

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan and Commissioners,

Thank you for the opportunity to comment on contract terms that harm fair competition. The American Economic Liberties Project is a non-partisan organization dedicated to reducing the role of corporate power in public life, in order to build a fairer and more inclusive economy and democracy.

We'd like to draw the commission's attention to the use of non-disclosure agreements in economic development deals with state and local governments. These restrictions on the public availability of information regarding negotiations between public officials and dominant corporations harm workers, taxpayers, and small businesses. The FTC should initiate an investigation¹ and produce a public report² on these agreements and apply remedies where appropriate.

There is no national data on how pervasive these non-disclosure agreements are, but a casual survey of economic development agreements turns up many. For example, when the City Council of Gallatin, Tennessee, approved nearly \$20 million in tax breaks for the creation of a data center within the city in May of 2020, the official entity receiving the benefit was called "Project Woolhawk." It wasn't until months later that the actual beneficiary was revealed:

¹ Section 6(b) empowers the Commission to require an entity to file "annual or special . . . reports or answers in writing to specific questions" to provide information about the entity's "organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals." 15 U.S.C. Sec. 46(b)

² Section 6(f) authorizes the Commission to "make public from time to time" portions of the information that it obtains, where disclosure would serve the public interest. 15 U.S.C. Sec. 46(f).

Facebook. The council didn't know its identity because the officials negotiating the deal through an economic development office were prevented by an NDA from revealing it.³

In March 2021, the City Council of Fort Wayne, Indiana, voted 7 to 2 to approve \$16 million in tax breaks for a corporation to open a distribution center in the city, even though four of the council members — including two who voted in favor of the deal — didn't know which corporation they were considering, because the rest had signed non-disclosure agreements.⁴

A similar situation occurred in Onondaga County, New York, where Amazon was provided more than \$70 million in subsidies without disclosing its identity.⁵ In Sherbourne County, Minnesota, Google was negotiating with local officials to build a data center for more than a year before residents knew those negotiations were occurring, with Google employing the name "Project Pine."⁶

But it's not only large tech firms that use these agreements. In Calvert County, Maryland, a non-disclosure agreement between officials and Dominion Cove Point LNG, a natural gas company, kept financial details secret that would have shown that property tax breaks granted to the company were far more lucrative than were being publicly disclosed.⁷

³ Josh Cross, "Rumored Facebook Project Could Get Tax Breaks," Gallatin News, May 15, 2020 https://www.gallatinnews.com/news/rumored-facebook-project-could-get-tax-breaks/article_c4478a7c-96ba-11ea-b7ea-97ea5cce2faf.html

⁴ Pat Garofalo, "How Amazon, Google and Other Companies Exploit NDAs," The New York Times, June 29, 2021 <https://www.nytimes.com/2021/06/29/opinion/nda-amazon-google-facebook.html>

⁵ Rick Moriarty, "Amazon's \$350M center in Clay could bring big economic spinoff to Syracuse area," Syracuse.com, May 18, 2020 <https://www.syracuse.com/business/2020/05/amazons-350m-center-in-clay-could-bring-big-economic-spinoff-to-syracuse-area.html>

⁶ Mike Kaszuba, "After obtaining a non-disclosure agreement, Google comes to Minnesota," Public Record Media, July 30, 2019 <https://www.publicrecordmedia.org/after-obtaining-a-non-disclosure-agreement-google-comes-to-minnesota/>

⁷ Anne Meador, "Secret Non-Disclosure Agreement Raises Questions about Cove Point Tax Breaks," DC Media Group, Jan. 31, 2014 <https://www.dcmediagroup.us/2014/01/31/secret-non-disclosure-agreement-raises-questions-cove-point-tax-breaks/>

“It’s customary now, when mega-Fortune 500 companies come, that they prefer that you not divulge what they’re doing,” said the manager of the Village of University Park, an Illinois community that gave large subsidies to Amazon. “It happens all the time.”⁸

The motivation for using these agreements is clear: to prevent public debate on economic development agreements that funnel tens of billions of dollars annually to dominant corporations, who use those funds to entrench their dominance over smaller businesses and workers. The Partnership for Working Families used Freedom of Information Act requests to access eight non-disclosure agreements local officials signed with Google. They prevent local officials from discussing “the terms of any agreement entered into between the two parties, and the discussions, negotiations and proposals related thereto.”⁹ In correspondence with a local official in San Jose, Google confirmed that the point of the agreements was to prevent public relations problems in the community.¹⁰

