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National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: Proposed Rule, "The Standard for Determining Joint-Employer Status" (Sept. 14, 2018), RIN 3142-AA13

Dear Members of the Board:

We write to you as, collectively, lawyers, law professors, and economists whose research involves labor law/labor markets, antitrust law/market power, and the intersection of the two areas. On September 14, 2018, the National Labor Relations Board (the "Board") published the Standard for Determining Joint-Employer Status Rule, proposing a new definition of "joint employers" ("the proposed rule"). The proposed rule provides that a person or entity should be considered a joint employer of a "separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." The proposed rule further requires that a putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

We strongly recommend that the Board withdraw the proposed rule because it would further undermine the precarious associational rights and well-being of American working people, which the Board is charged by its governing statute to uphold.[1] We further recommend that the Board allow the existing *Browning Ferris* "joint employer" definition to stand;[2] wherein indirect control over wages (or other essential working conditions) of the group of workers in question is sufficient to establish joint employer status, without requiring any separate showing of direct or indirect control over hiring, firing, discipline, supervision, or direction. We further note that the bargaining relationship between workers and a joint employer is already limited to those subjects over which the joint employer actually exerts direct or indirect control.

Under the existing *Browning-Ferris* standard, an important form of "indirect control" involves the franchisor dynamics that the rest of this letter discusses. However, the functional equivalence between this form of indirect control and direct control is, in the franchising context, currently not

[1] *See* 29 U.S.C. §§ 151 *et seq.*

[2] *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186, at 2 (2015), defined "joint employers" of the same statutory employees as those who "share or codetermine those matters governing the essential terms and conditions of employment," and did not require that a statutory employer's control "be exercised directly and immediately." Instead, "[i]f otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status." The Board also affirmed its "inclusive approach in defining 'essential terms and conditions of employment'," noting that "[e]ssential terms indisputably include wages and hours, as reflected in the Act itself." *Id.* at 15.

constrained by antitrust law. Indeed, the current antitrust treatment of franchising arrangements is already inconsistent with its labor law treatment. Full and proper enforcement of *Browning-Ferris* could remedy this inconsistency. The proposed rule, on the other hand, would only heighten the current regulatory inconsistency by expanding the right of franchisors to control without legal consequence.[3] Indeed, it is precisely franchisors' tight controls over franchisees' operational, supply, advertising, and even pricing decisions—which once would have been illegal under antitrust law—that contributes to low wages, and leaves franchisees little maneuvering room to affect the economic terms and conditions of their relationships with their own employees.

The reason that the Board's proposed rule would heighten the existing regulatory inconsistency is that the rule would essentially exempt franchisors from the legal consequences of firm status as a labor law matter, while antitrust continues to extend the privileges of firm status—namely economic control over franchisees—to franchise "families," with franchisors reaping the benefits. On the other hand, a rule that favored bargaining between franchisees' employees and franchisors would help to protect franchisees from the poor profit margins or even "extreme losses" (see *infra*) that franchisees too often suffer given the permissive antitrust treatment of franchisors' control over franchisees' pricing decisions. The Board's proposed rule would do direct, additional harm to both workers and small businesses, while further rewarding large, profitable, and powerful firms. This is the precise opposite of what the American economy currently needs.

Franchisors and other lead firms effectively dictate the terms and conditions of employment through the other types of control and coordination in which they are permitted to engage. For example, a recent McDonald's franchise agreement requires compliance with detailed specifications for operations, which in practice requires purchasing specified food preparation equipment and often extensive remodeling of premises, in addition to the many other requirements of operational uniformity.[4] It also requires franchisees to secure franchisor's approval for all advertising, and to spend a minimum percentage of gross sales revenue on advertising annually.[5] It demands that franchisees send managers for training at Hamburger University.[6] It mandates franchisees' operating hours.[7] And of course, it requires an exacting set of fees to be paid to the franchisor.

