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December 7, 2022

VIA ELECTRONIC SUBMISSION (www.regulations.gov)

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

**Re: Notice of Proposed Rulemaking on Standard for Determining Joint-Employer Status,
RIN 3142-AA21**

Dear Ms. Rothschild:

McDonald's USA, LLC ("McDonald's"), the franchisor of McDonald's-brand restaurants in the United States, respectfully submits this comment in response to the National Labor Relations Board's Notice of Proposed Rulemaking on the Standard for Determining Joint-Employer Status, RIN 3142-AA21, published in the Federal Register on September 7, 2022.

As one of the largest restaurant companies in the United States, McDonald's and its franchisees create jobs that power the U.S. economy. Over 800,000 people work at the nearly 14,000 corporate-owned and independent franchisee-owned restaurants in the United States. Our customers and local communities are at the center of everything we do.

A key ingredient of McDonald's success has been our franchise system, built on foundational principles of quality, service, and cleanliness. Approximately 95% of McDonald's-brand restaurants in the United States are owned and operated by independent local business owners. Our franchise system has improved the lives of McDonald's franchisees, the employees who work in their restaurants, and the local communities they serve. We are proud that approximately 30% of our U.S. franchisees are minority- or women-owned businesses. And workers at franchise businesses like McDonald's earn higher wages than workers at non-franchise businesses.

McDonald's could not have developed our franchise system without the certainty and predictability afforded by the Board's longstanding approach to joint-employer relationships. For decades, McDonald's and our franchisees structured their franchise system on the basis that McDonald's and the small businesses that run McDonald's franchises are not joint employers. While McDonald's provides access to the world's premier restaurant operating system, local small business owners manage their restaurants and bear responsibility for their own employees.

The proposed rule, however, would harm the franchise business model that allows independent small business owners to create jobs, support their local communities, and provide opportunities for their workforces. By significantly expanding the joint employer standard, the proposed rule makes it more likely that all franchisors are held liable as joint employers with their franchisees. If McDonald's were found to be a joint employer under the standard set forth in the proposed rule, the Board would deprive McDonald's and other franchisors of the certainty and predictability that they need to operate their franchise systems, unfairly rewrite the terms of McDonald's franchise agreements, undermine the independence that McDonald's small business owner franchisees are contractually entitled to expect, and jeopardize all of the benefits that McDonald's franchise business model provides to our franchisees, their employees, and their local communities.

For the past decade, the McDonald's brand has been the target of a corporate campaign led by the Service Employees International Union ("SEIU"). An objective of this campaign is to make it easier for workers to unionize across a large franchise business like McDonald's by declaring the franchisor to be a joint employer with its franchisees. Despite spending hundreds of millions of dollars toward this aim over the last decade, to date the union has failed to achieve this objective and resorted to changing the underlying rules that have been in place for decades until 2015. While declaring a franchisor and its franchisees to be joint employers might reduce some obstacles to unionization across large franchise systems, it would have the devastating consequence of destroying the franchise business model that powers the U.S. economy.

The proposed rule is a regrettable departure from the Board's founding mission of serving as a neutral arbiter of fair labor practices. It improperly gives the SEIU through regulatory overreach what the union has been unable to obtain under the Board's longstanding approach to joint-employer relationships. Instead of changing the rules, the Board should maintain the longstanding approach to joint-employer relationships that McDonald's relied upon for decades in building our franchise system and that has allowed McDonald's-brand restaurants to become engines of job creation in the United States.

DISCUSSION

I. McDonald's Is a Model Business Format Franchisor.

A. McDonald's Relies Upon Thousands of Small Business Owner Franchisees Who Are Rooted In and Serve Their Local Communities.

Fundamental to the success of McDonald's franchise system is that franchisees are independent business owners who work for themselves, not for McDonald's. Although McDonald's uniformity may create the impression that all restaurants are run by a centralized bureaucracy, McDonald's and our franchisees are in fact independent businesses that each bear unique responsibilities to ensure the success of the McDonald's system.

McDonald's franchise business model has succeeded on a grand scale over the last seven decades because of the investment and motivation of tens of thousands of independent entrepreneurs, each of whom has been responsible for the success or failure of their personal McDonald's-brand restaurant(s).

