



September 7, 2022

Via regulations.gov

The Honorable Rohit Chopra, Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

RE: Request for Information Regarding Employer Driven Debt

Dear Director Chopra,

Americans for Financial Reform Education Fund (AFREF) submits the following comment in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) inquiry into employer driven debt. We thank the CFPB for taking the initiative to examine whether employment practices that leave employees indebted to their employers in the form of Training Repayment Agreement Provisions (TRAPs) and Income Share Agreements (ISAs) violate the rights of consumers and leave them worse-off financially.

TRAPs require an employee to pay the employer a fixed or pro rata sum if the employee received on-the-job training and quits work or is fired within a set period of time.¹ TRAPs often constrain employee mobility without providing employees the portable skills needed for quality jobs² These provisions are usually buried in boilerplate contracts and coupled with non-compete agreements. Industries ranging from retail to the United States military are luring working consumers into employer driven debt with the promise of free training, as occurred in the active class action lawsuit against PetSmart and multiple complaints from blacklisted transportation workers in the trucking industry.

The newest form of employer driven debt takes the form of an Income Share Agreement (ISA). ISAs require lenders to advance a certain amount of training in exchange for a set percentage of

¹ Harris, Jonathan, Unconscionability in Contracting for Worker Training (May 15, 2021). 72 Alabama Law Review 723 (2021), Available at SSRN: <https://ssrn.com/abstract=3642017>

² Harris, Jonathan, Unconscionability in Contracting for Worker Training (May 15, 2021). 72 Alabama Law Review 723 (2021), Available at SSRN: <https://ssrn.com/abstract=3642017>

the trainee's future earnings. This comment will focus on TRAPs, but we encourage the Bureau to consider the many forms employer driven debt can be presented to consumers.

Professional development is the responsibility of the employer and training falls within this category, as having a workforce capable of performing the job is essential to business. Employment law suggests that an employer must not require an employee to pay any of the employer's business costs³, yet TRAPs do just that. Passing the burden of paying for training turns workers into debtors. A study conducted by the Student Borrower Protection Center states that "employers nationwide are using TRAPs to lock workers into low-paying positions and substandard working conditions, and to stifle employer competition for their services."⁴

I. Employer driven debt leads employees into debt traps, prevents workers from seeking higher paying jobs, and have the same effects as non-compete agreements

TRAPs are not new, however as the judicial⁵ system and the President⁶ begin to restrict the use of non-compete agreements, TRAPs have become more prevalent as a work around for businesses wanting to protect their investment by attaching hefty price tags and abhorrent debt collection practices to employment agreements. The cost of training provided to new hires from their employers can be astronomical compared to receiving the same training through other avenues,⁷ and leads to restricting workers by tricking them into debt and the inability to leave substandard pay and working conditions.

A. TRAPs Prevalence in Industries

Retail

TRAPs are reportedly used in many occupations, including truckers, police officers, fire fighters, mechanics, nurses, hair salons, bank workers, social workers, pilots, federal employees, and

³ Employment Lawyers Vancouver, Kelowna, Surrey & Victoria BC: Kent Employment Law." *Employment Lawyer Vancouver*, 13 Aug. 2020, <https://kentemploymentlaw.com>.

⁴*Trapped At Work - Student Borrower Protection Center*. https://protectborrowers.org/wp-content/uploads/2022/07/Collection-at-All-Costs_Final.pdf.

⁵ Overreaching Covenants Not to Compete Under Attack From All Sides ." *Americanbar.org*, <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2018/overreaching-covenants-not-to-compete/>.

⁶ Hsu, Andrea. "Biden Moves to Restrict Noncompete Agreements, Saying They're Bad for Workers." *NPR*, NPR, 9 July 2021, <https://www.npr.org/2021/07/09/1014366577/biden-moves-to-restrict-non-compete-agreements-saying-theyre-bad-for-workers>.

⁷Botella, Elena. "More Workers Are Starting Their Jobs in Debt under 'Training Repayment Agreements!'" *Forbes*, Forbes Magazine, 21 July 2021, <https://www.forbes.com/sites/elenabotella/2021/07/19/more-workers-are-starting-their-jobs-in-debt-under-training-repayment-agreements/?sh=355ccdd47c22>. Noting: "In an ongoing case in Illinois' Northern District, former employees of Edward R. Jones are suing their employer over a training repayment agreement that required financial advisor trainees to repay \$75,000 if they left the company for any reason within their first three years on the job. Trainees earned their FINRA Series 7 and Series 66 licenses – but in the study, Jonathan F. Harris points out the typical cost to take FINRA exam-prep classes from highly-regarded private companies is only about \$1,000.

