

PROTECTING PLATFORM WORKERS IN THE GIG ECONOMY: LOOK TO THE FTC

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ABSTRACT

Much litigation and scholarly commentary has focused on whether Uber drivers and other platform workers are employees of the platform or independent contractors. This Article contends that in the long run, this debate will be irrelevant to the question of how to protect workers in the platform economy. Many worker-platform relationships are not employment relationships under even the broadest definition of the term. Others may be found to be employment relationships but the platforms will react by changing the terms to service to ensure that their workers ultimately are held to be independent contractors. This Article maintains that rather than analogize platform-worker relationships to employment, a more apt analogy is to the franchisee-franchisor relationship. Platform workers have much in common with franchisees and since 1979 the Federal Trade Commission has required franchisors to make extensive disclosures when offering franchises to prospective franchisees and has prohibited material misrepresentations in the process. The Article urges the FTC to develop a platform disclosure rule, a measure that is within the FTC's existing authority and which can provide meaningful protection to platform workers without any new legislation.

INTRODUCTION

Is an Uber driver an employee of Uber? Most scholarship about the so-called on-demand or gig economy has focused on whether individuals providing services via platforms, such as Uber, Lyft, Task Rabbit, and Instacart, are employees under current law or should be protected to the same degree as employees are protected under current law.¹ Most litigation has focused on

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1. See, e.g., SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 1-36 (2015), available at http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [<https://perma.cc/4G6Y-V4PP>]; Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673 (2016); Orley Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C.

whether the platform has misclassified the service providers as independent contractors rather than employees.² In one case brought against Lyft for allegedly misclassifying drivers as independent contractors, a federal judge, in denying cross motions for summary judgment, described the jury's task as "be[ing] handed a square peg and asked to choose between two round holes."³

This Article maintains that the current battles over the classification of platform service providers will, in the long term, be irrelevant. Some platforms, such as Task Rabbit and Airbnb cannot be deemed to be employers no matter how far the common law and statutory definitions of employer are stretched.⁴ With others, such as ride hailing and delivery platforms, the current fights over classification will turn on the facts of each case.⁵ But regardless of how these

DAVIS L. REV. 1511 (2016); E. Gary Spitko, *A Structural-Purposive Interpretation of 'Employment' in the Platform Economy*, 70 FLA. L. REV. 409 (2018); Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023 (2016).

2. See, e.g., *Lawson v. Grubhub, Inc.*, No. 15-cv-05128-JSC, 2018 WL 776354 (N.D. Cal. Feb. 8, 2018); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *Vega v. Postmates, Inc.*, 2018 N.Y. Slip. Op. 04610, 2018 WL 3058287 (N.Y. App. Div. June 21, 2018); see also *Postmates, Inc.*, No. 13-CA-163079 (NLRB Gen. Counsel Advice Memo Sept. 19, 2016) (opining that Postmates courier was an employee under the National Labor Relations Act while recognizing that the Illinois Department of Human Rights and the Chicago Commission on Human Relations had found the courier to be an independent contractor).

3. *Cotter*, 60 F. Supp. 3d at 1081.

4. See Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL'Y J. 1, 9 (2016) (observing that service providers like Task Rabbit taskers are unlikely to be considered employees even under the broad economic realities test of the Fair Labor Standards Act).

5. Consider, for example, two food delivery platforms, Grubhub and Postmates. A U.S. district court magistrate judge found a Grubhub driver to be an independent contractor because, among other things, the driver determined when he would work, how often he would work, could reject any and all jobs offered him, did not have to wear a uniform or display Grubhub placarding on his vehicle, did not have a supervisor and did not report to anyone at Grubhub, could deliver for other companies at the same time he was working for Grubhub, and both parties contemplated that the driver's work would be episodic at the driver's convenience. *Lawson*, No. 15-cv-05128-JSC, 2018 WL 776354. In contrast, the NLRB General Counsel advised that a Postmates driver was an employee where the driver was subject to a dress code and required to placard his car; was on-boarded, counseled and disciplined by a Postmates community manager; was set up in an anticipated long-term uninterrupted employment relationship and was paid according to Postmates' formula with no opportunity for negotiations. *Postmates, Inc.*, No. 13-CA-163079, at 11. The Appellate Division of the New York Supreme Court divided over whether Postmates' drivers were employees or independent contractors. *Vega v. Postmates, Inc.*, 2018 N.Y. Slip. Op. 04610, 2018 WL 3058287 (N.Y. App. Div. June 21, 2018). The majority reversed a decision of the New York Unemployment Insurance Appeal Board which had held Postmates' couriers to be employees. The majority held that they were independent contractors because they had no designated supervisors,

cases turn out, the litigation will likely be futile as far as providing lasting protection for platform workers. Platforms control the terms of service and, because having their workers classified as independent contractors is critical to their business models, they will tweak the terms of service as needed to ensure that their workers ultimately are not classified as employees.

This Article urges that the quest to find a hole that more closely fits the square peg platform-service provider relationship should look to the franchisor-franchisee relationship rather than the round holes of employee and independent contractor. As developed below, the franchisor-franchisee relationship has many of the power imbalances, dependencies and vulnerabilities to abuse that are present in the platform-service provider relationship. Looking to franchising for models of regulation does not rule out the possibility that platform workers may be employees of the platforms. Indeed, where franchisor control of franchisees is sufficiently extensive, franchisors have been held to be employers of their franchisees.⁶ But, in the long term, the primary federal regulatory agency providing protection for franchisees is not likely to be the National Labor Relations Board or the Department of Labor or even the Equal Employment Opportunity Commission. Rather, it can and should be the Federal Trade Commission (FTC). Since 1979, the FTC has required that franchisors make extensive disclosures when offering franchises to prospective franchisees and has prohibited material misrepresentations in the offering process.⁷ Many states have enacted legislation regulating the substantive terms of the franchisor-franchisee relationship, which may also serve as models for regulating the platform relationship.⁸ But an FTC platform disclosure rule is within the FTC's existing

they had “unfettered discretion” as to whether they ever logged into the Postmates platform and even when logged in did not have to perform any work if they did not desire to, were not required to wear a uniform and decided the mode of transportation to use for deliveries and the routes to take, as well as the schedule to follow. 2018 WL 305287 at *1. The dissent would have found the Appeals Board's finding of employee status supported by substantial evidence, including that the couriers were subject to background checks, were instructed on how to use the Postmates platform, were supplied a reloadable credit card to use when making purchases requested by customers, signed acknowledgments indicating the mode of transportation they would use, were prohibited from using substitutes to make deliveries they had accepted, received a nonnegotiable eighty percent of the fee Postmates charged the customer and were not responsible should the fee become uncollectable and were subject to being blocked from access to the platform for various reasons. *Id.* at *1-2.

6. See, e.g., *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80 (D. Mass. 2010); *Fugazy Cont'l Corp.*, 231 N.L.R.B. 1344 (1977).

7. Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures; Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 43 Fed. Reg. 59,614, 59,630 (Dec. 21, 1978) [hereinafter *Disclosure Requirements and Prohibitions*].

8. See generally ALEXANDER M. MEIKLEJOHN, *FRANCHISING: CASES, MATERIALS & PROBLEMS* ch. 10 (2013).

authority and can provide meaningful protection to service providers without any new legislation. This Article urges the FTC to develop an analogous disclosure rule to regulate the platform-service provider relationship. Indeed, as developed below, the FTC has already provided relief to Uber drivers under its general authority under the Federal Trade Commission Act.⁹

Part II makes the case for looking to the franchise model as a model for regulating the platform-service provider relationship. It demonstrates the futility of the battle to classify platform service providers as employees of the platforms. It then explores the commonalities between the platform-service provider relationship and the franchisor-franchisee relationship. Part III develops the history, current status and effectiveness of the FTC Franchise Disclosure Rule and the analogous FTC enforcement action against Uber. Part IV considers recent critiques of mandatory disclosure as a basis for regulating relationships characterized by power imbalances. It analyzes those critiques in the context of the FTC Franchise Disclosure Rule and from that analysis draws lessons for a platform disclosure regime. Part V explores a possible platform disclosure rule. Part VI offers concluding thoughts on the way forward in learning from the franchisor-franchisee relationship when regulating the platform-service provider relationship.

I. WHY LOOK TO FRANCHISING

Platforms characterize themselves as providing a type of electronic brokerage service, matching independent businesses who are offering such services as transportation, the completion of odd jobs, delivery of food, temporary lodging or dog walking with consumers desiring such services.¹⁰ Many disclaim being a party to the transactions they facilitate.¹¹ As such, platforms maintain that they are not subject to traditional regulations aimed at service providers, such as hotels, taxis, trucking companies and others.¹² Orly Lobel describes the phenomenon:

Platform companies adamantly endeavor to be defined first and foremost by what they are not. These companies are not selling the thing itself: the service, the product, the content. Rather, they are selling access to the software, the matching algorithms, and a digital system of reputation and trust between their users. In turn, the platform breaks down traditional industry categorizations and, as a result, presents a challenge when

9. See Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Uber Tech.*, Case No. 3:7-cv-00261-JST (N.D. Cal. Feb. 2, 2017), available at https://www.ftc.gov/system/files/documents/cases/uber_final_order.pdf [<https://perma.cc/S8DK-HN72>] [hereinafter *FTC-Uber Consent Judgment*].

10. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 100-01 (2016).

11. See *Postmates, Inc.*, No. 13-CA-163079, at 4 (NLRB Gen. Counsel Advice Memo Sept. 19, 2016) (relating that Postmates' terms of service "state that the company does not provide courier services but rather a method to obtain such third party couriers"); Acevedo, *supra* note 4, at 7-8, n.23.

12. Lobel, *supra* note 10, at 100-01.

labeling the nature of the business by creating an ambiguous relationship between the provider and user; employer and employee; and owner and consumer.¹³

She catalogues some of the legal issues raised by how the platforms characterize themselves:

Are companies like Uber and Lyft digital clearinghouses connecting independent drivers-for-hire with customers, or rather are they employers violating wage-and-hour laws? Are zoning laws parsing parts of town for short-term rentals still relevant when residential property owners list their homes on Airbnb? Was Aereo, which went bankrupt following its recent Supreme Court defeat, a digital antenna rental company, or a service that streams broadcasted content, thereby infringing copyright? Is TaskRabbit just an app to connect people searching for odd jobs, or a manpower agency that should withhold taxes? Companies such as Uber, Lyft, Airbnb, Aereo, and TaskRabbit have been running against existing regulations and the legal battles often turn on how to define the platform business: Are these digital companies service providers or brokers of individualized exchanges? Should they be viewed as merely enabling intermediaries or robust corporate infrastructures?¹⁴

The fight over whether service providers are employees of the platform is a high stakes battle. As the judge presiding over the Lyft litigation observed,

The question in this case is whether Lyft drivers are ‘employees’ or ‘independent contractors’ under California law. The answer is of great consequence for the drivers, because the California Legislature has conferred many protections on employees, while independent contractors receive virtually none. The answer is also of great import to Lyft, because its business model assumes the drivers are independent contractors.¹⁵

The current round of litigation seeks to bring the platform-service provider relationship under the umbrella of employment regulation. This Part demonstrates why this approach ultimately will prove to be futile as far as protecting platform workers. It then introduces the franchisor-franchisee relationship and demonstrates why franchising provides a more analogous relationship on which to model regulation of platforms.