While McDonald's franchisees benefit by operating under one of the world's most recognized brands, they are also typical of many small business owners. As owners of their own business, they are responsible for all of its obligations and liabilities. This includes procuring insurance for the business, paying rent to occupy the restaurant premises, and complying with all federal, state, and local laws at their own expense.

Similar to other small business owners, franchisees are also entirely responsible for their own employees. McDonald's franchisees have full discretion to hire who they wish, to assign those employees to specific job positions, to determine the wages and employment benefits, and to create productive work environments for their employees. Likewise, franchisees alone are responsible for determining their staffing levels, setting their employees' scheduled hours of work, and supervising and directing the employees at their restaurants on a day-to-day basis. Franchisees are thus the exclusive employers of their employees with responsibility for employment law violations involving those employees.

B. McDonald's Depends Upon Uniform Operations to Provide a Uniform Experience for Customers While Preserving Flexibility for Franchisees to Meet the Needs of Their Employees and Local Communities.

McDonald's has become the most successful business format franchisor by building an iconic brand on the foundational principles of quality, service, and cleanliness.

Our restaurant system is famous for producing food of consistently high quality using uniform methods of preparation, while providing prompt, courteous service in a family-friendly restaurant environment. McDonald's food tastes just the same in Alaska as it does in Alabama, and customers can expect the same quick service in a welcoming and familiar manner regardless of restaurant location.

The McDonald's system emphasizes uniformity of operations across each element of the McDonald's brand: quality, service, and cleanliness. Our operational standards dictate precisely how the food is made and packaged, how customers are served, and how the restaurant should appear. For example, franchisees serve only certain food and beverage products and use only prescribed equipment and building layouts and designs. So while McDonald's franchisees have freedom and independence in many aspects of their small businesses—in particular with respect to their employees—the McDonald's system requires that franchisees adhere to McDonald's high brand standards. These standards benefit franchisees by attracting customers in their local communities who expect to receive the same level of quality, service, and cleanliness no matter which McDonald's restaurant they enter.

At the same time, McDonald's franchisees have the flexibility to meet the needs of their employees and local communities. Because the McDonald's brand's rich legacy is built upon a business model that allows local franchisees, as small business owners with roots in their local communities, to be the exclusive employers of their employees, franchisees have complete flexibility to tailor benefits, wages, schedules, orientation, and crew programming locally. Indeed, McDonald's franchise system was founded on the idea that individual franchisees and their restaurant management teams are best positioned to run local restaurants and provide personalized opportunities that best address the needs of their teams.

Franchisees—equipped with the knowledge of their market as well as direct feedback from their employees—set competitive wages and benefits to support their people. Franchisees determine the staffing of their restaurants and can best respond to customer demands that may not be consistent from week to week or month to month, such as in communities with seasonal population increases. Franchisees control scheduling at their restaurants, and they are uniquely positioned to work together with their employees on flexible working arrangements, allowing employees to tailor their work around other commitments, such as school or family responsibilities. Franchisees also have the flexibility to respond to local community demand. Of course, a local franchisee is in the best position to know that crowds are greatest after a Friday night high school football game or after congregants return from church on Sunday.

In sum, McDonald’s flexible culture, which prioritizes the individual needs of each crew member at each restaurant, helps ensure that our franchisees can meet the needs of each unique community that they serve while ensuring uniform standards of quality, service, and cleanliness.

C. McDonald’s Franchise System Creates Good Jobs That Power the Economy.

As some of the largest job creators in the United States, McDonald’s and our independent franchisees each believe in providing good-paying jobs with meaningful opportunities for growth and skill development, whether someone is in their first job or found work at McDonald’s later in life.

McDonald’s brand restaurants are engines of job creation, with more than 800,000 people working at nearly 14,000 corporate-owned and independent franchisee-owned restaurants in the United States. Franchise businesses like McDonald’s provide nearly 8.5 million jobs, produce \$787 billion in U.S. economic output, and contribute 3% to the gross domestic product.¹

McDonald’s is thus one of the main reasons why franchise businesses outperform their non-franchise peers in job creation and wages. A 2021 report by Oxford Economics, for example, found that workers at franchise businesses earned between 2-3% higher wages than workers at non-franchise businesses.² Franchise businesses also provide more than twice as many jobs compared to non-franchise businesses. In 2021, the franchising industry created more than 660,000 jobs with even more job growth forecast for 2022.³

McDonald’s and our independent franchisees are proud to provide millions of people at all stages of their professional journey with opportunities for learning and development, whether they choose to build a career with McDonald’s or our independent franchisees, or use the skills and knowledge they learn from McDonald’s and apply it to roles outside of the system.

