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Jennifer A. Carpenter
President & CEO

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Ms. Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

RE: Employee or Independent
Contractor Classification Under
the Fair Labor Standards Act
(RIN: 1235-AA43)

Dear Ms. DeBisschop:

The American Waterways Operators (AWO) is the tugboat, towboat and barge industry's advocate, resource, and united voice for safe, sustainable, and efficient transportation on America's waterways, oceans, and coasts. Our industry is the largest segment of the nation's 40,000-vessel domestic maritime fleet and moves 665 million tons of cargo each year safely and efficiently. On behalf of AWO's more than 300 member companies, we appreciate the opportunity to comment on the Department of Labor's (DOL) proposed rule regarding classification of employees or independent contractors under the Fair Labor Standards Act (FLSA).

Many AWO member companies occasionally utilize independent contractors called "trip pilots." A trip pilot is a mariner who holds a U.S. Coast Guard-issued Master of Towing license and who, when a company-employed towing vessel captain falls ill or is unexpectedly unavailable, may be contracted to serve as a temporary substitute. When a trip pilot is contracted, he or she joins the crew of the company-owned and/or operated towing vessel on a short-term basis.

The proposed rule would adopt a fact-specific "economics realities" test for classifying workers to determine whether the totality-of-the-circumstances factors show that a worker is economically dependent on the employer for work versus being in business for themselves. These factors include the worker's investment, the degree of the employer's control over the worker, and whether the work is integral to the employer's business. Due to the way in which the DOL has described these factors, our members have raised concerns over whether a trip pilot can be classified as an independent contractor within our highly regulated industry.

By the nature of the financial and operational structures of the industry, a trip pilot is contracted to work on board a company-owned and/or operated towing vessel, which is a multi-million-dollar asset; the operator/employer also invests in the vessel's equipment, maintenance, and crew, confusing the investment factor by making investments by the trip pilot unnecessary and impractical. Because of the safety-sensitive nature of towing vessel operations, the trip pilot must comply with U.S. Coast Guard and other applicable regulations and with the company's safety management system while working on board, implicating the control factor. And, without the trip pilot, a voyage may not be possible, resulting in disruption to the operator/employer's operations and the supply chain, which complicates the integral factor.

Trip pilots choose their line of work in order to be in business for themselves and decide which jobs they are willing to take based on their own schedule—an opportunity for profit or loss depending on their exercise of initiative. The DOL states in its notice, "This proposed rulemaking is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves." To preserve the important function of trip pilots within the tugboat, towboat, and barge industry, AWO respectfully requests that the DOL clarify that workers who work temporarily or occasionally for an employer in a highly regulated industry under these or similar circumstances may be considered independent contractors.

Thank you again for the opportunity to comment. We would be pleased to answer any questions or provide further information as the DOL sees fit.

Sincerely,

A handwritten signature in black ink that reads "Jennifer Carpenter". The signature is written in a cursive, flowing style.

Jennifer A. Carpenter
President & CEO