A. The Futility of Trying to Classify Platform Workers as Employees

For most purposes, adjudicatory authorities such as courts and administrative

13. *Id.*

14. *Id.* at 91.

15. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015).

agencies look to the common law definition for determining employee status.¹⁶ Indeed, the Supreme Court has held that when a statute uses the term employee or employment, a court or agency is to presume that Congress intended to adopt the common law definition.¹⁷ The *Restatement (Second) of Agency* contained a list of ten factors for classifying workers as employees:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.¹⁸

The *Restatement of Agency (Third)* eschews a list of factors and simply frames the common law definition of employee as an agent “whose principal controls or has the right to control the manner and means of the agent’s performance of the work.”¹⁹ Similarly, the *Restatement of Employment Law (Third)* requires for an employment relationship that “the employer controls the manner and means by which the individual renders his or her services or otherwise effectively prevents the individual from rendering those services as an independent businessperson.”²⁰

The common law right to control test is malleable.²¹ In the current round of litigation, some platform workers may win their battles to be classified as employees. But, in the end, the platforms will undoubtedly win the war.

Many platforms have structured their relationships with service providers as to make it impossible to classify the service providers as employees. For example, the relationship between Airbnb and individuals who make their properties

16. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

17. *Id.* A significant deviation is the Fair Labor Standards Act which defines “employ” expansively as “to suffer or permit to work.” 29 U.S.C. § 203(g) (2012); *see also* *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018) (California wage-hour law).

18. *RESTATEMENT (SECOND) OF AGENCY* § 220(2) (1958).

19. *RESTATEMENT (THIRD) OF AGENCY* § 7.07(3)(a) (2006).

20. *RESTATEMENT (THIRD) OF EMPLOYMENT LAW* § 1.01(1)(c) (2014).

21. *See Knight v. State Univ. of N.Y. at Stony Brook*, 880 F.3d 636 (2d. Cir. 2018).

available on the Airbnb platform (termed “hosts” under the Airbnb terms of service²²) to other individuals for short stays (termed “guests” under the Airbnb terms of service²³) is clearly not one of employer-employee. The host determines what to charge and what conditions to impose on guests.²⁴ The host sets the cancellation policy.²⁵ The host decides when the property is available.²⁶ The host decides whether to accept or reject a guest’s booking and if the host does not accept the booking within a specified period of time, the booking is cancelled.²⁷

It is also highly unlikely that platforms such as Task Rabbit create employment relationships between the service provider and the platform. Task Rabbit’s terms of service agreement do not impose any requirements on taskers as to how they perform jobs or whether they accept jobs.²⁸ Task Rabbit’s website advises taskers that they receive notice of jobs near their location, taskers decide which jobs they wish to perform, the tasker agrees on terms with the client, performs the job, and submits an invoice.²⁹

A U.S. District Court has held a Grubhub driver to be an independent contractor,³⁰ while the National Labor Relations Board General Counsel has advised that a Postmates’ courier is an employee of Postmates,³¹ and the Appellate Division of the New York Supreme Court has divided over the status of Postmates’ couriers with the majority holding them to be independent contractors.³² Much of the misclassification litigation has involved Uber and Lyft, with drivers claiming employee status having varied success thus far.³³ Uber and

22. *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> [<https://perma.cc/Y576-WN2H>] (last visited June 11, 2018).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *TaskRabbit Terms of Service*, TASKRABBIT, <https://www.taskrabbit.com/terms> [<https://perma.cc/4FXT-GWX8>] (last visited June 11, 2018).

29. TASKRABBIT, <https://www.taskrabbit.com/become-a-tasker> [<https://perma.cc/7NHH-SCYQ>] (last visited June 11, 2018).

30. *Lawson v. Grubhub, Inc.*, No. 15-cv-05128-JSC, 2018 WL 776354 (N.D. Cal. Feb. 8, 2018).

31. *Postmates, Inc.*, No. 13-CA-163079, at 11 (NLRB Gen. Counsel Advice Memo Sept. 19, 2016).

32. *Vega v. Postmates, Inc.*, 2018 N.Y. Slip. Op. 04610, 2018 WL 3058287 (N.Y. App. Div. June 21, 2018).

33. *See, e.g., Berwick v. Uber Tech., Inc.*, Case No. 11-46739 EK (Cal. Labor Comm’r June 3, 2015), *available at* <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical> [<https://perma.cc/MQG4-QZF4>]; *Claimant and Uber*, Case No. 5371509 (Cal. Unemployment Ins. Appeals Bd. July 1, 2016), *available at* <http://uberlawsuit.com/Uber%20Case%20No.%205371509.pdf> [<https://perma.cc/MPH2-H5GG>]; *In re The Employment Status of Uber Drivers*, Advisory Opinion (Or. Bureau of Labor & Indus. Oct. 14, 2015), *available at*

Lyft, however, highly value the classification of their drivers as independent contractors.³⁴ For example, Uber was willing to pay up to \$100 million to settle the California misclassification class action brought against it because the settlement acknowledged that the drivers were independent contractors, but the settlement was rejected by the judge overseeing the litigation.³⁵ If a significant number of jurisdictions ultimately hold that Uber and Lyft drivers are employees, we can expect those companies to change their terms of service sufficiently to ensure that, going forward, their drivers will be held to be independent contractors.

Of course, changing the terms of service will have to be consistent with the platform's overall business model, but it is quite likely that platforms will be able to do this without disrupting their business models. For example, many platforms deactivate, i.e. terminate, service providers whose customer ratings fall below a certain level. The NLRB General Counsel gave this significant weight in opining that Postmates drivers were employees of Postmates.³⁶ A platform, however, could effectively achieve the same result by giving consumers the ability to specify a minimum average rating for the driver or courier servicing the consumer. The platform would then send the consumer's order only to those service providers who had the specified minimum rating. The platform might pre-set a minimum rating on the consumer's app, giving the consumer the option to change it. By thus transferring control over the minimum acceptable rating to consumers, the platform would substantially lessen the weight of one of the factors that previously led it to be considered an employer.³⁷

In modifying their terms of service in response to litigation to ensure that their workers are held to be independent contractors, platforms will follow in the footsteps of other, more traditional, service providers. For example, Fed Ex Group and its predecessor company Roadway Express, have consistently

<http://uberlawsuit.com/Oregon.pdf> [https://perma.cc/MCA7-DKH6].

34. See Dan Levine & Heather Somerville, *U.S. Judge Rejects Uber Drivers' Expenses Settlement*, REUTERS, Aug. 18, 2016, available at <http://uberlawsuit.com/U.S.%20judge%20rejects%20Uber's%20driver%20expenses%20settlement.pdf> [https://perma.cc/ASA2-6DBR].

35. *Id.*

36. *Postmates, Inc.*, No. 13-CA-163079, at 16.

37. The ability to tweak the terms of service to ensure independent contractor status will, of course, depend on the legal standard a jurisdiction uses for determining employee status. Under the dominant common law right to control test, platforms should have little difficulty tweaking their terms of service to find the sweet spot that gives them the control they believe they need while ensuring that their service providers are held to be independent contractors. A stricter standard will make it harder for platforms to do this. For example, the California Supreme Court recently held that for purposes of state wage and hour law, an individual whose work is within the course of the hiring entity's business is an employee. See *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 35, 27-38 (2018). Of course, the *Dynamex* ruling applies only to California state law and the court limited its holding to California wage and hour law, expressly declining to indicate whether it applies to other aspects of California employment law. *Id.* at 7 n.5.

classified their truck drivers as independent contractors.³⁸ Each time Roadway or Fed Ex lost before the NLRB or in court, they modified the terms of their drivers' contracts to try to secure their independent contractor classifications.³⁹ Eventually, they found that sweet spot, i.e., the point at which adjudicatory authorities agreed that the drivers were independent contractors but still allowed the company to maintain maximum control.⁴⁰ In essence, Fed Ex and Roadway, through serial litigation, negotiated with the NLRB and the courts until agreement was reached on the details of the sweet spot.

This negotiation through serial litigation redounded to the detriment of the very drivers whom the employee classification was intended to protect. For example, as detailed by Professor V. B. Dubal, by 2016, Fed Ex's serial litigation had cost it more than \$1 billion.⁴¹ Yet, many drivers did not desire employee status; rather they wanted improved compensation and less Fed Ex control.⁴² In response to a significant loss in California where Fed Ex was ordered to reimburse its drivers, held to be employees, their employment-related expenses that California law required employers to cover,⁴³ Fed Ex changed its system from one in which drivers purchased from Fed Ex a single route to cover to a "multi-work area" business model in which drivers were forced to purchase additional routes and more than 1,000 single route drivers were not renewed and lost their jobs.⁴⁴ The drivers again sued for misclassification and again won.⁴⁵ Fed Ex responded by changing to an "independent service provider" model with drivers getting expanded territories that forced them to hire their own employee-drivers, making them look more like independent businesses but leaving them in financial positions that were more precarious than they had been in under the prior models that they had successfully attacked in misclassification litigation.⁴⁶

Having its drivers be independent contractors and foisting the costs of purchasing and maintaining its trucks onto the drivers was a key component of the Roadway-Fed Ex business plan.⁴⁷ It is similarly a key component of the platforms' business plans. Consequently, it is likely that if they lose the current round of misclassification litigation, the platforms will change the terms of service which they unilaterally control until they find the sweet spot where courts

38. See V. B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 781-85.

39. *Id.*

40. See KENNETH M. DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 245-46 (2d ed. 2014).

41. Dubal, *supra* note 38, at 785.

42. *Id.* at 786-87.

43. See *id.* at 777-78 (discussing *Estrada v. Fed Ex ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007)).

44. *Id.* at 789.