¹ International Franchising Association, *2022 Franchising Economic Outlook* 1 (Feb. 15, 2022), available at <https://www.franchise.org/franchise-information/franchise-business-outlook/2022franchising-economic-outlook>.

² See Oxford Economics, *The Value of Franchising* 14 (Sept. 2021), available at <https://www.oxfordeconomics.com/resource/the-value-of-franchising/>.

³ International Franchising Association, *2022 Franchising Economic Outlook*, *supra*, at 1.

D. McDonald's Franchise System Promotes Diversity, Equity, and Inclusion.

McDonald's strives to build a more diverse, equitable, and inclusive business in our ongoing quest to be a good neighbor in the local communities where we live, work, and serve.

Since the beginning, McDonald's has worked to put people first in everything we do. Fostering diversity, equity, and inclusion is a critical part of that. McDonald's is committed to attracting franchisees who represent the diverse communities that we serve. Through our franchise model, McDonald's empowers small business owners and helps franchisees from diverse backgrounds and experiences realize their dreams. We are proud that 31% of our U.S. franchisees are minority-owned businesses, and that 29% are women-owned businesses.

We are also investing in programs to make it easier for diverse franchisees to join the McDonald's system. For example, McDonald's recently announced a global recruiting initiative, including committing \$250 million in the United States over five years to provide alternatives to traditional financing to help franchisee candidates who may face socio-economic barriers to join the McDonald's franchise system. We aim to increase demographic representation of our franchisee base through reduced up-front equity requirements and by providing increased access to financing solutions for eligible candidates. By partnering with a network of banking partners to increase access to a menu of financing options and expanding our franchisee recruiting and training efforts for all backgrounds, including underrepresented groups, we will provide life-changing opportunities for aspiring entrepreneurs.

To consistently be a world-class franchising organization, McDonald's must have a relentless focus on raising the bar to ensure we have the best franchisees that represent the diverse communities in which we operate. For each of our franchisees, their business goes beyond a financial investment, but rather an entrepreneurial dream to be the local face of one of the most iconic brands in their local communities. Their stories are profiles of courage, community engagement, and economic empowerment. And they do so much more than run restaurants—they are job creators, civic leaders, and mentors who constantly seek ways to be more deeply rooted in their neighborhoods.

As we look ahead, we remain committed to advancing the principles of inclusion and diversity in all that we do, with the full might of our system. We remain committed to transparently communicating our progress and aspirations, as well as holding ourselves accountable for our efforts. And we will continually seek out every opportunity to emphasize that diversity, equity, and inclusion is—and must remain—central to who we are at McDonald's.

E. McDonald's and Our Franchisees Give Back to Their Local Communities.

With more than 39,000 restaurants operating globally under the McDonald's brand, McDonald's has a unique connection with local communities around the world.

At McDonald's, we believe that we have a responsibility to give back to our local communities. Our business, and the businesses of our independent franchisees, thrive when the local communities in which we operate thrive. When the people who run McDonald's-brand restaurants are both neighbors *and* business owners, we get unique perspectives into the challenges

facing our communities—and how we can help.

Being part of a community means being there for our neighbors when they need us most. McDonald's is proud to build and maintain strong relationships with local communities around the world, with our donations of time and money supporting charities such as the Ronald McDonald House Charities ("RMHC").

With a global network of over 260 Chapters in 62 countries and regions, RMHC—a nonprofit, 501(c)(3) organization—supports families in accessing medical care for children. RMHC programs provide families with somewhere to stay in and near leading hospitals and healthcare services, ensuring they have access to the medical care their children need. During 2021, McDonald's donated \$20 million to RMHC as part of our five-year, \$100 million commitment to support families when they need it most. In total, McDonald's, our franchisees and our customers have donated more than \$168 million to RMHC, helping the charity provide more than 1.8 million overnight stays for RMHC families around the world.