retail workers.⁸ With the average retail worker grossing \$26,520 per year, enforcement of TRAPs in this industry perpetuates marginalized poverty because industry depends on an underpaid workforce comprised significantly of Black, immigrant, and people of color workers and on women workers.⁹ The most recent class action lawsuit against retail giant PetSmart alleges “that PetSmart uses a TRAP to limit groomers from seeking out better working conditions, locking low-wage workers for years into high-volume groomer jobs that can be grueling and dangerous. For groomers who quit within two years of training, PetSmart may use debt collectors to pursue them for training debts that can total more than \$5,000.”¹⁰

Healthcare

The healthcare industry is increasingly reliant on TRAPs to ensnare nurses and other health care workers amid the COVID-19 pandemic, during which time nearly one in five health care workers quit or otherwise left their job.¹¹ These TRAPs are used with entry-level hospital workers, most frequently recent graduates from nursing school or immigrant nurses, as a precondition of employment. Nurses entering the profession often lack the bargaining power necessary to negotiate for higher wages or better benefits, and healthcare providers and hospitals exploit this even further by locking these workers into employment contracts that span years and prevent nurses from leaving for better opportunities if they cannot afford the cost of quitting. The impact of these agreements is made worse in hospital markets that feature a high level of ownership concentration, where many, or even all, potential employers in the market require such terms. The result is healthcare providers and hospitals maintaining undue financial power over their workers, particularly for those with monopsony power.¹²

⁸ Michael Hoffman and Stephen V. Burks, “Training Contracts, Employee Turnover, and the Returns from First-Sponsored General Training,” National Bureau of Economic Research, Working Paper 23247, March 2017; Caitlin Harrington, “Beware the contract clause loading US workers with debt,” *Wired*, August 4, 2022. Available at: <https://www.wired.com/story/contract-clause-loading-us-workers-with-debt/>

⁹ Department of Labor, Labor Force Statistics from the Current Population Survey, Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, 2021. Available at: <https://www.bls.gov/cps/cpsaat11.htm> ; For data on race see “A revealing look at racial diversity in the federal government,” Our Public Service blog, August 26, 2021 available at: <https://ourpublicservice.org/blog/a-revealing-look-at-racial-diversity-in-the-federal-government/> (also noting the dramatic racial disparities by GS levels), data on gender from OPM’s Federal Workforce Data FedScope, September 2021 data, available at: <https://www.fedscope.opm.gov/> accessed on August 29, 2022.

¹⁰“Press Release: Groundbreaking Lawsuit against Petsmart Alleging Illegal Training Repayment Agreement.” *Press Release: Groundbreaking Lawsuit against Petsmart Alleging Illegal Training Repayment Agreement – towards Justice*, 28 July 2022, <https://towardsjustice.org/2022/07/28/press-release-groundbreaking-lawsuit-against-petsmart-alleging-illegal-training-repayment-agreement/>.

¹¹ See Gaby Galvin, Nearly 1 in 5 Health Care Workers Have Quit Their Jobs During the Pandemic, Morning Consult (Oct. 4, 2021), <https://morningconsult.com/2021/10/04/health-care-workers-series-part-2-workforce/>

¹²*Trapped At Work - Student Borrower Protection Center*. https://protectborrowers.org/wp-content/uploads/2022/07/Collection-at-All-Costs_Final.pdf.

Transportation

Truck drivers are often blacklisted if, for any reason, they do not drive for the company for the duration of time specified in the repayment provision. In one study of truck drivers, researchers found that a TRAP reduced employee quitting by 15 percent.¹³ “Each year, thousands of aspiring truck drivers sign up for training with some of the nation’s biggest freight haulers. But the training programs often fail to deliver the compensation and working conditions they promise. And drivers who quit early can be pursued by debt collectors and blacklisted by other companies in the industry, making it difficult for them to find a new job.”¹⁴ Trucking programs from employers are usually advertised as “free training” and require new hires to work for the company from 6-24 months at reduced wages.

Government

Even the United States government has a form of TRAP called a Continued Service Agreement (CSA). A CSA is an agreement an employee makes to continue to work for the Government for a pre-established length of time in exchange for Government sponsored training or education. The service obligation begins when the training is completed. If the employee voluntarily leaves Government service before completing the service obligation, he or she must repay the Government all or some of the costs of the training.¹⁵

B. Pricing and Terms of Obligation

Entrants into these sectors, often blue-collar workers, are met with training repayment agreements leaving employees in the red before they’ve earned their first paycheck. Blue collar workers are overwhelmingly from BIPOC communities, with 43% of Black workers concentrated in lower paying service industries that gross less than \$30,000 a year.¹⁶

Although long term development is the responsibility of the employee (i.e., secondary and post-secondary education), once an employee has been hired professional development becomes the

¹³ Matt Marx, Deborah Stumsky, and Lee Fleming, “Mobility, skills, and the Michigan non-compete experiment,” *Management Science* 55 (2009): 875-889.