45. *Id.* at 789-90.

46. *Id.* at 790-92.

47. *Id.* at 782.

and regulatory authorities agree that their workers are independent contractors. This result is inevitable as it is consistent with a basic premise of American labor law. Ultimately, in the United States it is the employer who, by controlling the terms of the relationship, determines which of its workers are statutory employees.⁴⁸ Recognizing the long-run futility of the battle over employment status, the next two sections consider the franchising relationship as an alternative model for regulating the platform relationship.

B. What Is a Franchise?

Generally, a franchise is an agreement in which one party, the franchisee, pays the other party, the franchisor, for the right to sell the franchisor's product and use its trademarks and business format in a specified location for a specified period of time.⁴⁹ In the United States, a franchise relationship is one in which the franchisor licenses the franchisee to operate under the franchisor's trade names and trademarks, exerts considerable control over the franchisee's operations and receives significant up-front payments from the franchisee.⁵⁰ The FTC's Franchise Disclosure Rule defines a franchise as having three elements: (1) the franchisee obtains the right to operate under the franchisor's trademark or to offer, sell or distribute goods or services identified with the franchisor's trademark; (2) the franchisor exerts significant control over the franchisee's operations or provides significant assistance to the franchisee's operations; and (3) the franchisee "makes a required payment or commits to making a required payment to the franchisor."⁵¹

Traditional franchising involves dealers who concentrate on selling the franchisor's product line and identify with the franchisor, found primarily in auto dealerships, gasoline stations and soft drink bottling.⁵² Most franchising today is business-format franchising, whereby the franchisee not only gets the right to market the franchisor's trademarked product or service but also participates in a business format itself, including marketing, quality control, and standards for operations.⁵³ Under business-format franchising, the franchisee pays an up-front fee, and continuous royalties and advertising fund contributions to the franchisor.⁵⁴

The sizes of franchisors and franchisees vary greatly. Although most franchised outlets are part of the giants of franchising, such as McDonald's, a

48. See Martin H. Malin, *Expanding Mike Zimmer's Cross-Border Comparative Work: The Role of Property Rights in U.S. and Canadian Labor*, 20 EMP. RTS. & EMP. POL'Y J. 417, 433-34 (2016).

49. ROGER D. BLAIR & FRANCINE LAFONTAINE, *THE ECONOMICS OF FRANCHISING* 3-4 (2005).

50. *Id.* at 4.

51. 16 C.F.R. § 436.1(h)(3) (2018).

52. BLAIR & LAFONTAINE, *supra* note 49, at 5-6.

53. *Id.* at 6.

54. *Id.* at 7-8.

large number of franchisors have as few as ten outlets.⁵⁵

Similarly, although most franchisees are small mom-and-pop operations typically with only one outlet, some are large sophisticated publicly traded corporations that are larger than the median franchisor.⁵⁶ In examining the franchisor-franchisee relationship as a model for regulating the platform-service provider relationship, I will focus on the small franchisee outlets. Indeed, the FTC franchise disclosure rule exempts *inter alia* franchisees with net worth of at least \$5 million that have been in business at least five years.⁵⁷

*C. Comparing the Franchisor-Franchisee and Platform-Service
Provider Relationships*

The worker who affiliates with a platform and the franchisee, share many characteristics. Most fundamentally, both view the relationship they enter as a source of income. The small franchisee does not regard the franchise as a passive investment. In explaining the basis and purpose of its franchising disclosure regulations, the FTC quoted University of Washington Professor Donald Chisum:

The typical investor in a franchise, in a very real sense, is “buying a job.” Hence the item of information about which the prospective franchisee is most concerned is the amount of earnings he can expect to derive from the franchise. The franchisor, who has a strong interest in selling franchises to garner the initial franchise fee, has a great incentive to be overly optimistic about future earnings. It is no surprise, therefore, that there have been many abuses in the area of earnings predictions. Indeed, misrepresentation in the disclosure of earnings is probably the most crucial disclosure problem in the franchising area.⁵⁸

Not surprisingly, the FTC found that franchisees purchase franchises expecting “[t]hat the franchise offers a bona fide employment opportunity, i.e., one that will return enough on his or her investment to earn a living.”⁵⁹

Franchisors and platforms share a similar need to control the franchisees or service providers. At the heart of the franchising operation is the value of the trademark. Key to protecting the value of the trademark is ensuring that customers experience the same quality regardless of the outlet visited. As Professors Blair and LaFontaine have observed:

The strength of franchise systems typically does not lie in the *absolute* quality of the products offered. Instead, it resides largely in the capacity of the franchised chain to offer a *uniform* product at a reasonable price. Customers know what to expect when they patronize an outlet in a

55. *Id.* at 46-47.

56. *Id.* at 49-50.

57. 16 C.F.R. § 436.8(a)(5)(ii) (2018).

58. *See* Disclosure Requirements and Prohibitions, *supra* note 7, at 59,630.

59. *Id.* at 59,637.

franchised chain, and it is important for the chains to successfully meet these expectations time after time.⁶⁰

Individual franchisees may be tempted to cut corners to increase their profits, particularly if their customer base is mostly transient. Blair and LaFontaine provide an easy to understand example:

[A] donut shop owner might reduce costs, and so enhance profits, by selling rather than throwing away donuts that are no longer completely fresh. Such a strategy, in turn, is more likely to be profitable if most of his customers are transient; knowledgeable local customers would be unlikely to continue to patronize a place with low quality. At the same time, the more transient consumers are, the more this misbehavior will hurt the franchisor and other franchisees as it depreciates the value of the franchisor's trademark.⁶¹

A similar conflict of interest can infect the platform-service provider relationship. Platforms succeed when customers return to the platform repeatedly. Ride hailing platforms such as Uber and Lyft depend for their profits on repeat customers using their apps whether they are in Boston, San Diego or countless locations in between. Unlike McDonald's, Uber's business model does not require that consumers have the identical experience every time they use its service. Uber drivers may use different cars and wear different clothing, but Uber's business model does depend on consumers receiving consistent quality when using the service. A ride-hailing customer who does not receive a consistently positive experience is more likely to take it out on the platform than the individual driver. Similarly, although perhaps to a somewhat lesser extent, other platforms depend on uniformly positive customer experiences to drive their businesses. Task Rabbit will not be profitable if clients do not get uniformly competent, timely and courteous service from taskers. A guest who has a subpar experience with an Airbnb host may take it out on the host but may also hesitate to book again through Airbnb. Indeed, one scholar has analogized the platform's need to ensure uniform quality to the franchisor's similar need and argued that control exercised by the platform in the interest of ensuring uniform quality should not be considered when determining whether the service provider is an employee of the platform company.⁶²

A third commonality between the franchisor-franchisee and platform-service provider relationships is the wide disparity in bargaining power. In both situations, there is a substantial difference in the parties' levels of sophistication. Platform service providers are individuals seeking to earn income. Indeed, platforms' marketing is aimed at such individuals—both individuals seeking a primary source of income and individuals seeking flexible and convenient income

60. BLAIR & LAFONTAINE, *supra*, note 49, at 117 (emphasis in original).

61. *Id.* at 118-19.

62. Spitko, *supra* note 1, at 409-46.

supplements.⁶³ Because franchising often requires significant upfront investments, one might expect that prospective franchisees would have a higher level of sophistication than prospective Uber drivers or Task Rabbit taskers or would at least be advised by someone with expertise. Such, however, often is not the case. It is common for franchisees to have no prior business experience and to not engage counsel to advise them in evaluating and negotiating the franchise contract.⁶⁴

Beyond disparities in sophistication, there are disparities in resources. Service providers and franchisees are at obvious economic resource disadvantages vis-à-vis platforms and franchisors. Moreover, both relationships are characterized by informational disparities. The franchisor presents information to the prospective franchisee about sales, profits and required payments. The franchisee is dependent on the franchisor for this information, which renders the franchisee vulnerable to misrepresentations and lack of full disclosure.⁶⁵

A recent FTC action against Uber demonstrates that service providers are similarly vulnerable to informational disparities vis-à-vis platforms. On January 19, 2017, the FTC filed suit against Uber alleging that Uber misrepresented driver earnings and misrepresented the terms on which drivers could acquire vehicles under Uber programs.⁶⁶ The complaint alleged that Uber falsely represented that in New York uberX drivers' median income exceeded \$90,000 per year and in San Francisco it exceeded \$74,000 per year when the median uberX driver earned \$29,000 less in New York City and \$21,000 less in San Francisco.⁶⁷ The complaint further charged that Uber made false claims of average hourly earnings for drivers in Atlanta, Baltimore, Boston, Chicago, Dallas, Denver, Houston, Los Angeles, Miami, Minneapolis, New Jersey, Orange County, Philadelphia, Phoenix, San Diego, San Francisco, Seattle, and Washington, DC.⁶⁸ The complaint also alleged that Uber enticed drivers to drive for it by making false claims that the drivers could lease to own a car or purchase a car with financing at rates that turned out to be far below the rates actually provided by the sub-prime lenders to whom Uber referred the drivers, that Uber falsely stated that the arrangements would not have mileage limitations, and that when drivers decided

63. Complaint for Permanent Injunction and Other Equitable Relief, ¶¶ 9-10, *FTC v. Uber Techs., Inc.*, (N.D. Cal. Filed Jan. 17, 2017) (3:17-cv-00261), available at <https://www.ftc.gov/system/files/documents/cases/1523082ubercmpl.pdf> [<https://perma.cc/AA9D-UAPJ>] [hereafter *FTC Uber Complaint*] (describing the recruiting practices of Uber).

64. See Disclosure Requirements and Prohibitions, *supra* note 7, at 59,625-26; Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel*, 51 *SAN DIEGO L. REV.* 709 (2014). For a contrary view, see William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship*, 28 *FRANCHISE L.J.* 23, 29-30 (2008).

65. See Disclosure Requirements and Prohibitions, *supra* note 7, at 59,625-26.

66. See *FTC Uber Complaint*, *supra* note 63.

67. *Id.* ¶¶ 19-20.