McDonald's is committed to providing our customers with opportunities to support the RMHC mission, with many ways to support Chapters around the world. The largest ongoing fundraisers are RMHC Donation Boxes at restaurant counters and drive-thru windows. In 2021, more than \$27 million was donated worldwide through the Donation Box program. In select markets in 2021, "Round-Up for RMHC" was also an option for customers by allowing them to round up their purchase to the nearest whole number (of their local currency) at self-order kiosks, front counters and drive-thrus, raising more than \$23 million across participating restaurants.

Additionally, we are working with the International Youth Foundation (IYF) and nine community-based organizations to deliver Passport to Success, a life skills training program. During the COVID-19 pandemic, we supported and extended IYF's development of a digital, game-based equivalent (Passport to Success Explorer) to the curriculum to external organizations. Partner organizations included Historically Black Colleges and Universities in the United States. We are continuing to extend the curriculum, with a goal to reach up to 100,000 young people in diverse communities.

Launched in 2015, the Archways to Opportunity program provides corporate and franchised restaurant employees an opportunity to participate in English as a second language program, complete a high school diploma, pursue a college degree and have an assigned academic and career advisor. This program has increased access to education for more than 65,000 people and awarded more than \$130 million in tuition assistance.

In 2018, McDonald's launched the Youth Opportunity program with a goal to reduce barriers to employment for two million young people by 2025 through pre-employment job readiness training, employment opportunities, and workplace development programs. To date, we have supported more than 1.6 million young people through our Youth Opportunity program.

In 2021, we launched a centralized Community Fund to improve McDonald's philanthropic investments. Throughout the year, the U.S. business provided over \$1.4 million in grants and sponsorships. We also partnered with the Obama Foundation by making a two-year, \$5 million commitment across 2022–2023 to the Obama Presidential Center's global programming

and Chicago initiatives. Throughout the COVID-19 pandemic, and with guidance from partners like Food Donation Connection, The Global FoodBanking Network, and Feeding America, we have ensured millions of pounds of abandoned food haven't been wasted, instead donating that food to people globally who need it.

We aim to build strong and inclusive connections that deliver on the needs of our communities. In 2021, we strengthened our Community Impact Strategy to consolidate and enhance community support efforts, creating opportunities to get involved in meaningful campaigns and volunteering. At the beginning of 2022, we launched a community platform that organizes philanthropic investments and volunteer activities in one central location, helping corporate employees, franchisees, and franchisee employees to create, manage, and report on volunteer events and donate to causes they care about.

II. Despite a Sustained Attack by the SEIU and Its Affiliates Over the Past Decade, McDonald's and Our Franchisees Have Never Been Declared Joint Employers.

Despite all of the benefits associated with our franchise system, McDonald's has been under attack from third parties seeking to declare McDonald's a joint employer. Over the past decade, the SEIU and other unelected, third-party special interest groups have spent hundreds of millions of dollars seeking to destroy the livelihood of small business owners in the United States by attempting to dismantle the franchise business model through an unsuccessful corporate campaign targeting the McDonald's brand. The objective of this campaign is to increase the power and size of the union by making it easier for workers to unionize across a large franchise business like McDonald's. Those efforts have failed spectacularly—McDonald's has never been found to be a joint employer with any franchisee under any state or federal law in over 70 years.⁴

By way of background, the SEIU National Fast Food Workers Union's ("NFFWU") Fight for \$15 campaign publicly launched in late-2012 in New York City, with demonstrations and the simultaneous filing of unfair labor practice charges naming McDonald's as a putative joint employer with McDonald's-brand franchisees. Those initial filings were just the start of years of litigation seeking to hold McDonald's liable as a putative joint employer with franchisees. Over the next several years, SEIU-sponsored litigation was filed against McDonald's and our franchisees, and the SEIU's affiliates filed hundreds of unfair labor practice charges containing joint employer allegations. A portion of those unfair labor practice charges alleging that McDonald's should be held liable as a joint employer of its franchisees' employees were litigated in a multi-year Board proceeding.