¹⁴ Butrymowicz, Sarah, and Meredith Kolodner. “Trucking Companies Train You on the Job. Just Don't Try to Quit.” *The New York Times*, The New York Times, 5 Apr. 2022, <https://www.nytimes.com/2022/04/05/business/economy/trucker-training.html>.

¹⁵ “Training and Development Policy .” *U.S. Office of Personnel Management*, <https://www.opm.gov/wiki/training/Continued-Service-Agreements.ashx>.

¹⁶ “Race in the Workplace: The Black Experience in the US Private Sector.” *McKinsey & Company*, McKinsey & Company, 14 July 2022, <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/race-in-the-workplace-the-black-experience-in-the-us-private-sector>.

responsibility of the employer.¹⁷ However, TRAPs allow for this cost to be passed on to the employee. Contracts incorporating TRAPs are usually contracts of adhesion and most workers wanting to enter into these fields are either unaware of the terms obligating them to pay back overpriced training costs or unaware of the limiting nature of these agreements if working conditions do not meet their standards. TRAPs also do not take into consideration an employee's likelihood to repay if she or he leaves or is fired from their job before the term specified. The provisions are standard, and employees typically do not seek legal recourse until having to pay the penalty and realizing after payment that they have worked for less than minimum wage.¹⁸

C. Private Equity

There is particular concern about private equity's (PE) role in the perpetuation of TRAPs. There are two ways in which we see this role manifest. Some companies named in lawsuits regarding TRAPs are owned by PE firms (i.e. PetSmart¹⁹ is owned by BC Partners; Cedar Rapids Steel Transport²⁰ is owned by Hillcrest Holdings, a family-owned investment firm that partners with PE firms like Akoya Capital to buy other companies; Blackstone Group, a PE firm that purchases healthcare staffing agencies)²¹.

And then there is PE as an owner of "corporate training solutions" companies. The Global Corporate Training market is forecasted to reach \$487.3 billion by 2030²² and private equity is purchasing online training programs that boast big corporate client lists. In 2021, PE acquisitions accounted for 11.8 percent of all mergers and acquisitions in the sector.²³ Significant purchases have included:

¹⁷"Employers Should Take Responsibility for Employee Development." *The EvoLLLution*, 21 Sept. 2015, <https://evollution.com/opinions/employers-should-take-responsibility-for-employee-development/>.

¹⁸ Botella, Elena. "More Workers Are Starting Their Jobs in Debt under 'Training Repayment Agreements'." *Forbes*, Forbes Magazine, 21 July 2021, <https://www.forbes.com/sites/elenabotella/2021/07/19/more-workers-are-starting-their-jobs-in-debt-under-training-repayment-agreements/?sh=26fb09ad7c22>.

¹⁹ Greed Unleashed: PetSmart, BC Partners, and what happens when private equity preys on workers and pets," United for Respect, September 2021. Available at: <https://united4respect.org/wp-content/uploads/2021/09/Greed-Unleashed-Report.pdf>

²⁰Kauffman, Clark. "Lawsuit: Cedar Rapids Trucking Firm Keeps Pay Meant for Drivers." *Log In*, 6 July 2022, <https://www.thegazette.com/crime-courts/lawsuit-cedar-rapids-trucking-firm-keeps-money-meant-for-drivers/>.

²¹Eidelson, Josh. "Underpaid Contract Nurses Who Faced Fines, Lawsuits for Quitting Fight Back." *Bloomberg.com*, Bloomberg, 2 Feb. 2022, <https://www.bloomberg.com/news/features/2022-02-02/underpaid-contract-nurses-who-faced-fines-lawsuits-for-quitting-fight-back>.

²²"Corporate Training Market Size, Share & Growth: Industry Analysis." *Allied Market Research*, <https://www.alliedmarketresearch.com%2Fcorporate-training-market-A06445&data=05%7C01%7Cachristman%40nelp.org>

²³ "Corporate Training M&A Market Produces Record Volume and Valuations," Capstone Partners Report, January 2022. Available at: https://www.capstonepartners.com/wp-content/uploads/2022/02/Capstone-Partners-Corporate-Training-MA-Coverage-Report_January-2022.pdf