68. *Id.* ¶¶ 21-23.

to stop driving for Uber because the Uber-represented earnings did not materialize, drivers had to pay exorbitant penalties to escape the leases.⁶⁹

On February 2, 2017, the court entered a Stipulated Order.⁷⁰ The order prohibits Uber from misrepresenting or assisting others in misrepresenting drivers' likely income, terms of financing or leasing vehicles offered by Uber or other entities, and terms and conditions of any vehicle program.⁷¹ It also prohibits Uber from making any representations or assisting others in making representations concerning driver income, vehicle financing and vehicle programs unless it "possesses and relies upon competent and reliable evidence that is sufficient in quality and quantity to substantiate that the representation is true."⁷² Uber consented to a judgment against it of \$20 million to fund redress for adversely affected drivers.⁷³ The Order requires Uber to maintain records for five years showing its revenues from all goods and services sold; names, titles, contact information, dates of service and reasons for termination if applicable for all drivers; records of all driver complaints related to earnings or the vehicle program; records necessary to demonstrate full compliance with the order and copies of all advertisements and marketing materials relating to potential driver earnings and the vehicle program.⁷⁴

Finally, franchisors and platforms employ a business model that transfers risks inherent in a basic business to franchisees and workers. A traditional business makes capital investments and assumes the risk of losing those investments. The business hires employees and assumes the risks posed by unproductive employee time because, as long as the employee is engaged to be waiting for customers to service, the employer must pay.⁷⁵ The business also assumes the risks posed by downturns in the market for its goods and services because, regardless of the volume of business, the business must still cover its capital costs, service and maintain its equipment and pay its employees. In franchising, these risks are transferred to the franchisee. Platforms similarly transfer these risks to their workers. A ride hailing company, for example, does not incur the costs of purchasing or leasing the vehicles, maintaining the vehicles, operating the vehicles, and need not pay for drivers' idle time spent waiting for a fare. The risk of a downturn in the market is on the driver rather than the platform.

One difference between franchisees and platform service providers is the upfront payment generally required of franchisees. Upfront payments can lock in

69. *Id.* ¶¶ 24-33.

70. Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Uber Techs., Inc.* (N.D. Cal. Feb. 2, 2017) (3:7-cv-00261-JST), available at https://www.ftc.gov/system/files/documents/cases/uber_final_order.pdf [<https://perma.cc/M8MA-GMC9>] [hereinafter *FTC-Uber Consent Judgment*].

71. *Id.* at 3.

72. *Id.*

73. *Id.* at 4-5.

74. *Id.* at 7-8.

75. See 29 C.F.R. § 525.6 (2018).

franchisees leaving them vulnerable to franchisor overreaching. One concern that drew the FTC's attention and led to its coverage in the franchise disclosure rule was the tendency of franchisors to misrepresent or fail to honor representations about the refundability of upfront payments.⁷⁶ Recognizing the significant role that upfront payments play in franchisee vulnerability, the FTC exempts from its disclosure rule franchises where required franchisee payments total less than \$570 in the first six months.⁷⁷ As the FTC explained:

The record supports the proposition that the rule should focus upon those franchisees who have made a personally significant monetary investment and who cannot extricate themselves from the unsatisfactory relationship without suffering a financial setback Where a franchisee makes no significant investment in the franchise business, he assumes only a limited risk, and the protection of the rule is inappropriate.⁷⁸

Generally, platforms do not require significant upfront payments from affiliated service providers. Platforms, however, may have other methods for locking service providers in and rendering them vulnerable to abusive practices. The FTC's action against Uber provides an illustration. Uber attracted drivers by claiming that driving for Uber is an easy way to acquire a car with favorable financing.⁷⁹ Uber connected drivers with sub-prime auto companies and dealers which enter into lease-to-own and installment finance contracts.⁸⁰ But when drivers found that their earnings were not what Uber led them to believe they would be and tried to cancel their auto agreements, they incurred significant financial harm, such as a charge for mileage driven above specified levels.⁸¹ The auto program tended to lock drivers in to continuing to drive with Uber until the car was paid off.⁸²

Although other platforms may not lock service providers in, virtually all platforms control service provider access to their income. In the typical franchise, the customer pays the franchisee who, in turn, remits royalties and other fees to the franchisor. With platforms, the customer pays the platform, usually through a credit card registered with the customer's account. The service provider is dependent on the platform correctly computing deductions from the payment and promptly remitting the balance to the service provider. This dependency renders the service provider vulnerable to abuse comparable to wage theft, as illustrated by the numerous complaints against Uber for short-changing its drivers when remitting fees to them.⁸³ If the platform goes bankrupt, the service provider is no

76. Disclosure Requirements and Prohibitions, *supra* note 7, at 59,632-33.

77. 16 C.F.R. § 436.8(a)(1) (2018).

78. Disclosure Requirements and Prohibitions, *supra* note 7, at 59,704.

79. FTC Uber Complaint, *supra* note 63, ¶¶ 24-26.

80. *Id.* ¶¶ 25.

81. *Id.* ¶¶ 11-12, 33.

82. *Id.* ¶¶ 32.

83. See, e.g., Braden Campbell, *Uber Drivers Win Class Cert. In Fair-Share Pay Suit*,

different from any other unsecured creditor.

Service providers are also dependent on the platform maintaining its method of operations. For example, Task Rabbit taskers complained when Task Rabbit changed from a system of open bidding by taskers on tasks to a system that matched taskers with clients by algorithm.⁸⁴ Taskers were upset that the new system caused reductions in their income by impeding their ability to seek and obtain multiple jobs in close geographic proximity to each other that they could perform on the same day.⁸⁵ The more market power a platform attains, the more its service providers are locked in and vulnerable to abusive practices.

Thus, although the financial relationships between service providers and platforms are different from the financial relationships between franchisees and franchisors, in both the dependent party, i.e. the service provider or the franchisee, is vulnerable to abuse and overreaching by the platform or franchisor. This comparable vulnerability, coupled with the shared characteristics of franchisees and platform service providers discussed above, make it worthwhile to explore regulation of the franchise relationship as a model for regulating the platform relationship. The next part explores the FTC's regulation of franchising.

II. THE FTC FRANCHISE DISCLOSURE RULE

Section 5 of the FTC Act prohibits “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”⁸⁶ Section 46(g) gives the FTC authority to “make rules and regulations for the purpose of carrying out the provisions of” the FTC Act.⁸⁷ In *National Petroleum Refiners Ass’n v. FTC*, the D.C. Circuit held that Section 46(g) empowers the FTC to promulgate trade regulation rules,⁸⁸ of which the

LAW360 (Feb. 15, 2018, 8:36 PM), <https://www.law360.com/articles/1013201/uber-drivers-win-class-cert-in-fair-share-pay-suit> [<https://perma.cc/FAK6-B3JB>]; Noam Scheiber, *Uber, Admitting Error, Will Pay Millions to Drivers, Who Could Be Owed More*, N.Y. TIMES, May 24, 2017, at B1, available at <https://www.nytimes.com/2017/05/23/business/economy/uber-drivers-tax.html> [<https://perma.cc/WV8K-M3TR>] (recounting how Uber deducted from all New York driver fares a tax that applied only to rides which originated and ended in New York State); Andrew Wolfson, *Uber drivers say company reneged on pay guarantees for Kentucky Derby weekend*, COURIER-JOURNAL (May 11, 2017, 10:44 AM), <https://www.courier-journal.com/story/news/2017/05/11/uber-drivers-say-company-reneged-pay-guarantees-kentucky-derby-weekend/317593001/> [<https://perma.cc/ZK4S-4EJ2>] (recounting driver allegations that Uber guaranteed earnings to entice them to work over the Kentucky Derby weekend but shorted them by deducting its usual twenty-five percent charge).

84. See Sam Biddle, *If Task Rabbit Is the Future of Employment, the Employed Are Fucked*, VALLEYWAG (July 23, 2014, 12:30 PM), <http://valleywag.gawker.com/if-taskrabbit-is-the-future-of-employment-the-employed-1609221541> [<https://perma.cc/6VRK-LH93>].

85. *Id.*

86. 15 U.S.C. § 45(a)(1) (2012).

87. *Id.* § 46(g).

88. 482 F.2d 672 (D.C. Cir. 1973).

FTC's franchise disclosure rule is one.

A. The Development and Provisions of the Franchise Disclosure Rule

On November 11, 1971, the FTC published notice of a proposed regulation that would require franchisors to disclose to prospective franchisees twenty-seven items.⁸⁹ The rulemaking consumed seven years. The FTC published the final rule on December 21, 1978, effective July 21, 1979.⁹⁰ On April 7, 1995, the FTC began a regulatory review of the rule.⁹¹ It promulgated a revised rule on March 30, 2007, effective July 1, 2007.⁹²

In the original rulemaking, the FTC found widespread unfair and deceptive acts in the sale of franchises which it categorized as misrepresentations about the nature and value of the franchise; unsubstantiated claims concerning profits, earnings, sales and income; unfair refusals to honor refund provisions; and failures to disclose material facts.⁹³ Based on the rulemaking record, the FTC found misrepresentations concerning the supplies, equipment and services to be provided as part of the franchise package; training to be provided; advertising programs; franchisee earnings; the franchisor's financial stability and experience; the use of public figures in marketing the franchises; and the extent of territorial protection for the franchisee.⁹⁴ The Commission found franchisors made unsubstantiated and atypical claims of franchisee profitability and, similar to the allegations the FTC made against Uber,⁹⁵ franchisors "highlighted the atypical success of a few franchisees without disclosing the nonrepresentative nature of these claims."⁹⁶ The FTC also found a significant problem of failures by franchisors to honor promises to refund upfront franchisee payments.⁹⁷ Finally, the FTC found a significant problem of franchisors' failures to disclose material facts including recurring fees, required purchases, franchisor background and current status, restrictive covenants, and termination provisions.⁹⁸

The FTC Rule requires franchisors to disclose to prospective franchisees

89. Disclosure Requirements and Prohibitions Concerning Franchising, Notice of Public Hearing and Opportunity To Submit Data, Views or Arguments, 36 Fed. Reg. 21,607 (Nov. 11, 1971).

90. See Disclosure Requirements and Prohibitions, *supra* note 7, at 59,614.

91. Request for Comments Concerning Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 60 Fed. Reg. 17,656 (Apr. 7, 1995).

92. Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,444 (Mar. 30, 2007).

93. Disclosure Requirements and Prohibitions, *supra* note 7, at 59,628.

94. *Id.* at 59,628-31.

95. See FTC Uber Complaint, *supra* note 63, ¶22.

96. Disclosure Requirements and Prohibitions, *supra* note 7, at 59,632.

97. *Id.* at 59,632-33.