⁴ See, e.g., *Bosley v. Rawden Joint Ventures Corp.*, No. 21-CV-4616, 2022 WL 3701171, at *5 (E.D. Pa. Aug. 26, 2022); *Ries v. McDonald's USA, LLC*, No. 20-CV-2, 2021 WL 5768436, at *5 (W.D. Mich. Dec. 6, 2021); *Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1241 (N.D. Cal. 2015); *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1089-90 (10th Cir. 1991); *Cropp v. Golden Arch Realty Corp.*, No. 08-cv-96, 2009 WL 10710585, at *8 (D.S.C. Mar. 30, 2009); *Mosley v. McDonald's Corp.*, No. 05-CV-7290, 2006 WL 3541872 (N.D. Ill. Dec. 6, 2006); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1144 (D. Nev. 1999); *Dotson ex rel. Dotson v. McDonald's Corp.*, No. 97 C 1833, 1998 U.S. Dist. LEXIS 4676, at *8-9 (N.D. Ill. Mar. 31, 1998); *Kennedy v. McDonald's Corp.*, 610 F. Supp. 203, 205 (S.D. W. Va. 1985); *Whitfield v. McDonald's*, No. 08-118582-NO (Mich. Cir. Ct. July 28, 2010); *Hall v. McDonald's Corp.*, No. 84-270803 (Mich. Cir. Ct. June 22, 1986).

Those proceedings ultimately settled in 2018 without a finding that McDonald's was a joint employer. McDonald's has successfully opposed the NFFWU's efforts to declare McDonald's a joint employer with our franchisees because McDonald's franchisees are independent small business owners who take pride in being job creators and exemplary employers in the local communities in which they operate. Under the common law and the Board's longstanding approach to joint-employer relationships, McDonald's is not a joint employer of our franchisees' employees.

Unhappy with the Board's settlement, however, the NFFWU's Fight for \$15 campaign continues unabated in targeting the McDonald's brand through demonstrations, strikes, and NFFWU sponsorship of state and local laws targeting McDonald's. While the SEIU's attack focused primarily on the McDonald's brand, its negative effects were felt more broadly throughout the franchising industry. The International Franchise Association concluded that the NLRB General Counsel's announcement of complaints against McDonald's "represented an inflection point which would lead to an avalanche of charges being filed against franchisors alleging joint employment with their franchisees. In the following four years, more than 200 unfair labor practice charges were filed similarly alleging a joint employment relationship between a franchisor and its franchisee."⁵

III. Changing the Joint-Employer Standard Would Destroy the Franchise Model, Hurt the U.S. Economy, and Eliminate Jobs.

Despite the failure of the SEIU's well-funded campaign to declare McDonald's a joint employer with our franchisees, the Board proposes to change the law to help the SEIU achieve what it has been unable to achieve under the Board's longstanding joint-employer standard. The change will further the interests of the SEIU at the expense of small business owners and their local communities and is an unfortunate and inappropriate departure from the Board's historic mission of serving as a neutral arbiter of fair labor practices.

McDonald's, like other business format franchisors, has long relied on the Board's joint-employer standard in structuring our franchising relationships. The McDonald's franchise system is based on a fundamental exchange between franchisor and franchisee: franchisees gain access to the world's premier restaurant operating system, and in exchange pay franchising fees and bear the forms of liability that come with being a business owner, including employment liability.

The proposed rule threatens to destroy this franchise business model. Under the proposed rule's vague joint-employer standard, nearly *any* business format franchisor risks being found a joint employer with its franchisees. And that momentous risk is based upon conduct by a franchisor that is merely designed to ensure uniformity of operations and maintain brand standards, which has historically been insufficient to sustain a joint-employer finding.

The proposed rule would unexpectedly deprive McDonald's of the regulatory certainty and stability that we need to operate our franchise system. The uncertainty inherent in the proposed rule will result in more joint-employer litigation, delay in providing remedies to employees in

⁵ International Franchise Association, *The Economic Impact of an Expanded Joint Employer Standard*, at 11 (Jan. 29, 2019), at <https://www.franchise.org/sites/default/files/2019-05/IE%20Econ%20Impact%200128.pdf>.

meritorious unfair labor practice cases, delay in processing representation cases, increased litigation between franchisors and franchisees, and harm to the ability of franchise businesses to create jobs that power the U.S. economy.

A. The Proposed Rule Abandons the Board’s Longstanding Joint-Employer Standard that McDonald’s Relied Upon to Build Our Franchise System.

The Board should reject the unions’ efforts to tilt the joint-employer standard in their favor because McDonald’s built our franchise system on the predictability and certainty provided by the Board’s longstanding joint-employer approach. Changing the joint-employer standard in response to shifting political winds destroys the certainty and stability that McDonald’s and other franchisors need to operate their franchise systems.

