

June 8, 2023

Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

Comment submitted electronically via <https://www.regulations.gov>

**Re: Solicitation for Public Comments on Provisions of Franchise Agreements and Franchisor Business Practices, Document ID FTC-2023-0026-0001**

Dear Commissioners:

The undersigned civil society organizations are writing in response to the Federal Trade Commission's Request For Information on franchise agreements and franchisor business practices.<sup>1</sup>

We call your attention in particular to the unfair contracts and tactics used by powerful companies such as Amazon and other technology giants against smaller firms and workers. In addition to violating antitrust tenets concerning unfair competition, coercive franchisor and franchisor-like practices suppress worker wages, undermine worker health and safety, and thwart workers from bargaining collectively for better pay and working conditions. We urge the FTC to use its extensive legal authorities to rein in these corporate abuses of power and rule them as categorically or presumptively unlawful vertical restraints under antitrust law.

In the franchising context and similar business models, the lead company typically dominates and controls subordinate firms or individuals through strict contractual rules on how to operate, how to perform the work, and other aspects of decision-making regarding prices, suppliers, and customers—"vertical restraints" as they are known in antitrust parlance.<sup>2</sup> At one time, the FTC took on abuses deriving from unfair contracts directly, using its Section 5 authority to prohibit unfair methods of competition.<sup>3</sup> However, when the FTC finally enacted a trade regulation rule governing franchising, it ignored franchisee requests for action under Section 5. Instead, in

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<sup>1</sup> Federal Trade Comm'n, Submit a Comment on Franchise Request for Information (Mar. 10, 2023), <https://www.ftc.gov/policy/studies/submit-comment-franchise-request-information>.

<sup>2</sup> Common vertical restraints in the franchise context include no-poaching agreements, maximum or minimum prices that the franchisee may charge, veto over the selection of products sold, and mandatory hours of operation. For a discussion, see Brian Callaci, *New research shows the franchise business model harms workers and franchisees, with the problem rooted in current antitrust law*, Washington Center for Equitable Growth (Dec. 13, 2018), <https://equitablegrowth.org/new-research-shows-the-franchise-business-model-in-the-united-states-harms-workers-and-franchisees/>.

<sup>3</sup> See, e.g., *FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316 (1966) (holding that exclusive contracts between Brown Shoe, the second-largest shoe manufacturer at the time, and hundreds of shoe stores is an unfair method of competition under FTC Act). See also Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, Cornell Law Review (Mar. 14, 2023), <https://www.cornelllawreview.org/2023/03/14/antitrust-remedies-for-fissured-work/>.

promulgating the Franchise Rule<sup>4</sup> in 1979, the agency chose to merely require franchisors to inform franchisees about unfair terms in franchise contracts.

Since 1979, the use of highly restrictive vertical restraints to control independent contractors—often to the same extent as if they were direct employees, while denying them and their employees employment rights—has expanded well beyond franchising to other parts of the economy. Examples of franchise businesses—representing 10 million workers<sup>5</sup>—have long been familiar to ordinary Americans as McDonald's restaurants, Jiffy Lube shops, and Supercuts hair salons, but franchising-like business models now include rideshare companies and Amazon's outsourced Delivery Service Partner (DSP) and Flex last-mile delivery programs. In light of these developments, the FTC must update its approach and look beyond the Franchise Rule to confront abuses from vertical restraints throughout the economy.

The case study of Amazon DSPs demonstrates many of the exploitative features of modern franchising, franchising-like, and fissured workplace models.<sup>6</sup> Touted by Amazon as a hands-on opportunity for entrepreneurs who lack logistics experience and significant start-up capital,<sup>7</sup> the DSP program is now contracted with more than 2,000 DSP small business operators employing 115,000 workers in the U.S.<sup>8</sup> Although DSPs are supposed to be independent businesses, in reality Amazon dictates the delivery routes, order of deliveries, productivity quotas, trainings, and scheduling of the DSP employees, who wear Amazon-branded uniforms and drive Amazon-branded vehicles equipped with Amazon-approved electronic surveillance gear and smartphone apps that closely supervise the workers on behalf of Amazon.<sup>9</sup>