98. *Id.* at 59,633-36.

general business information about the franchisor, its parent and affiliates, and any predecessor entities going back ten years.⁹⁹ They must disclose the employment history, going back five years, for each officer, director, and manager involved in the sale or operation of the franchise.¹⁰⁰

Franchisors must make extensive disclosures concerning litigation: pending material criminal, civil, or administrative actions against the franchisor, its parent or affiliates, and its key managers concerning violations of franchising, antitrust or securities laws, or fraud or unfair or deceptive practices, or any civil action material to the size, nature, financial condition or business operation of the franchise system; whether in the past year any such entities or individuals were party to material civil actions involving franchisees directly relating to the franchise relationship; whether any such entities or individuals in the prior ten years was convicted or pled nolo contendere to a felony or held liable for franchise, antitrust or securities law violations or for fraud or unfair or deceptive practices; and whether in the past ten years such entities or individuals have been subject to injunctive or other restrictive orders concerning a federal, state or Canadian franchise, antitrust, securities, trade regulation or trade practice law.¹⁰¹ Franchisors must disclose bankruptcy filings and discharges of such entities and individuals, as well as corporations and partnerships in which such individuals were principal officers or general partners, going back ten years.¹⁰²

The Rule requires franchisors to disclose all fees that the franchisee must pay upfront and the conditions under which they are refundable.¹⁰³ Franchisors must provide tables showing all other fees the franchisor imposes or collects for other parties, itemizing the type of fee, due date and amount;¹⁰⁴ and another table detailing the franchisee's anticipated initial costs prior to beginning operations and at least three months following commencement of operations.¹⁰⁵ These costs include franchise fees; training expenses; real property purchased or leased, equipment, fixtures, construction and remodeling expenses; inventory; and prepaid expenses such as business licenses, security deposits and utility deposits.¹⁰⁶

Franchisors must disclose all goods, real estate, and services that they require franchisees to purchase or lease from the franchisor or designated or approved suppliers.¹⁰⁷ If franchisees may seek approval of alternate suppliers, franchisors must disclose the process, criteria, and amount of time such approval requires.

99. 16 C.F.R. § 436.5(a) (2018).

100. *Id.* § 436.5(b).

101. *Id.* § 436.5(c). The 2007 amendment expanded this disclosure to include litigation initiated by the franchisor. *See* Disclosure Requirements and Prohibitions Concerning Franchising, *supra* note 92, at 15,480-82.

102. 16 C.F.R. § 436.5(d).

103. *Id.* § 436.5(e).

104. *Id.* § 436.5(f).

105. *Id.* § 436.5(g).

106. *Id.*

107. *Id.* § 436.5(h).

Franchisors must also disclose any revenue they receive as a result of requiring franchisees to purchase or lease from approved suppliers.¹⁰⁸

Franchisor disclosures must include a table headed, “Franchisee’s Obligations,” providing references to locations in the franchise contract and the disclosure document with respect to twenty-five specified items.¹⁰⁹ Franchisors must disclose the terms of any financing that the franchisor or an affiliate offers franchisees including whether the franchisee is required to waive any defenses or legal rights and whether the franchisor intends to transfer the financing arrangement to a third party.¹¹⁰

Franchisors are required to disclose any assistance they provide to franchisees in a section headed by a bold all capitals warning, “EXCEPT AS LISTED BELOW, [THE FRANCHISOR] IS NOT REQUIRED TO PROVIDE YOU WITH ANY ASSISTANCE.”¹¹¹ The disclosure covers assistance with the start-up of the new franchise, including locating and purchasing or leasing a site, preparing it for commencement of operations, hiring and training employees, and acquiring equipment, fixtures, inventory and supplies.¹¹² Franchisors must also disclose the typical amount of time it takes for the new franchisee to begin operations.¹¹³ They must disclose assistance provided during operation of the franchise,¹¹⁴ and the franchisor’s advertising program including franchisee rights and obligations.¹¹⁵ Disclosure extends to the details of any computer systems that franchisees are obligated to purchase or use.¹¹⁶ The franchise disclosure must include a table detailing the subjects, hours of instruction (classroom and on-the-job), and locations for all training, including whether such training is required of franchisees, the materials used and the costs including travel costs, and whether the franchisor or franchisee is responsible for the costs.¹¹⁷

Franchisors must disclose details concerning franchisee territories, including exclusivity.¹¹⁸ If the franchisee’s territory is not exclusive, the disclosure must affirmatively state, “You will not receive an exclusive territory. You may face competition from other franchisees, from outlets that we own, or from other channels of distribution or competitive brands that we control.”¹¹⁹ Extensive disclosures concerning trademarks and patents are required.¹²⁰ Disclosure is also

108. *Id.*

109. *Id.* § 436.5(i).

110. *Id.* § 436.5(j).

111. *Id.* § 436.5(k).

112. *Id.* § 436.5(k)(1).

113. *Id.* § 436.5(k)(2).

114. *Id.* § 436.5(k)(3).

115. *Id.* § 436.5(k)(4).

116. *Id.* § 436.5(k)(5).

117. *Id.* § 436.5(k)(6).

118. *Id.* § 436.5(l).

119. *Id.* § 436.5(l)(5)(i).

120. *Id.* §§ 436.5(m), (n).

required of requirements that the franchisee personally operate the franchise,¹²¹ and of restrictions on what the franchisee may sell.¹²²

The franchisor disclosure document must contain a table that lists and summarizes franchise contract provisions concerning the following subjects: length of the term; renewal or extension of the term; requirements for renewal; termination by the franchisee; termination by the franchisor without cause; termination by the franchisor with cause; cause defined both for curable and non-curable defaults; franchisee obligations upon termination; franchisor assignment of the contract; franchisee transfer of the franchise, including franchisor approvals and rights of first refusal; franchisee death or disability; covenants not to compete during and following the end of the relationship; contract modification and integration clauses; arbitration and mediation provisions; and choice of forum and choice of law provisions.¹²³

One abusive franchisor practice was to use endorsements from celebrities in selling franchises.¹²⁴ To combat this abuse, the FTC rule requires franchisors to disclose compensation paid to public figures used in marketing the franchise, whether the public figure plays any role in managing the franchise or has invested any money in the franchise.¹²⁵

The FTC's action against Uber alleged that Uber misrepresented typical driver earnings in an effort to entice additional drivers to affiliate.¹²⁶ Evidence of wide-spread franchisor misrepresentations concerning franchisee earnings led the FTC in the original disclosure rule to require that any such representations comply with criteria specified in the rule.¹²⁷ Some franchisors responded to these requirements by falsely telling prospective franchisees that the FTC prohibited them from providing earnings information. In response, the 2007 amendment requires every disclosure document to affirmatively state:

The FTC's Franchise Rule permits a franchisor to provide information about the actual or potential financial performance of its franchised and/or franchisor-owned outlets, if there is a reasonable basis for the information, and if the information is included in the disclosure document. Financial performance information that differs from that included in Item 19 may be given only if: (1) a franchisor provides the actual records of an existing outlet you are considering buying; or (2) a franchisor supplements the information provided in this Item 19, for example, by providing information about possible performance at a particular location or under particular circumstances.¹²⁸

121. *Id.* § 436.5(o).

122. *Id.* § 436.5(p).

123. *Id.* § 436.5(q).

124. Disclosure Requirements and Prohibitions, *supra* note 7, at 59,677.

125. 16 C.F.R. § 436.5(r).

126. *See* FTC Uber Complaint, *supra* note 63.

127. Disclosure Requirements and Prohibitions, *supra* note 7, at 59,684-92.

128. 16 C.F.R. § 436.5(s)(1).

If the franchisor decides not to provide earnings information, the franchisor must state:

We do not make any representations about a franchisee's future financial performance or the past financial performance of company-owned or franchised outlets. We also do not authorize our employees or representatives to make any such representations either orally or in writing. If you are purchasing an existing outlet, however, we may provide you with the actual records of that outlet. If you receive any other financial performance information or projections of your future income, you should report it to the franchisor's management by contacting [name, address, and telephone number], the Federal Trade Commission, and the appropriate state regulatory agencies.¹²⁹

Franchisor financial performance representations must have a reasonable basis and written substantiation.¹³⁰ The basis must be disclosed, including the number and characteristics of the outlets on which the representations are based.¹³¹ The bases and assumptions underlying forecasts of financial results must also be disclosed.¹³²

The original franchise rule required disclosures concerning outlets and franchisees.¹³³ The 2007 amendment greatly strengthened this requirement.¹³⁴ Under the amended rule, franchisor disclosures must include five tables. One shows the number of franchised and company-owned outlets at the start and end of each of the past three years.¹³⁵ The second shows the number of outlets by state transferred from franchisees to new owners for each of the last three years.¹³⁶ The third shows by state for each of the last three years the number of outlets at the start of the year, the number opened during the year, the number terminated, not renewed, reacquired by the franchisor, closed for other reasons, and the number of outlets at the end of the year.¹³⁷ The fourth shows similar information for franchisor-owned outlets.¹³⁸ The fifth shows projected openings by state as of the end of the prior fiscal year.¹³⁹

The original rule required franchisors to disclose the names and contact

129. *Id.* § 436.5(s)(2).

130. *Id.* § 436.5(s)(3).

131. *Id.*

132. *Id.*

133. Disclosure Requirements and Prohibitions Concerning Franchising, *supra* note 92, at 15,501.

134. *Id.*

135. 16 C.F.R. § 436.5(t)(1).

136. *Id.* § 436.5(t)(2)(i).

137. *Id.* § 436.5(t)(2)(ii).

138. *Id.* § 436.5(t)(2)(iii).

139. *Id.* § 436.5(t)(3).

information for the ten franchisees in closest geographic proximity to the prospective franchisee.¹⁴⁰ The 2007 amendment expands that number to one hundred.¹⁴¹ Significantly, the amendment also requires the franchisor to disclose the names and contact information of every franchisee who was terminated, not renewed, or ceased doing business under the franchise in the prior fiscal year.¹⁴² If a prospective franchisee is to take over an existing outlet, the franchisor must disclose the name and contact information of every franchisee who operated that outlet in the prior five years, including the time period each operated the outlet and the reasons for the changes in ownership.¹⁴³ The amended rule also requires franchisors to disclose names and contact information for franchisor-endorsed franchisee organizations and, upon annual request, names and contact information for independent franchisee organizations.¹⁴⁴ Franchisors must also disclose the extent to which current and former franchisees have signed confidentiality agreements that would preclude them from speaking to prospective franchisees.¹⁴⁵ Finally, franchisors must disclose their own financial statements,¹⁴⁶ and provide copies of all contracts the franchisee is expected to sign.¹⁴⁷

B. Claimed Benefits of the Franchise Disclosure Rule

One expected benefit of the FTC's franchise disclosure rule was that it would make for better-informed prospective franchisees making better decisions about whether to enter into franchise relationships.¹⁴⁸ But as the old adage goes, you can lead a horse to water but you cannot make it drink. There is evidence that prospective franchisees tend not to use the disclosure documents to their advantage.¹⁴⁹

Even if most prospective franchisees fail to use the disclosure document to level the playing field with the franchisor, there is reason to believe that the disclosure rule may prevent some of the most abusive franchisor practices. It may do so in two ways.