McDonald’s has for decades structured our franchise agreements and other business relationships in reliance upon the Board’s longstanding joint-employer approach. Specifically, McDonald’s franchise agreements are negotiated with an understanding that the franchisee is the exclusive employer of the franchisee’s employees—meaning that the franchisee is responsible for NLRA (and other employment law) compliance and liability costs associated with those employees.

This bargain is the foundation of the franchise relationship. In exchange for a capital outlay and for accepting the forms of liability that go along with running their own business, franchisees receive access to the world’s premier restaurant operating system and the resources, know-how, and optional tools to assist them in running a successful small business.

In addition to structuring our franchise agreement on the basis of the Board’s longstanding joint-employer approach, McDonald’s has for over half a century taken actions to maintain brand standards and ensure uniform operations at all McDonald’s restaurants. These efforts include training our franchisees, requiring adherence to brand standards of quality, service, and cleanliness, and inspecting franchisee restaurants to ensure their compliance with those standards.

Further, McDonald’s has provided optional tools and resources to franchisees and employed business consultants to advise franchisees in the operation of their restaurant. These longstanding aspects of the McDonald’s franchise relationship have never led a court or administrative agency to deem McDonald’s a joint employer with any franchisee.

There is no question that McDonald’s is not a joint employer with our franchisees under the Board’s 2020 Rule, which mirrors the joint-employer standard the Board articulated for over three decades before its 2015 *Browning-Ferris* decision. McDonald’s does not exercise “substantial direct and immediate control” over essential terms and conditions of employment that would warrant a finding that McDonald’s “meaningfully affects matters relating to the employment relationship” between franchisees and their employees.⁶

The proposed rule, however, significantly expands the joint-employer standard by allowing reserved or indirect control to suffice for a joint-employer finding, increasing the risk that any

⁶ 29 C.F.R. § 103.40.

franchisor would be held liable as a joint employer for engaging in conduct that for decades has been insufficient to sustain a joint-employer finding. The proposed rule also contains no limitation on what may be deemed an “essential term or condition” of employment, what types of actions by a franchisor may be characterized as “control,” or what contract terms (if any) are probative of joint-employer status under the Act. All of this increases the likelihood that franchisors and their franchisees would be deemed joint employers of the franchisees’ employees.

For all of these reasons, the proposed rule would severely undermine the reliance interests of McDonald’s and the thousands of small business owners who own and operate McDonald’s-brand restaurants across the United States.

B. The Proposed Rule Creates Substantial Uncertainty About What Conduct Might Transform a Franchising Relationship Into Joint Employment.

Besides destroying these reliance interests, the proposed rule fails to provide clear guidance as to what conduct will trigger a joint-employer finding. This leaves business format franchisors like McDonald’s to guess how, if at all, they could avoid being declared a joint employer.

To start, the proposed rule provides no meaningful guidance because it relies on wholesale incorporation of common-law agency principles. In subsection (a), for example, the proposed rule states that an employer “is an employer of particular employees ... if the employer has an employment relationship with those employees under common-law agency principles.”⁷

No rule is needed to establish this uncontroversial principle. Congress has already told the Board and the courts to “apply general agency principles” under the NLRA.⁸ But the Board never articulates what it believes these principles are. Instead, it unhelpfully directs parties to look them up in historic judicial opinions and reports compiling those opinions. That’s hardly meaningful guidance.

Other aspects of the rule only deepen the confusion. Subsection (d) purports to define the “[e]ssential terms and conditions of employment,” but it never identifies what terms and conditions are “essential” or limits those terms in any way.⁹ Rather, the proposed rule’s definition provides an unbounded list of examples.¹⁰ This definition fails to explain how, if at all, companies like McDonald’s and our franchisees could determine the full list of “essential terms and condition of employment” so they can shape their conduct to avoid a joint-employer finding.

In fact, beyond its overly inclusive, open-ended list of evidence that *could* result in a joint employer finding, the proposed rule doubles the confusion by failing to clarify what evidence *could not* lead to a joint employer finding. The only evidence excluded from its totality-of-the-circumstances analysis is “[e]vidence of an employer’s control over matters that are immaterial to the existence of an employment relationship under common-law agency principles or control over

⁷ Proposed 29 C.F.R. § 103.40(a).