This reliance on intrusive surveillance practices and electronic technologies is especially noteworthy because they enable close monitoring of the DSP drivers while also circumventing traditional or pre-digital modes of management associated with the employer-employee relationship, such as on-site supervisors. When the FTC enacted the Franchise Rule decades ago, lead companies had to rely on fax machines and in-person "secret shoppers" to monitor franchisees and contractors. Now, lead companies receive up-to-the-minute information directly from a myriad of digital devices and software programs, such as electronic cash registers and point-of-sale software, mobile phones, smartphone apps, keycards, and GPS devices and other

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<sup>4</sup> 16 C.F.R. Parts 436 and 437.

<sup>5</sup> *Franchising is More than Just Fast Food*, U.S. Census Bureau (Dec. 1, 2021), <https://www.census.gov/library/stories/2021/12/franchising-is-more-than-just-fast-food.html>.

<sup>6</sup> Brian Callaci, *Puppet Entrepreneurship: Technology and Control in Franchised Industries*, Data & Society (Jan. 27, 2021), <https://datasociety.net/library/puppet-entrepreneurship/>.

<sup>7</sup> Anna Kramer, *Amazon's entrepreneur dream is closer to a nightmare for many*, Protocol (Mar. 7, 2022), <https://www.protocol.com/workplace/amazon-delivery-program-trap>; Amazon, *Amazon Logistics - Become an Amazon DSP* (accessed May 22, 2023), <https://logistics.amazon.com/>.

<sup>8</sup> Katie Tarasov, *Pee bottles, constant monitoring and blowing through stop signs: Amazon DSP drivers describe the job*, CNBC (June 21, 2021), <https://www.cnbc.com/2021/06/21/drivers-speak-out-about-p pressures-of-delivering-for-an-amazon-dsp.html>.

<sup>9</sup> Josh Eidelson & Matt Day, *Drivers don't work for Amazon but company has lots of rules for them*, The Detroit News (May 5, 2021), <https://www.detroitnews.com/story/business/2021/05/05/drivers-dont-work-amazon-but-company-has-lots-rules-them/4955413001/>; Amazon DSP Brochure (accessed May 22, 2023), [https://m.media-amazon.com/images/G/01/DSP2/DSP\\_Brochure\\_English\\_Final.pdf](https://m.media-amazon.com/images/G/01/DSP2/DSP_Brochure_English_Final.pdf); *Primed for Pain*, Strategic Organizing Center (May 2022), <https://thesoc.org/wp-content/uploads/2021/02/PrimedForPain.pdf>.

geolocation trackers.<sup>10</sup> Amazon in particular enforces its strict requirements on DSP drivers through cameras inside the vehicle that monitor the driver's movements and handheld devices that monitor package deliveries.<sup>11</sup> The intensity of control via vertical restraints and electronic surveillance obliterates any distinction between "employee" and "independent contractor" that the FTC relied on in the past.

Meanwhile, the DSP drivers are blocked from making claims on Amazon corporate headquarters for rights or resources or from collectively bargaining with their real bosses over their working conditions and compensation. Adding insult to injury, Amazon is able to ensure the DSP jobs displace strong union jobs by contractually requiring workers to remain at-will employees of the DSP.<sup>12</sup> It is no surprise that abysmal rates of workers getting hurt on the job and other indicators of worker misery are endemic to the DSP program.<sup>13</sup> And when Amazon's unreasonable delivery or delivery routing requirements lead to vehicle crashes, Amazon will claim that it bears no legal responsibility to the victims.<sup>14</sup>