First, with respect to the wide-spread practice of selling franchises with false, misleading, or unsubstantiated earnings claims, the FTC rule affirmatively bans the process. The rule prohibits earnings claims unless they are reasonably based with written substantiation.¹⁵⁰ When some franchisors who opted not to make

140. Disclosure Requirements and Prohibitions Concerning Franchising, *supra* note 92, at 15,501.

141. 16 C.F.R. § 436.5(t)(4).

142. *Id.* § 436.5(t)(5).

143. *Id.* § 436.5(t)(6).

144. *Id.* § 436.5(t)(8).

145. *Id.* § 436.5(t)(7).

146. *Id.* § 436.5(u).

147. *Id.* § 436.5(v).

148. Emerson, *supra* note 64, at 756.

149. *See id.*

150. 16 C.F.R. § 436.5(s)(3).

earnings claims falsely told franchises that the FTC prohibited such claims, the FTC responded in the 2007 amendment by affirmatively requiring franchisors to notify prospective franchisees that earnings claims, when reasonably based and properly substantiated, are permissible.¹⁵¹

Second, disclosure itself may deter the most abusive practices. For example, with franchisors required to disclose the number of terminations and non-renewals by state and year, they may be more circumspect when deciding to terminate or not renew franchisees. The rulemaking records for the original rule and the 2007 amendment are replete with instances where the FTC apparently believed that the sunlight of disclosure would provide at least a partial cure for abusive practices.

In the original rulemaking, the record disclosed abuses where franchisors would reacquire the most successful franchises.¹⁵² The FTC rule did not directly regulate these practices but did require disclosure of the conditions under which the franchisor may repurchase the franchise.¹⁵³ Presumably, such disclosure would deter franchisors from abusing their repurchase authority.

The record in the original rulemaking proceeding evidenced harm suffered by franchises due to delays in commencing operations, including franchisor delay in approving a site or a building.¹⁵⁴ The FTC's prescription for this ailment was the sunshine of disclosure. The FTC suggested that disclosure of the potential for lengthy delays would deter franchisees from purchasing, implying that disclosure would provide incentive for franchisors to minimize delays.¹⁵⁵ The original rulemaking also used disclosure to remedy hardships suffered by franchisees as a result of improper or inadequate training,¹⁵⁶ and the "use of celebrities in sports and entertainment fields to head up franchises, including sales of franchises solely on the basis of the big name and nothing else."¹⁵⁷

In response to concerns raised by franchisees about franchisor encroachment on their territories, the amended rule enhanced the mandated disclosures in this regard to include *inter alia* disclosure of franchisor plans to operate a competing franchise system offering similar goods or services, and required franchisors not offering exclusive territories to include a mandated warning to prospective franchisees.¹⁵⁸ The FTC determined that the required warning was "warranted in

151. *Id.*

152. Disclosure Requirements and Prohibitions, *supra* note 7, at 59,667.

153. *Id.*

154. *Id.* at 59,674.

155. "Paragraph (a)(17) has been adopted in recognition of the substantial financial hardships faced by many franchisees when site selection or the opening of an outlet is delayed. Given this fact, information as to franchisor site-selection activity would have a substantial likelihood of affecting the prospective franchisee in deciding whether to enter into a business relationship with that franchisor" *Id.* at 59,675.

156. *Id.* at 59,676.

157. *Id.* at 59,677.

158. Disclosure Requirements and Prohibitions Concerning Franchising, *supra* note 92, at

light of the volume and persuasiveness of franchisee complaints regarding territory issues.”¹⁵⁹

The FTC also enhanced required disclosures in response to evidence from the Illinois Attorney General that some franchisors were churning franchises, ignoring or even encouraging franchisee failures to be able to sell the same franchise multiple times. Consequently, the amended rule requires franchisors to disclose the five-year history of an outlet’s ownership.¹⁶⁰

One of the most significant enhancements in the amended rule is its requirement that franchisors disclose names and contact information for at least the one hundred geographically closest franchisees, an increase of tenfold from the original rule, for all former franchisees who ceased operating a franchise within the prior year and for franchisee associations. The FTC made clear its expectation that these disclosures would contribute to a better-functioning market that would regulate franchisor conduct:

One rationale for not mandating [financial] performance information is that prospects can contact franchisees directly to obtain such information. Indeed, franchisees are the best source of information about their own earnings. If true, then prospective franchisees, at the very least, should be able to contact as many existing and former franchisees as possible to learn about franchisee performance. A franchisee association disclosure may greatly assist prospective franchisees in their effort to obtain and review franchisees’ financial performance by providing an independent source of information.¹⁶¹

Recent scholarship, however, has questioned the use of disclosure as a regulatory tool. The next part turns to that critique, applies it to the Franchise Disclosure Rule, and draws lessons from it for developing a platform disclosure rule.

III. THE DEBATE OVER MANDATING DISCLOSURE

In recent years, there has been a robust debate over mandating disclosure as a regulatory device. Led by Professors Omri Ben-Shahar and Carl E. Schneider, critics urge that mandating disclosure is not only ineffective, it may also be harmful.¹⁶² The debate is part of a broader debate over whether, and if so how, law should draw on the insights offered by the discipline of behavioral economics.¹⁶³ This part examines the critique of mandatory disclosure, applies it

15,491.

159. *Id.* at 15,493.

160. *Id.* at 15,504.

161. *Id.* at 15,508.

162. See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (Princeton Univ. Press 2014); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011).

163. See generally Stephanie M. Stern, *Out-psyched: The Battle of Expertise in Psychology-*

to the Franchise Disclosure Rule, and draws lessons from it for a platform disclosure rule.

A. The Critique of Mandating Disclosure

Ben-Shahar and Schneider make plain their rejection of disclosure as a regulatory tool. They write:

“Mandated disclosure” may be the most common and least successful regulatory technique in American law. It aspires to help people making unfamiliar and complex decisions while dealing with specialists by requiring the latter (disclosers) to give the former (disclosees) information so that disclosees choose sensibly and disclosers do not abuse their positions.¹⁶⁴

In their view, mandatory disclosure fails and causes harm. They offer several reasons for disclosure’s failure.

Mandated disclosures, they observe, are often associated with complex problems facing the recipients of the disclosure.¹⁶⁵ Consequently, the disclosure mandates detailed and complex information, overwhelming the disclosees who lack the expertise to evaluate the information or the perseverance to get through it.¹⁶⁶ Many disclosures are written at literacy levels far above those possessed by the typical recipients of the disclosure.¹⁶⁷ They also require numeracy skills above those possessed by the typical disclosee.¹⁶⁸

The problem is exacerbated by the pervasiveness of mandatory disclosure. Ben-Shahar and Schneider refer to this as the accumulation problem.¹⁶⁹ People are bombarded with so many mandatory disclosures that they become numb and simply ignore all of them. They observe:

This book overflows with evidence about how onerous disclosees’ work can be. Educating yourself about even one of these decisions can mean starting from a base of ignorance that can be diminished only by reading texts indecipherable to many and daunting to many more, especially since people lack the background to interpret even the sentences they read. Even if you rightly interpret what you read, the labor of analyzing a complex choice (often pockmarked with uncertainties) can be bruising. There are so many decisions in so many fields. It’s hard, unending, unpleasant. It’s education. And who cares? Do you really want to know everything that can go wrong when you book a cruise vacation? Or what

Informed Law, 57 JURIMETRICS 45 (2016).

164. BEN-SHAHAR & SCHNEIDER, *supra* note 162, at 3.

165. *Id.*

166. *Id.* at 25.

167. *Id.* at 82-84.

168. *Id.* at 84-86.

169. *Id.* at 56.

Web sites do with their data on your shopping? Or how many calories you spend on every bite of a decadent dessert? As Schwartz writes, “We can’t make ourselves sufficiently well informed about everything so that the need for trust goes away.” But wariness “makes each transaction a context, a confrontation. It leaves us feeling all the time that we’ve probably been taken. It makes acquisition a full time job.”¹⁷⁰

In Ben-Shahar and Schneider’s view, not only does mandatory disclosure fail to achieve its goals, it may actually harm the parties it was intended to protect.¹⁷¹ Information disclosed pursuant to mandates may crowd out other information that is useful for decision-making.¹⁷² Disclosure mandates may also impede better, more direct regulation,¹⁷³ by giving lawmakers an easy answer to a problem, allowing them to avoid struggling with potentially better but less popular reforms.¹⁷⁴ Disclosure mandates may even undermine other regulations. For example, instead of designing a safer product, manufacturers avoid liability by disclosing risks.¹⁷⁵

B. The Critique and the FTC Franchising Rule

At first glance, the FTC Franchise Disclosure Rule may appear to be a poster child for the indictment of mandatory disclosure. The decision to purchase a franchise is a very complex one. Prospective franchisees must consider, among other things, potential sales revenue, costs, cash flow, net income, and loss and legal risks.¹⁷⁶ The mandated disclosures are detailed, dense and lengthy. They typically run hundreds of pages.¹⁷⁷ The complexity of the decision and the density of the disclosures could easily overwhelm even sophisticated entrepreneurs. But there is strong evidence that most new franchisees lack any business experience,¹⁷⁸ and most also lack any work experience in the industry in which they purchase their franchise.¹⁷⁹ Most new franchisees do not consult lawyers or

170. *Id.* at 71 (quoting BARRY SCHWARTZ, *THE COSTS OF LIVING: HOW MARKET FREEDOM ERODES THE BEST THINGS IN LIFE* 29 (Xlibris 2001)).

171. *Id.* at 175.

172. *Id.*

173. *Id.* at 173-74.

174. *Id.* at 11.

175. *Id.* at 170-73. Ben-Shahar and Schneider’s critiques have not received uniform acceptance. For critiques of their work, see, e.g., Oren Bar-Gill, *Defending (Smart) Disclosure: A Comment on More than You Wanted to Know*, 11 JERUSALEM REV. LEG. STUD. 75 (2015); Ryan Bubb, *TMI? Why the Optimal Architecture of Disclosure Remains TBD*, 113 MICH. L. REV. 1021 (2015).