⁸ *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

⁹ Proposed 29 C.F.R. § 103.40(d).

¹⁰ *Id.*

matters that do not bear on the employees' essential terms and conditions of employment.”¹¹

That formulation is practically meaningless. It is both circular (because it turns on what constitutes the essential terms and conditions of employment) and vague (because it once again imports wholesale an ill-defined and internally inconsistent body of authorities interpreting the common law). Such an unclear rule leaves a business format franchisor like McDonald's at a loss as to how they can ensure compliance with brand standards and maintain uniformity of operations throughout the franchise system without being found to be a joint employer.

Moreover, the proposed rule fails to heed the D.C. Circuit's instruction to differentiate “between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships.”¹² The proposed rule provides no guidance on what types of contract terms and relationships are relevant to the joint-employer inquiry.

The proposed rule stands in stark contrast to the clear guidance in the Board's 2020 Rule. That rule “foster[s] predictability and consistency regarding determinations of joint-employer status in a variety of business relationships” and “enhanc[es] labor-management stability” because it provides clear guidance to parties subject to the Board's jurisdiction: they will be held to be joint employers only if they meet clearly defined, enumerated criteria.¹³

For example, the 2020 Rule, which codified the Board's longstanding practice, identified the eight essential terms and conditions of employment relevant to the joint-employer inquiry.¹⁴ It also identified the “general types of control that will render one company the joint employer of another's workers” by spelling out, with precision, what type of control is necessary to establish direct and immediate control with respect to each essential term and condition of employment.¹⁵ Further, unlike the proposed rule, the 2020 Rule clarified the types of contract terms that are not probative of joint-employer status.¹⁶

By the Board's own metric, the Board's 2020 Rule has been a success. The Board has identified reduction in litigation as a metric by which to assess the certainty that the proposed rule provides.¹⁷ The Board has never been required to apply the 2020 Rule to a single case, but the

¹¹ Proposed 29 C.F.R. § 103.40(f).

¹² *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1220-21 (D.C. Cir. 2018).

¹³ 85 Fed. Reg. 11184, 11188 (Feb. 26, 2020).

¹⁴ *See* 29 C.F.R. § 103.40(b).

¹⁵ 87 Fed. Reg. 54641, 54645 (Sept. 7, 2022) (dissent); *see also* 29 C.F.R. § 103.40(c)(1)-(8).

¹⁶ *See, e.g.*, 85 Fed. Reg. at 11193 (“[T]he final rule provides that direct and immediate control excludes setting minimal hiring standards; setting minimal standards of performance or conduct; refusing to allow another employer's employee to continue performing work under a contract; entering into a cost-plus contract; maintaining standards that are required by government regulation; and permitting another employer, under an arms-length contract, to participate in its benefit plans. These same acts also would not constitute evidence of indirect control to the extent they involve setting the objectives, basic ground rules, or expectations for another entity's performance under a contract”).

¹⁷ 87 Fed. Reg. at 54645.

uncertainty created by the proposed rule will only increase litigation, as explained below.

C. The Proposed Rule Would Rewrite McDonald's Franchise Agreement.

The proposed rule also fails to account for its disruptive impacts on longstanding contractual arrangements between franchisors and franchisees.

As explained, the business arrangement between McDonald's and our franchisees is based on a shared understanding of the parties' contractual entitlements and obligations. The financial terms of the deal account for the costs and benefits each party assumes under the agreement, including which party is responsible for the employment liabilities of operating the franchise. And a standard McDonald's franchise agreement has a term of 20 years, so once executed the franchisor and franchisee are bound by its financial terms for decades.

The franchise agreement is clear that the franchisee, not McDonald's, is responsible for employment law compliance, employment decisions, and any resulting employment-related liabilities with regard to the franchisee's employees. It also makes clear that McDonald's and our franchisee are not jointly responsible for or jointly liable to the franchisees' employees, including as joint employers.

The proposed rule promises to undermine that fundamental understanding. By significantly expanding the joint employer standard, the proposed rule increases the likelihood that any franchisor, including McDonald's, would be deemed a joint employer of its franchisees' employees. Such a joint-employer finding would directly contradict the terms of McDonald's franchise agreement.