Of particular relevance is that franchisors frequently require franchisees' participation in advertising and promotional programs that set prices for franchisees' products. This often requires franchisees to sell those products at a loss. In some legal disputes that have arisen as a result, franchisors have specifically asserted their right to impose maximum prices upon franchisees. For example, in one instance Burger King sued its former franchisees for shutting down their restaurants before the expiration of the contract; the franchisees explained that they had done so because they were operating at an "extreme loss," thanks to the franchisor-imposed "Value Menu."[8]

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[3] This Comment focuses specifically upon franchising arrangements, but many of its conclusions are generalizable to other business arrangements implicated by the proposed rule, such as sub-contracting arrangements and other business structures in which a "lead firm" exercises firm-like control over formally separate business associations. *See, e.g.,* David Weil, *The Fissured Workplace* (Harvard, 2014).

[4] "Exhibit B: Franchise Agreement (Traditional)," viewed at https://www.scribd.com/doc/233487415/McDonalds-Franchise-Agreement ("McDonalds Franchise Agreement"), at ¶ 12(b) and (c).

[5] Id. at ¶ 5.

[6] Id. at ¶ 6.

[7] Id. at ¶ 12(g).

[8] *Burger King Corporation v. E-Z Eating 8th Corp.*, 2008 WL 11330723 (S.D. Fla., May 22, 2008) (order on motion for summary judgment in lawsuit by franchisor Burger King Corporation against franchisees for breach of contract, on ground that they shut down their franchisees prior to the contract's expiration; franchisees counter-claimed that they

Franchisors more generally put downward pressure on franchisees' product pricing; some of that pressure is informal, and some of it is contractual.

Indeed, franchisors' control over franchisee pricing is likely even more pervasive than the reported disputes and the published decisions indicate. For example, for McDonald's franchisees, conformance to suggested prices is a tacit requirement (even where not specifically required as part of a promotional or advertising campaign), at least if a franchisee would like her contract to be renewed. As one long-time franchisee recently told *The Guardian*, "participation in deals and pricing is voluntary only in theory":

> "In practice, if you don't do it, they will brand you not a team player and you will be in a great deal of trouble," she said. Being in trouble, she explained, can mean increase [*sic*] number of visits by regional and corporate representatives. "One time our coffee price was a nickel over what the advertised sale price was and the head of the McDonald's region came in and he said: 'You are over. You can't do this.' That was the first time he told us to sell our business."[9]

In this environment, it is difficult to see how meaningful bargaining between franchisees and their employees over their terms and conditions of employment, notably wages and compensation, is possible. Franchisees may have little space to increase wages. On the contrary, the trend has been that precisely as a result of increasing control by franchisors—some of it due to technology that permits greater monitoring, and some of it due to a favorable legal environment (see *infra*)—franchisees have faced downward pressure on their wage policies.[10] Regarding wage policies, the same McDonald's franchisee noted: "Obviously when McDonald's controls most of your pricing, we were left with less than 20 items on our menu – out of 100 – that we were able to set prices on. Everything else was mandated either through nationwide dollar menu or through local advertising co-op mandates. Your hands are pretty well tied." She reports that she was advised: "You guys can make more money if you pay your employees less."[11]

All this occurs in an antitrust environment that is increasingly permissive toward precisely the sort of top-down control upon which franchisors rely, even as it is increasingly intolerant of horizontal economic coordination beyond firm boundaries.[12] Franchisors have historically shaped

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were operating under "extreme losses" due to franchisor's imposition of the "Value Menu"). *See also Burger King Corp. v. E-Z Eating, 41 Corp.*, 572 F.3d 1306 (11th Cir. 2009) (upholding summary judgment for Burger King Corporation on the ground that its imposition of the Value Menu on franchisors did not violate the implied covenant of good faith and fair dealing).

[9] Jana Kasperkevic, "McDonald's franchise owners: what they really think about the fight for $15," *The Guardian* (April 14, 2015).

[10] *Id.* ("Running a McDonald's store back in the 1970s or 1980s allowed for a much greater level of independence, she said, recalling the years when her dad first opened his. 'One of the bad things that has happened from computers is that that [independence] is no longer there,' she said. The main reason for that is that the store operators use McDonald's software for inventories, points of sale, training, payroll and scheduling. Slater-Carter says that McDonald's requires its franchisees to use their computer system and to pay for it as well.").