- 2021 TPG acquired Teachers of Tomorrow from another PE firm (Gauge Capital), a company that provides training, certification, and professional development to teachers.
- 2021 RLJ Equity Partners bought Ogle School, a provider of cosmetology and esthetics career education in Texas.
- 2021 Clearlake Capital Group purchased Cornerstone OnDemand which provides workforce education services to companies like Wells Fargo, MidMichigan Health, and Siemens.
- In 2018, Golden Gate Capital bought Vector Solutions, a first-responder elearning company, from another PE company (Providence Equity Partners).
- In 2017, Luminate Capital Partners invested in Axonify “remote training for frontline workers,” which services Walmart, Levi’s, and Dollar General.
- Blackstone Partners purchased Ascend Learning in 2017, specializing in medical-industry education.
- In 2014, Renovus Capital Partners invested in Telemedia, which provides technical skills training content and programs for large industrial companies including Boeing, International Paper, and Jones Lang LaSalle;
- In 2016, FFL Partners bought Crisis Prevention Institute, which provides training and consulting in behavior management and dementia care for human service professionals, before selling it three years later to another PE company, Wendel Group.

Given the PE business model, the fact that they are seeing these as profit generators should be a red flag for regulators. Are they overcharging for training knowing that their corporate customers will just pass through the costs? Are the customer corporations accurately representing the cost of the training to workers who sign TRAPs?

D. Steps Taken States Have Taken to Ban TRAPs

Only three states have passed legislation directly affecting the use of TRAPs in employment contracts, with Connecticut and California prohibiting mandatory TRAPs for at least some types of workers, and Colorado limiting the enforceability of TRAPs to narrow circumstances. There is much more work to be done, and ample room for states to act regardless of whether federal policymakers do the same. State policymakers should move to prohibit the use of TRAPs between employers, employees, and prospective employees. In addition, state law enforcement agencies should investigate the use of TRAPs through the prism of existing state laws, even when there is not an explicit prohibition on TRAPs themselves, as it is possible existing state consumer protection, unfair competition laws, or wage and hour laws may make most TRAPs illegal.²⁴

²⁴ *Trapped At Work - Student Borrower Protection Center*. https://protectborrowers.org/wp-content/uploads/2022/07/Collection-at-All-Costs_Final.pdf.

II. Recommendations

Below are a few recommendations our coalition partner, the Student Borrower Protection Center, have published in its report²⁵ on employer driven debt that we would like to uplift:

The Department of Labor should categorize TRAPs as unlawful kickbacks to employers under the Fair Labor Standards Act (FLSA).²⁶

In many contexts, courts have upheld TRAPs when faced with statutory challenges under the FLSA, where employers seek to collect payments for training that was principally for the benefit of the employee and not the employer. But many courts have also recognized that where TRAPs seek to recoup payments for training that are for the employer's benefit—and many, if not most TRAPs today do—they may be an illegal kickback under minimum wage laws. This is true whether or not the employer actually deducts money out of a final paycheck, as the payment of wages subject to a repayment obligation is not payment made “free and clear.”²⁷ The Department of Labor (DOL) and state agencies should pursue this issue aggressively, under their current authority, both through enforcement and rulemaking.

The CFPB should require Truth in Lending Act disclosures and debt collection protections in training repayment agreements.

The agency might find a more expedient solution by using against what it determines to be “unfair, deceptive and abusive acts and practices”. If these training repayment agreements are unreasonable and amount to unenforceable non-compete agreements, then they are an unfair practice. The CFPB could then say that the entire scheme is unfair and illegal.²⁸ Where the Bureau determines that employers that offer TRAPs are extending consumer credit to their employees or providing consumer financial services, it should vigorously enforce crucial consumer protections there as well.

The CFPB should routinely supervise debt collectors that collect on debts arising from TRAPs.

The CFPB engages in routine supervision of larger participants in the debt collection market¹⁵⁸ for compliance with a range of consumer financial protection laws, including the Federal Debt Collection Practices Act (FDCPA).¹⁵⁹ The FDCPA protects debtors from unfair and predatory debt collection practices. As third-party debt collectors pursue workers for debts under TRAPs, the Bureau should ensure they are not engaged in unlawful debt collection practices. This may involve determining whether debt collectors are making false representations about the collectability of otherwise unenforceable debts. Furthermore, the Bureau should investigate and

²⁵ *Trapped At Work - Student Borrower Protection Center*. https://protectborrowers.org/wp-content/uploads/2022/07/Collection-at-All-Costs_Final.pdf.

²⁶ 29 U.S.C. § 203 et seq; 29 C.F.R. § 531.35.

²⁷ 29 CFR § 531.35

²⁸ Weinberger, Evan, and Rebecca Rainey. “Employers Face CFPB Scrutiny over Job Training Repayment Demands.” *Bloomberg Law*, 21 Apr. 2022, <https://news.bloomberglaw.com/banking-law/employers-face-cfpb-scrutiny-over-job-training-repayment-demands>.

pursue any Fair Credit Reporting Act (FCRA)160 violations by debt collectors furnishing information to credit bureaus about debts that may be invalid or unenforceable.