract staff, and would not be likely to raise pay beyond that point. The \$5.8 billion would go to the employer. The EPI analysis shows that the amount confiscated from employees is more than 16 percent of total tips, or more than \$1,000 per year per

tipped worker, averaged across all tipped workers. EPI recognizes that customers may tip less as they come to understand that workers will not be receiving their tips directly, if at all. If that is the case, customers will retain more of their income, but workers will continue to lose out on the \$5.8 million they would otherwise have received.

The Administrative Procedure Act requires that quantifying the impact of a proposed rule be included with the proposal in time for the public to comment on it. Publishing an analysis at a later date is not adequate to meet the conditions of the APA. DOL should withdraw its NPRM and reissue it with a full analysis, listed in the Federal Register with a new comment period.

It is the role of the Department of Labor to protect workers from unscrupulous practices of employers. The 2011 Final Rule is an important step in clarifying employer responsibilities in the payment of tipped wages. Rescinding that rule is a step backwards certain to reduce the pay of low-wage workers and to transfer their lost income to employers. We believe such an unfortunate step would be unjust as well as contrary to existing law.

Thank you for taking these comments into consideration.

Sincerely yours,



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Executive Director
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¹ 29 U.S.C. §§ 203(m), 206(a).

² <https://www.bna.com/labor-dept-ditches-n73014474899/>

³ <http://www.nelp.org/publication/wait-staff-and-bartenders-depend-on-tips-for-more-than-half-of-their-earnings/>

⁴ See JASON STEELE, PAYMENT METHOD STATISTICS, <https://www.creditcards.com/credit-card-news/payment-method-statistics-1276.php> (suggesting that two-thirds of dine-in restaurant meals and 1/2 of fast food meals are not paid in cash).

⁵ <https://www.dol.gov/newsroom/releases/whd/whd20140044>

⁶ Tipped Workers NPRM, 82 Fed. Reg. at 57,402 n.14.

⁷ <http://www.epi.org/publication/employers-would-pocket-workers-tips-under-trump-administrations-proposed-tip-stealing-rule/>