These agreements cover more than just local economic development officials or city council members. Amazon’s non-disclosure agreement for its regional headquarters, dubbed “HQ2,” was signed not just by people working directly on the incentive package in each respective city, but also by university researchers, urban planners, and even the waitstaff at a restaurant where the local chamber of commerce met to discuss their city’s bid.¹¹

⁸ John Lippert and Natalie Moore, “Amazon’s Massive Chicago-Area Expansion Was Fueled By \$741 Million From Taxpayers,” WBEZ, Oct. 26, 2020 <https://www.wbez.org/stories/amazons-massive-chicago-area-expansion-was-fueled-by-741-million-from-taxpayers/300fa829-1b71-4d9e-a2f4-1776e88d4cb3>

⁹ “Document Dump Reveals Backroom Deals between Google & Local Governments,” Partnership for Working Families, Feb. 15, 2019 <https://www.forworkingfamilies.org/news/document-dump-reveals-backroom-deals-between-google-local-governments>

¹⁰ Caroline O’Donovan, “When Cities Sign Secret Contracts With Big Tech Companies, Citizens Suffer,” BuzzFeed, Nov. 20, 2018 <https://www.buzzfeednews.com/article/carolineodonovan/amazon-hq2-google-foxconn-secret-nda-real-estate-deals>

¹¹ Scott Calvert, “After Amazon HQ2, Some Lawmakers Question Nondisclosure Requirements,” Wall Street Journal, Nov. 26, 2018 <https://www.wsj.com/articles/after-amazon-hq2-some-lawmakers-question-nondisclosure-requirements-1543228202>

The proliferation of these agreements has tangible harms about which the commission should be concerned. Most prominently, it means local businesses are being treated asymmetrically, with some of them being forced to subsidize their largest competitors through their tax dollars. A 2015 study of incentives in 14 states by Good Jobs First found that 90 percent of the money went to large corporations.¹² This is a policy that advantages and entrenches large, dominant corporations that have the political connections, time, and staff expertise to navigate often confusing and paperwork-heavy subsidy applications.

NDAs make it easier for dominant firms to obtain subsidies by rendering it more difficult for the public and other businesses to oppose them. This is by design, as explained above. Were the public provided more opportunity to give feedback to these subsidy requests, it's likely more of them would be defeated.

Amazon provides a clear example of how these agreements and the subsidies they facilitate harm small businesses. Amazon has received more than \$4 billion in state and local subsidies since its founding, most of which has gone to build out its warehousing and distribution network.

The extent of that distribution network disadvantages other retailers and logistics firms that aren't having their networks subsidized by the state. Moreover, it supports Amazon's use of its logistics network as a cudgel to wield over smaller retailers. For example, Amazon regularly forces smaller retailers on its platform to pay for logistics support if they want to receive higher Amazon ranking or access to Amazon Prime customers. The growth of Amazon's dominant

¹² LeRoy, Greg, Carolyn Fryberger, Kasia Tarczynska, Thomas Cafcas, Elizabeth Bird and Philip Mattera, "Shortchanging Small Business: How Big Businesses Dominate State Economic Development Incentives," Good Jobs First, October 2015 <https://www.goodjobsfirst.org/sites/default/files/docs/pdf/shortchanging.pdf>

distribution network also harms workers. It is well documented that Amazon's warehouses pull down local wages in the warehousing sector.¹³

If smaller retailers had more advance warning of when their local elected leaders were considering subsidizing Amazon, they would have an opportunity to correspond with local leaders and make their objections known. But the NDAs Amazon forces on local officials prevent that from happening.

We recommend that the FTC initiate an investigation and produce a public report on the abuse of NDAs in economic development deals, to help lawmakers and business owners know the tactics they are facing and implement remedies where appropriate.

Best,

American Economic Liberties Project

¹³ Janelle Jones and Ben Zipperer, "Unfulfilled promises: Amazon fulfillment centers do not generate broad-based employment growth," Economic Policy Institute, Feb. 1, 2018 <https://www.epi.org/publication/unfulfilled-promises-amazon-warehouses-do-not-generate-broad-based-employment-growth/>