[11] Lydia DePillis, "McDonald's franchisee says the company told her 'just pay your employees less'," *Washington Post* (August 4, 2014).

[12] Franchisees' own coordination as to the terms and conditions of their bargains with franchisors would likely be condemned as straightforward price-fixing, which is how antitrust regards horizontal coordination beyond firm boundaries.

their regulatory environment to accommodate their business model.[13] Judicial reinterpretations of antitrust law since the late 1970's have only intensified the asymmetry between the antitrust treatment of vertical, hierarchical coordination imposed by the powerful upon the less-powerful (which is favored), and the treatment of horizontal, democratic coordination between relative equals (which is disfavored and often proscribed). Two related lines of jurisprudence are potentially implicated by franchisors' conduct: that involving vertical restraints, and that involving firm status itself. The first line of cases radically expanded franchisors' (and sellers') rights to control both price and non-price aspects of franchisees (and small re-sellers') business decisions.[14] Under the second line of cases, inaugurated by the Supreme Court's landmark decision in *Copperweld v. Independence Tube*,[15] appellate courts have authorized franchisor-imposed restraints on hiring by franchisees within the franchise "family."[16] Both strands of case-law expand the permission of vertical, top-down economic coordination flowing from a concentrated center of ownership and control, even while identical forms of coordination, when agreed upon horizontally among small owners, remain illegal.

Franchisors' economic control over franchisees, both over hiring decisions and pricing, operates in the shadow of this body of decisional law and sometimes with its express protection. For example, in *Williams*, the Ninth Circuit immunized franchisors' imposition of "no-poaching" or "no-switching" clauses on franchisees under the single entity doctrine, effectively expanding firm status to encompass the entire franchise 'family.'[17] Thereafter, in at least one reported example, McDonald's successfully relied upon *Williams* and the single entity doctrine to restrain a franchisee's attempts to purchase other restaurants.[18] Franchisors' use of the single entity doctrine is striking because it expressly asserts firm status for the franchise family as a whole, a status whose consequences franchisors expressly disavow under labor and employment law.

Even more recently, as franchisors' previously-overlooked restraints upon franchisees' hiring decisions have come under increasing public criticism,[19] a number of plaintiffs have again challenged such restraints ("no poaching" clauses) under antitrust. In defending these pending lawsuits,

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[13] For a regulatory history of the franchising business model, see Brian Callaci, "Vertical Dis-Integration and the Creation of a New Business Form: Franchising 1960-1980" (Univ. of Mass.-Amherst, Dept. of Economics, working paper, September 2018).

[14] *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (legalizing vertical restraints by franchisor involving territorial market allocation); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (permitting vertical fixing of maximum prices by gasoline supplier, restraining gas station operators). These cases reversed the earlier direction of the law, which had refused to immunize such coordination partly on the ground that it involved a level of control that should occur only within firm boundaries. *See, e.g., Simpson v. Union Oil Co.*, 377 U.S. 949 (1964) (vertically imposed price-fixing (minimum prices) by oil company on gas station re-sellers was illegal, where the Court's reasoning is based as much upon the freedom of the small dealers, as it is on promoting the competitive price); *United States v. Richfield Oil Corp.*, 99 F.Supp. 280 (S.D. Cal. 1952) (vertical restrictions on gas station operators by oil company impermissible, reasoning that gas station operators were tenants, not employees, and thus principles of subordination inherent in hierarchical vertical coordination were inappropriate).

[15] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

[16] *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (dismissing former employee's claim that "no-switching" provision in franchising agreement violated Sherman Act, on the basis that franchisor and franchisee cannot conspire under *Copperweld*).

[17] *Williams*, 999 F.2d. 445.