In other words, Amazon uses the DSP program to maintain what is essentially an in-house fleet of package delivery drivers that also creates the perception of Amazon's ubiquity in our communities—all the while evading accountability and responsibility for compliance with various worker protections and employment laws, like timely paychecks, workers' compensation, and unemployment insurance. Amazon relies on a number of other coercive and unfair tactics to further keep DSPs under its thumb, including de facto noncompete clauses that require DSPs to be available to Amazon at all times and therefore unavailable to deliver for Amazon's competitors.<sup>15</sup> And if a DSP business wishes to challenge Amazon over these unfair vertical restraints—even for reasons such as to ease workloads to meet safety requirements or to support

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<sup>10</sup> Aiha Nguyen, *The Constant Boss: Work Under Digital Surveillance*, Data & Society (May 2021), [https://datasociety.net/wp-content/uploads/2021/05/The\\_Constant\\_Boss.pdf](https://datasociety.net/wp-content/uploads/2021/05/The_Constant_Boss.pdf); Kathryn Zickuhr, *Workplace surveillance is becoming the new normal for U.S. workers*, Washington Center for Equitable Growth (Aug. 2021), <https://equitablegrowth.org/wp-content/uploads/2021/08/081821-worker-surv-report.pdf>.

<sup>11</sup> Lauren Kaori Gurley, *Amazon's AI Cameras Are Punishing Drivers for Mistakes They Didn't Make*, Vice (Sept. 20, 2021), <https://www.vice.com/en/article/88npjv/amazons-ai-cameras-are-punishing-drivers-for-mistakes-they-didnt-make>; Tyler Sonnemaker, *Amazon is deploying AI cameras to surveil delivery drivers '100% of the time'*, Business Insider (Feb. 3, 2021), <https://www.businessinsider.com/amazon-plans-ai-cameras-surveil-delivery-drivers-netradyn-2021-2>; Caroline O'Donovan & Ken Bensinger, *Amazon's Next-Day Delivery Has Brought Chaos And Carnage To America's Streets — But The World's Biggest Retailer Has A System To Escape The Blame*, BuzzFeed News (Sept. 6, 2019), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths>.

<sup>12</sup> Brian Callaci, *Entrepreneurship, Amazon Style*, The American Prospect (Sept. 27, 2021), <https://prospect.org/power/entrepreneurship-amazon-style/>.

<sup>13</sup> *Primed for Pain*, Strategic Organizing Center (May 2022), <https://thesoc.org/wp-content/uploads/2021/02/PrimedForPain.pdf>; *The Worst Mile*, Strategic Organizing Center (Feb. 2021), <http://thesoc.org/wp-content/uploads/2022/06/The-Worst-Mile.pdf>.

<sup>14</sup> Patricia Callahan, *THE DEADLY RACE: How Amazon Hooked America on Fast Delivery While Avoiding Responsibility for Crashes*, ProPublica (Sept. 5, 2019), <https://features.propublica.org/amazon-delivery-crashes/how-amazon-hooked-america-on-fast-delivery-while-avoiding-responsibility-for-crashes/>.

<sup>15</sup> Amazon, DSP Brochure (accessed May 26, 2023) ("You'll be expected to provide support for your drivers to ensure the successful delivery of parcels in a 7 days/week, 365 days/year operation."), [https://m.media-amazon.com/images/G/01/DSP2/DSP2.0\\_IN\\_Brochure.pdf](https://m.media-amazon.com/images/G/01/DSP2/DSP2.0_IN_Brochure.pdf); Sean M. O'Brien, General President of International Brotherhood of Teamsters, Testimony Before the Senate Committee on Health, Education, Labor & Pension (Mar. 8, 2023), <https://www.help.senate.gov/imo/media/doc/O%27Brien%20-%20WRITTEN%20help%20testimony.pdf>.

those workers exercising their right to form a union—Amazon can easily retaliate by simply terminating the DSP's contract.<sup>16</sup> The resulting impact would be trivial for Amazon, the world's largest retailer, but it would be devastating to individual DSP operators who sunk their savings and years of their life into building the DSP business.<sup>17</sup>

We strongly encourage the FTC to look to these ways in which Amazon treats the DSPs for examples of corporate abuses of power and for specific illustrations of the need for the FTC's robust intervention. That said, current law allows franchisor companies across industries to stifle their competitors, unfairly limit the independence of small businesses, and dictate virtually all key aspects of the franchisee's operations, often in employer-like fashion.