176. See Robert W. Emerson & Uri Benoliel, *Are Franchisees Well Informed? Revisiting the Debate Over Franchise Relationship Laws*, 76 ALB. L. REV. 193, 209 (2012-13).

177. See Eric H. Karp & Ari N. Stern, *A Proposal for a Mandatory Summary Franchise Disclosure Document*, 35 FRANCHISE L.J. 541, 543 (2016).

178. See Emerson & Benoliel, *supra* note 176, at 206-07 (detailing empirical studies).

179. *Id.* at 207.

other experts for advice,¹⁸⁰ and ignore the mandated disclosure document.¹⁸¹

Furthermore, there is evidence that the easy, popular route of disclosure may have impeded more direct regulation. During the FTC's rulemaking that led to its 2007 revisions of the Franchise Disclosure Rule, franchisee advocates urged the FTC to prohibit franchisor practices that the advocates deemed abusive, but the FTC rejected direct regulation in favor of additional disclosure. For example, the FTC received numerous comments urging it to police specific substantive details of the franchisor-franchisee relationship including post-relationship covenants not to compete, franchisor encroachment on franchisees' territories, and restrictions on sources of products and services that franchisees have to purchase.¹⁸² The FTC's response was to fight such practices with expanded disclosure¹⁸³ and, presumably, rely on the market to lead franchisors to adopt more franchisee-friendly behavior. The FTC explained why it rejected regulating the substance of franchise terms and conditions:

The Franchise Rule ensures that each prospective franchisee receives disclosures—expanded in key respects by the current amendments—that explain the terms and conditions under which the franchise will operate. Prospective franchisees can avoid harm by comparison shopping for a franchise system that offers more favorable terms and conditions¹⁸⁴

As Henry Perritt has observed, the FTC Act authorizes the FTC to prevent unfair or deceptive practices in commerce “but the Commission has been skittish about using [its authority to prevent unfair practices], fearing adverse congressional reaction. It typically relies on claims that the violation of disclosure obligations is a *deceptive* trade practice, rather than an unfair one.”¹⁸⁵

But all evidence concerning the FTC Franchise Disclosure Rule is not gloomy. Although there is some evidence that new franchisees tend to be novices who ignore the disclosure document and fail to get expert advice, there is contrary evidence as well. The studies that focused on new franchisees could not include those perspective franchisees who exercised due diligence and decided not to invest.¹⁸⁶ There are reports that only one in 100 or one in 150 individuals who initially express interest in a franchise actually purchases it.¹⁸⁷ A 2015 survey “asked 1,122 franchisees the same question: whether they had read and

180. *Id.* at 209.

181. *Id.*

182. Disclosure Requirements and Prohibitions Concerning Franchising, *supra* note 92, at 15,447.

183. *Id.*

184. *Id.*

185. Henry H. Perritt, Jr., *Protecting Independent Contractors*, in 2018 EMPLOYMENT LAW UPDATE 1-68 to 1-69 (2018) (emphasis added).

186. See Carl E. Zwisler et al., *A Proposed Mandatory Summary Franchise Disclosure Document: A Solution in Search of a Problem*, 36 FRANCHISE L.J. 465, 471 (2017).

187. *Id.* at 471 n.31.

understood the FDDs they had received. When speaking for themselves, seventy-two percent of respondents reported having a clear understanding of the obligations and commitments within the franchise agreements; eighty-two percent reported having read through the FDD and franchise agreement; and seventy-six percent reported that they had consulted with an attorney, accountant, or franchise consultant to help them to evaluate the franchise they were considering investing in.”¹⁸⁸

There is also evidence that, although a majority of new franchisees are novices, a significant minority already own multiple franchise outlets.¹⁸⁹ Franchise attorney David Killion reports, “[T]he multiunit operator has become the target franchisee for many franchisors. As a consequence, the uniform franchise agreement present in the market place today is frequently written to attract sophisticated franchisees that are candidates to become multiunit operators.”¹⁹⁰

Furthermore, although the FTC has eschewed direct regulation of franchisor practices, opting to stick with mandatory disclosure, the presence of disclosure mandates has not stopped state governments from directly regulating the franchisor-franchisee relationship. State franchise relationship laws regulate franchisee terminations and non-renewals as well as franchisee ability to transfer the business, franchisee associational rights, and anti-discrimination protection.¹⁹¹

In light of the similarities between platform service providers and franchisees, the experience with the FTC Franchise Disclosure Rule may provide insights for developing a platform disclosure rule. The next section explores the potential development of a platform disclosure rule.

C. Lessons from Franchising and Beyond: Toward a Platform Disclosure Rule

There is growing evidence that the absence of disclosure breeds an uncertainty that impedes the freedom that platform workers seek. Based on her ethnographic study of platform workers, Deepa Das Acevedo found that they face disempowering uncertainty because of their lack of crucial information that affects their lives. She writes:

Uncertainty of this type constrains autonomy without ever rising to the level of direct interference because it makes it impossible for workers to exercise meaningful choice. When an Uber driver accepts every ride request she gets but is told she did not meet the acceptance rate requirement to qualify for a guaranteed hourly wage, she has no information with which to counter Uber’s assertion and, consequently, no way to judge her best future course of behavior. Her safest bet is to continue accepting all possible ride requests in the hope that Uber’s

188. *Id.* at 471.

189. Killion, *supra* note 64, at 30.

190. *Id.* at 28.

191. See generally ALEXANDER M. MEIKLEJOHN, *FRANCHISING: CASES, MATERIALS & PROBLEMS* ch. 11 (2013).

assessment of her acceptance rate and her own assessment of her acceptance rate will eventually match up. Similarly, when a Fiverr worker does not know what will catapult her into the highest category of elite workers (“Top Rated Sellers”) she has no way of choosing among an array of possible behaviors or business decisions in order to access the very real benefits that come with Top Rated Seller classification.¹⁹²

The right type of mandatory disclosure thus may empower platform workers and advance their autonomy. The right type of disclosure may also have a direct effect on the behavior of the platforms. Actors may be deterred from acting badly if they are required to disclose their bad acts.

Richard Thaler and Cass Sunstein provide an example of the Toxic Release Inventory that firms are required to file with the Environmental Protection Agency under the Emergency Planning and Community Right to Know Act.¹⁹³ Thaler and Sunstein relate that this mandatory disclosure has resulted in significant reductions in toxic emissions. They explain how this came about:

A major reason is that environmentally concerned groups, and the media in general, tend to target the worst offenders, producing a kind of “environmental blacklist.” This is a nice example of a social nudge The bad publicity can result in all sorts of harms, including lower stock prices. Companies that end up on the list are likely to take steps to reduce their emissions. Even better, companies are motivated to ensure that they do not end up on the list. The result is a kind of competition, in which companies enact more and better measures to avoid appearing to be significant contributors to toxic pollution.¹⁹⁴

Two aspects of how the Toxic Release Inventory affects disclosers’ behavior are notable and relevant to using disclosure to protect platform workers. First, the disclosure itself is a means of holding firms accountable for their polluting behavior and behavior is most likely to be affected when a disclosure requirement imposes accountability on the disclosing party.¹⁹⁵ Second, environmental groups

192. Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. ___, __ (2018); see also Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), <https://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html> [https://perma.cc/64ML-BSFS].

193. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* 190 (2008).

194. *Id.* at 191; see also Andrew Jacob, *Waging a Sweeping War on Obesity, Chile Slays Tony the Tiger*, N.Y. TIMES, Feb. 8, 2018, at A-1, A-10, available at <https://www.nytimes.com/2018/02/07/health/obesity-chile-sugar-regulations.html> [https://perma.cc/8JYC-EA7W] (reporting that in Chile laws mandating black warning labels on foods disclosing high sugar, salt, calorie and fat content have led food companies to modify their products voluntarily).

195. The psychology literature on accountability is vast and inconsistent. For a good survey

and the media serve as intermediaries, using the data disclosed in ways that render the disclosers accountable.

There is reason to believe that a platform disclosure rule can similarly deter bad conduct by platforms or stimulate positive conduct. Unions, such as the Teamsters and the Machinists have made forays into organizing platform workers.¹⁹⁶ As unions adapt themselves to changes in the workplace, they may become the intermediaries that process and publicize the information contained in platform disclosures. Furthermore, the disclosure methodology may be shaped such that the disclosure itself provides accountability for abusive practices by platforms.

Platform service providers who perform such work casually and when it is convenient as a hobby or income supplement may be beyond the reach of any disclosure regardless of how it is presented. For platforms to be concerned that they will be held accountable for matters they disclose, disclosure designers should focus on platform service providers who perform such work as their principal source of income. Even with this group, however, disclosures targeted at influencing platform behavior cannot be buried in the middle of dense documents that are hundreds of pages long. They simply will not be read, platforms will know that they will not be read, and platforms will not take the requirement to disclose into account when deciding how to act. Disclosures targeted at influencing platform behavior must be salient. They should be designed in such a way as to maximize the likelihood that they will be noticed.¹⁹⁷

see Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999).

196. See Chen, Michelle, *Are Uber's Anti-Regulatory Crusades Hurting Drivers and Their Cities?* THE NATION (Feb. 26, 2018), <https://www.thenation.com/article/ubers-anti-regulatory-crusades-are-hurting-drivers-and-their-cities/> [<https://perma.cc/G8B7-LQSD>].

197. Professor Robert Emerson's empirical work demonstrates that inexperienced franchisees are very likely not to be advised by experienced counsel when entering into a franchise agreement. The more inexperienced they are, the greater the likelihood that they will mistakenly believe that they can handle the transaction without expert advice. He proposes a salient warning be included prominently in the franchise disclosure document. His proposed language is:

Before agreeing to become a franchisee, you should consult with an experienced franchise lawyer. As a practical matter, including a long-term savings of time and money, your hiring that lawyer at the outset is almost always a "must."

Do not trust in your ability, or the ability of others, to decide whether you need a lawyer's assistance for something this important. Just as a new but persistent physical ailment should lead you, as a matter of personal health, to do more than just treat it yourself but to see a medical doctor, so you, when buying a franchise, should not "go it alone." To proceed without a lawyer, you simply do not know enough about this franchise, the legal nature of the franchise documents, and the many relevant laws.