Moreover, the proposed rule would rewrite the terms of the parties' deal. It would make McDonald's jointly liable for losses relating to our franchisee's employees (and responsible for compliance costs under the NLRA), despite the parties' agreement to the contrary. This would unfairly penalize the parties to the contract.

D. The Proposed Rule Would Delay Legal Remedies and Increase Litigation.

The proposed rule would also frustrate the purposes of the NLRA by delaying remedies to employees and creating needless and costly litigation.

The former NLRB General Counsel's joint employer litigation against McDonald's and our franchisees provides an apt case study. At trial, the General Counsel dedicated over 75 days to presenting evidence of an alleged joint employer relationship even though McDonald's was not alleged to have committed a single violation of the NLRA and every franchisee was willing and able to provide all the relief requested in the complaint.¹⁸

By contrast, the General Counsel's presentation of evidence relating to the merits of the unfair labor practice violations—the conduct alleged to be unlawful—lasted less than a third as many days. The addition of joint-employer allegations unnecessarily complicated that litigation

¹⁸ See *McDonald's USA, LLC*, 368 NLRB No. 134 (2019) (approving settlement in largest consolidated trial in NLRB history where McDonald's was not even alleged to have violated the Act).

and needlessly wasted the resources of McDonald's, several dozen small business owner franchisees, and the Board. Joint-employer allegations will thus add extensive time to any future litigation.

Similarly, the proposed joint-employer rule would inevitably lead to drawn-out representation hearings that would be complicated by disputes over joint employment. This would upend the Board's stated policy of "remov[ing] unnecessary barriers to the fair and expeditious resolution of representation questions."¹⁹ Likewise, the proposed rule is highly likely to lead to an unnecessary delay in employees' and their direct employers' ability to bargain first contracts because it will create acrimonious (and unnecessary) test-of-certification and federal court litigation.

The proposed rule is likely to create additional, costly derivative litigation. For example, the proposed rule may require franchisors to implement legal remedies that they have no authority or ability to implement under their franchise agreements, which would create additional disputes between franchisor and franchisee. In fact, under the terms of McDonald's franchise agreement, it has no authority to implement many of the most common NLRB remedies at our franchisees' restaurants (e.g., posting notices, revising employment policies, removing/revising employee discipline, or reinstating discharged employees).

All of this will undermine the Board's goal of providing certainty and reducing litigation.

E. The Proposed Rule Would Eliminate Jobs and Hurt the U.S. Economy.

Ultimately, all of the proposed rule's devastating effects on franchise businesses will cost jobs and economic output.

These concerns are neither theoretical nor abstract. After studying the impact of the Board's 2015 *Browning-Ferris* decision, Professor Ronald Bird concluded that changing the joint-employer standard negatively impacted the franchising sector by as much as \$33.3 billion annually and caused the franchising industry to lose as many as 376,000 jobs.²⁰

Adopting the proposed rule would multiply these economic harms and job losses associated with changing the joint-employer standard. These harms would cause the destruction of the franchise business model. Ultimately, the proposed rule will jeopardize all of the benefits that McDonald's franchise business model has provided to independent small business owners, their employees, and their local communities.

CONCLUSION

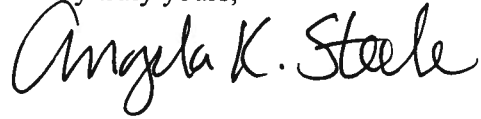
McDonald's appreciates the opportunity to comment and urges the Board not to adopt its

¹⁹ See NLRB, *NLRB Representation Case-Procedures Fact Sheet*, <https://www.nlr.gov/news-publications/publications/fact-sheets/nlr-representation-case-procedures-fact-sheet> (last visited Dec. 6, 2022).

²⁰ Ronald Bird, Ph.D., *Statement Regarding the Economic Impact of the Prospective NLRB Public Policy Decision Regarding the Definition of Joint Employer 2* (2019), available at <https://www.franchise.org/sites/default/files/2019-05/IE%20Econ%20Impact%200128.pdf>.

proposed rule on the standard for determining joint-employer status.

Very truly yours,

A handwritten signature in black ink that reads "Angela K. Steele". The signature is written in a cursive, flowing style.

Angela K. Steele
U.S. Vice President – U.S. General Counsel