Franchises, and similar business models like Amazon DSPs, are marketed as opportunities for entrepreneurs to launch their own business under the experienced lead company's guidance, often targeting inexperienced hopefuls with promises of high profits and the independence of being their own boss. However, as we explain in this letter, the lead company is the real boss—especially when it enjoys an enormous power disparity over smaller contractors. Enabled by loopholes in outdated antitrust, labor, and employment laws, and fueled by new digital technologies, lead companies today flex this power by unilaterally dictating the subordinate firms' work through "take-it-or-leave-it" contracts, managing the minutiae of the working conditions of those firms' employees, and relying on intrusive electronic surveillance for enforcement.

Franchising is thus emblematic of workplace "fissuring,"<sup>18</sup> similar to subcontracting, classifying (and often misclassifying) workers as independent contractors, and use of temporary staffing agencies. Fissuring refers to companies externalizing or outsourcing their workforce and operations for everything from manufacturing to data center operations<sup>19</sup>—a phenomenon increasingly exploited by powerful multinational corporations like Amazon. In part due to the massive power imbalance, the subordinate firms and contractors usually have little recourse against abusive lead companies. Their employees have even less power to push back.

Given the magnitude and severity of these concerns, we urge the FTC to take correspondingly strong action against the unfair vertical restraints imposed by lead companies against nominally independent businesses in the franchise or franchise-like context.<sup>20</sup> As a start, blatantly anti-competitive restraints imposed by lead companies, such as noncompete agreements and

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<sup>16</sup> Luis Feliz Leon, *Teamsters Begin Major Amazon Fight*, American Prospect (May 4, 2023), <https://prospect.org/labor/2023-05-04-teamsters-begin-major-amazon-fight/>.

<sup>17</sup> Lauren Kaori Gurley, *'I Had Nothing to My Name': Amazon Delivery Companies Are Being Crushed by Debt*, Vice (Mar. 7, 2022), <https://www.vice.com/en/article/wxdbnw/i-had-nothing-to-my-name-amazon-delivery-companies-are-being-crushed-by-debt>.

<sup>18</sup> See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press (2014). See also Brian Callaci, *Control without responsibility: The legal creation of franchising, 1960–1980*, Enterprise & Society 22, No. 1 (2021).

<sup>19</sup> See, e.g., Nat'l Emp. Law Project, *Temps in Tech: How Big Tech's Use of Temp Labor Degrades Job Quality and Locks Workers Out of Permanent, Stable Jobs* (Aug. 20, 2021), <https://www.nelp.org/publication/temps-in-tech-how-big-techs-use-of-temp-labor-degrades-job-quality-and-locks-workers-out-of-permanent-stable-jobs/>.

<sup>20</sup> Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, Cornell Law Review (Mar. 14, 2023), <https://www.cornelllawreview.org/2023/03/14/antitrust-remedies-for-fissured-work/>.

mandatory hours of operation, should be declared *per se* or categorically unlawful under antitrust law. Other coercive business practices, such as restrictions on the suppliers or vendors that a subordinate firm may use, should be declared presumptively unlawful or banned when used by dominant firms.

Thank you for considering our views. As you further engage in the important work of determining the details of a possible rulemaking, we stand ready to offer our assistance.

Sincerely,

Athena Coalition  
Action Center on Race and the Economy  
American Economic Liberties Project  
Center for Popular Democracy  
Data & Society Research Institute  
Demand Progress Education Fund  
Fight for the Future  
Institute for Local Self-Reliance  
International Brotherhood of Teamsters  
Jobs With Justice  
Main Street Alliance  
Munro Law LLC  
National Employment Law Project  
NextGen Competition  
Open Markets Institute  
PowerSwitch Action  
Public Citizen  
Revolving Door Project