The nature of professional expertise (medicine, law, etc.) is that even an otherwise very smart and experienced individual, if not a professional in that field, needs professional

As discussed previously, most new franchisees lack any business experience and there is evidence that they ignore the disclosure document.¹⁹⁸ However, there is also evidence that a significant minority are sophisticated multiunit operators who are desired by franchisors.¹⁹⁹ These multiunit operators may exercise their bargaining power in ways that benefit all franchisees, including the inexperienced newcomers.²⁰⁰

It is highly unlikely that there will be market participants transacting with platforms comparable to the multiunit franchise operator. Consequently, disclosure mandates modeled completely on the FTC's franchise rule will not likely provide much benefit to platform workers while imposing costs on platforms. Fortunately, a similar situation arises under the Employee Retirement Income Security Act (ERISA), and ERISA provides a very viable solution.

Under ERISA each participant and beneficiary in a covered employee benefit plan has a right to a copy of the plan document.²⁰¹ Plan documents, however, tend to be lengthy, dense documents that plan participants and beneficiaries are not likely to read or comprehend. ERISA recognizes that and requires that the plan administrator provide each participant and beneficiary with a summary plan description, a more readable document that contains what might be described as the essential information about the plan.²⁰² Similarly, an FTC platform disclosure rule should require platforms to provide, in addition to a full disclosure document, a summary disclosure in a format and language likely to be accessible to typical platform workers containing the essential information about the platform.²⁰³ Recognizing that platforms and service providers transact their business electronically, the summary disclosures might be required to come in the form of a pop-up or email with set categories such as termination, levels of performance and rewards, number and percentage of service providers terminated each year, and other major categories which the recipients may click to get the details that

assistance. Also, your lack of training and experience in law likely makes you unable to assess whether and how a legal expert (a franchise lawyer) could help you. So, no matter how smart or experienced you may be generally or even for this particular type of business, you probably cannot accurately weigh the costs of "going it alone" versus paying for legal counsel. Very often in hindsight, a franchisee who failed to hire a lawyer deeply regrets that he or she did not hire a lawyer at the outset.

Emerson, *supra* note 64, at 770.

198. *See id.*

199. *See* Killion *supra* note 64, at 28.

200. *See id.*

201. 29 U.S.C. § 1022 (2012).

202. *Id.*

203. Indeed, there is an ongoing debate over having a similar summary document for prospective franchisees. *See* Karp & Stein, *supra* note 177 (arguing in favor of such a summary document) with Zwisler et al., *supra* note 186 (arguing that such a summary document is unnecessary).

are important to them.²⁰⁴ The more user-friendly the format, the more likely that platforms will fear accountability from the disclosures and modify their practices.²⁰⁵

An FTC platform disclosure rule would also mark a regulatory milestone. As discussed previously,²⁰⁶ platforms style themselves as brokers who connect consumers desiring services with independent businesses offering such services and who have no participation in the resulting transaction. Consequently, platforms maintain that they are not subject to existing legal regulations that govern traditional businesses.²⁰⁷ A platform disclosure rule, however, would apply regardless of how the platform is characterized. Uber will be subject to such a rule regardless of whether it is considered a technology company connecting riders and drivers or a transportation company. A platform disclosure rule would establish the precedent that platforms can be subjected to uniform federal regulation designed to protect significantly weaker parties transacting with them.²⁰⁸

The FTC's Franchise Rule thus provides important protections for franchisees against abuses by franchisors. As the FTC's recent successful enforcement action against Uber illustrates, the FTC has the authority to regulate platforms in a similar manner. The next part examines how that process could develop.

IV. A PLATFORM DISCLOSURE RULE?

Rome was not built in a day, and neither was the FTC's Franchise Rule. The initial rulemaking took seven years, from its first announcement in 1971 to its final promulgation in 1978.²⁰⁹ During that period, the FTC developed a voluminous record concerning franchisor practices. That record was key to enabling the FTC to make findings that the rule was necessary to prevent unfair and deceptive trade practices that violate section 5 of the FTC Act.

The FTC should initiate a similar exploration of platforms. It should amass evidence concerning practices of platforms in their recruitment and relationships with service providers who affiliate with them. The record that the FTC develops would inform any disclosure regulations it would enact. Some aspects of the Franchise Rule would appear to apply with equal strength to platforms. Other aspects, such as territory protections and patent and trademark information, are probably unique to franchising. But a detailed rulemaking proceeding would

204. I gratefully acknowledge Deepa Das Acevedo for this suggestion.

205. One limitation on accountability may be the low likelihood of enforcement. The Franchise Disclosure Rule is not privately enforceable. *See Freedman v. Meldy's, Inc.*, 587 F. Supp. 658 (E.D. Pa. 1984).

206. *See* Lobel, *supra* note 10, at 100-01.

207. *Id.*

208. I gratefully acknowledge my Chicago-Kent colleague, Kathy Baker, for suggesting this.

209. *See* Disclosure Requirements and Prohibitions Concerning Franchising, Notice of Public Hearing and Opportunity to Submit Data, Views or Arguments, *supra* note 89, at 21,607; Disclosure Requirements and Prohibitions, *supra* note 7, at 59,614.

likely uncover comparable issues with platforms that the rule could address. Undoubtedly, there are also issues unique to platforms that the rulemaking proceedings would uncover.

The FTC requirements concerning disclosure of basic information about the franchisor, its affiliated companies, and its managers would be easily adapted to a platform disclosure rule. These entities' and individuals' litigation and bankruptcy histories particularly seem equally relevant to prospective platform service providers as they are to prospective franchisees. Given that platform agreements usually mandate arbitration on an individual basis to resolve service provider claims,²¹⁰ litigation history should also include arbitration history. Indeed, because arbitration is a private process, a platform's arbitration history, absent mandatory disclosure, is not likely to be available to even the most industrious prospective service provider.

The franchising rulemaking found widespread franchisor misrepresentation with respect to franchisee earnings and potential earnings.²¹¹ The rulemaking uncovered the strong temptation for franchisors to inflate earnings claims to entice prospective franchisees.²¹² The temptation to inflate earnings claims to entice service providers to affiliate with the platform is similarly strong for platform providers. The FTC's action against Uber may be just the tip of the iceberg. If a rulemaking proceeding uncovers similar abuses by platforms, the Franchise Rule's approaches to earnings claims could serve as a model for a platform disclosure rule.

There is considerable anecdotal evidence of a need for platforms to clearly disclose their methods of operations and terms and conditions governing their ability to change those methods. A frequent source of tension between Uber and its affiliated drivers is Uber's changes to pricing.²¹³ As previously noted, Task Rabbit taskers complained when Task Rabbit changed from a system of open bidding by taskers on tasks to a system that matched taskers with clients by algorithm.²¹⁴ Taskers were upset that the new system caused reductions in their income by impeding their ability to seek and obtain multiple jobs in close geographic proximity to each other that they could perform on the same day.²¹⁵ If a rulemaking proceeding finds similar problems to be widespread, a platforms rule could require disclosure of basic operating methods, plans to change those methods and the conditions under which those methods could be changed.

Although platforms generally do not require upfront fees, a key vulnerability of affiliated service providers is their dependence on the platform to collect and remit the service provider's fees. An FTC platform rule should require platforms

210. See Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205.

211. Disclosure Requirements and Prohibitions, *supra* note 7, at 59,625.

212. *Id.* at 59,625-26.

213. See Campbell, *supra* note 83.

214. See Biddle, *supra* note 84.

215. *Id.*

to clearly disclose the frequency of payment to the service provider, how the net payments are calculated and who bears the risk of the failure of the customer's credit card or other payment method. The rulemaking process may also uncover other concerns in this area.

Although service providers do not pay upfront fees to platforms, they do incur expenses that prospective service providers may not consider. An FTC rulemaking proceeding can probe this area and, depending on what the evidence shows, a platform disclosure rule could adapt the mandated franchisor disclosures concerning franchise operating expenses.

Termination from a platform can be financially devastating to a service provider just as termination of a franchise can devastate a franchisee. Many of the disclosures required in the Franchise Rule can be adapted to a platform disclosure rule. These include disclosures of the number of terminations and other departures from the platform by year and state, and the grounds and procedures for termination. Relatedly, a platform disclosure rule can follow the lead of the Franchise Rule by requiring disclosure of names and contact information for other platform-affiliated service providers and providers who were terminated or otherwise left the system in the past year.

One area not relevant to the typical franchisee but highly relevant to service providers is their employment status. A platform disclosure rule should include disclosure of whether the platform considers the service providers to be its employees and the consequences of that decision. The rule should mandate a prominent warning whenever the platform considers its service providers to be independent contractors of the legal protections afforded employees that are not afforded to independent contractors and the legal responsibilities imposed on independent contractors (such as self-employment tax and the need to make quarterly estimated income tax payments) that are not imposed on employees. To the extent that the platform makes available insurance or other services to fill the void, those should be disclosed along with information as to how they differ from what the law affords employees.

An FTC platform disclosure rulemaking is something that can occur now without any need to enact or amend legislation or to reconsider common law doctrines. Hopefully, the FTC's action against Uber may indicate that platforms have caught the agency's attention, and the FTC will begin the process of collecting data that can lead to eventual promulgation of a platform rule comparable to the Franchise Rule.

CONCLUSION

Much of the current focus of scholars and litigators is on whether platform workers are independent contractors or employees of the platforms. In the long run, a focus on classification of platform workers is not likely to yield much in the way of protections for those individuals. Some platforms are already structured in ways that ensure their workers will be classified as independent contractors and others, where the correct legal classification is unclear, will, if courts and regulatory authorities find their workers to be employees, change the terms of service to find the sweet spot where their workers are classified as

independent contractors.

But employment is not the only relationship we should consider in seeking models for regulating the platform-service provider relationship. The Platform relationship shares many characteristics with the franchise relationship that make franchising an appropriate model to consult. The key federal regulation of the franchisor-franchisee relationship is the FTC's Franchise Disclosure Rule. As the FTC's enforcement action against Uber demonstrates, it has the authority to promulgate a comparable disclosure rule for platforms. There is no need for additional legislation or precedent-setting litigation. The FTC should draw on lessons learned from the franchise rule experience to develop a disclosure rule that will benefit platform workers.

Apart from statutes regulating the auto manufacturer-dealer relationship²¹⁶ and the oil company-gasoline retailer relationship,²¹⁷ the FTC Franchise Rule is the only federal regulation of the franchisor-franchisee relationship. The rule only governs the initial formation of that relationship. Operation and termination of the franchise relationship, except for car dealers and gas stations, are governed by state law. There are a wide variety of state franchise relationship laws and other regulatory schemes. Future research should learn from state regulation of franchising to develop a model that provides a better fit for the square peg of the platform relationship than does either round hole of employee or independent contractor.

216. 15 U.S.C. § 1222 (2012).

217. *Id.* § 2801.