[18] *Abbouds' McDonald's, LLC v. McDonald's Corp.*, No. CV04-1895P, 2005 WL 2656591, at *1 (W.D. Wash. Oct. 14, 2005), *aff'd*, No. 05-36032, 2006 WL 1877247 (9th Cir. July 7, 2006)

[19] See, e.g., Alan B. Krueger and Orley Ashenfelter "Theory and Evidence on Employer Collusion in the Franchise Sector" (IZA Discussion Paper No. 11672, August, 2018).

franchisors have emphasized the vertical integration between themselves and franchisees as the basis of the right to impose such restraints, and in some cases have even asserted the single entity doctrine, if more tentatively than previously.[20] Meanwhile, of course, franchisors continue to disclaim any control or influence over franchisees for the purpose of labor regulation, whether of wages or collective bargaining.[21] One antitrust plaintiff, having noticed this contradiction, cited McDonald's litigation positions in a recent labor case to support her contentions.[22]

Beyond these overt tensions and contradictions in litigation positions, the criteria under which franchisors or other lead firms are held to the responsibilities of firm status under labor law are already significantly more contracted than the criteria for applying the privileges of firm status under antitrust. The focus on terms and conditions of employment in the joint-employer doctrine was likely intended to *expand* coverage. Thus, in theory a firm that might not meet more comprehensive criteria of firm integration could still qualify as a joint employer. In practice though, the joint employer standard too often has the effect of authorizing disregard of a lead firm's control over other aspects of the direct employer's business operations, which are determinative of the key terms and conditions of employment. Consequently, many powerful firms, including franchisors, benefit from a broad drawing of firm boundaries for antitrust purposes and an exceedingly narrow drawing of firm boundaries for labor law purposes.

The consequences for franchisees and franchisees' employees are grave. Workers are effectively deprived of the coordination rights to which they are entitled under the National Labor Relations Act. As a result, by barring the exercise of any countervailing power by franchisees *or* their employees, the current regulatory further solidifies the exclusive, top-down control rights with which our current regulatory environment rewards powerful franchisor firms like McDonald's and Burger King. Full and robust application of *Browning-Ferris*, requiring collective bargaining over wages, hours or any other significant working conditions (where a franchisor or other powerful firm exerts direct or indirect control over that term or condition) would help to remedy this situation.

The drafters of the Wagner Act found that "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry…" 29 U.S.C. § 151. The legislators thus expressly recognized that business associations themselves benefit from a legal grant of coordination rights, parallel to the collective bargaining rights provided to workers by the statute. Franchising—especially given its permissive antitrust treatment—precisely expands the grant of coordination rights to "corporate or other forms of ownership association" to which Congress referred, a grant of rights that has worked to "depress[] wage rates" given that franchise workers' countervailing "full freedom of association" remains an unfulfilled promise. The Board's proposed

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[20] See, e.g., DesLandes v. McDonalds, No. 17-cv-04857 (N.D. Ill., June 28, 2017); Ion v. Pizza Hut, LLC., No. 17-cv-00788 (E.D. Tex., Nov. 3, 2017); Butler v. Jimmy John's Franchise LLC, No. 18-cv-00133 (S.D. Ill., Jan. 24, 2018). See also Andrele St. Val, "Having a Big Mac and Eating it Too: An Analysis of McDonald's Antithetical Positions in Antitrust and Joint-Employment Cases," (Wayne State University Law School Master's Thesis, December 2018; on file with signatories).

[21] See, e.g., Salazar v. McDonald's Corp., 14-CV-02096-RS, 2016 WL 4394165 (N.D. Cal. Aug. 16, 2016) (case arising under the California Labor Code); McDonald's USA, LLC v. Fast Food Workers Comm & SEIU, 363 N.L.R.B. No. 144 (Mar. 17, 2016) (complaint arising under the National Labor Relations Act).

[22] DesLandes v. McDonalds, No. 17-cv-04857 (N.D. Ill., June 28, 2017).

rule promises to intensify and continue this state of affairs by denying countervailing coordination rights to franchise workers. On the other hand, a proper application of *Browning-Ferris* has the potential to remedy the problem. The Board's proposed rule is deeply set against the legislative intent that animates its governing statute.

For all the foregoing reasons, we respectfully request that the Board withdraw the proposed rule to let the existing *Browning Ferris* "joint employer" definition stand, wherein direct or indirect control by a putative joint employer over wages, hours, or other essential working conditions of the group of workers in question is sufficient to ground the permission of a collective bargaining relationship over those terms or conditions, without requiring any separate showing of direct or indirect control over hiring, firing, discipline, supervision, or direction.

Thank you for your consideration.

Very truly yours,

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