



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

**Dissenting Statement of Commissioner Christine S. Wilson
Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule**

Commission File No. P201200-1

January 5, 2023

Today, the Commission announced a notice of proposed rulemaking (“NPRM”) for a Non-Compete Clause Rule. “The proposed rule would provide that it is an unfair method of competition – and therefore a violation of Section 5 – for an employer to enter into or attempt to enter into a non-compete clause with a worker; [or to] maintain with a worker a non-compete clause . . .”¹ For the many reasons described below, on the current record, I do not support initiating the proposed rulemaking and consequently dissent.

The proposed Non-Compete Clause Rule represents a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration and scope, given the business justification for the restriction. The Commission undertakes this radical departure despite what appears at this time to be a lack of clear evidence to support the proposed rule. What little enforcement experience the agency has with employee non-compete provisions is very recent (within the last week) and fails to demonstrate harm to consumers and competition. Lacking enforcement experience, the Commission turns to academic literature – but the current record shows that studies in this area are scant, contain mixed results, and provide insufficient support for the scope of the proposed rule. And one study illustrates clearly, in the financial services sector, the negative unintended consequences of suspending non-compete provisions, including higher fees and broker misconduct. The suspension of non-competes across all industry sectors in the U.S. undoubtedly will impose a much larger raft of unintended consequences.

Setting aside the substance of the rule, the Commission’s competition rulemaking authority itself certainly will be challenged. The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in “unfair methods of competition” rulemaking, (2) the major questions doctrine addressed in *West Virginia v. EPA* applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced

¹ Notice of Proposed Rulemaking for Non-Compete Clause Rule (“NPRM”) Part I (Jan. 5, 2023).

the consumer welfare standard with one of multiple goals. In short, today's proposed rule will lead to protracted litigation in which the Commission is unlikely to prevail.

The NPRM invites public comment on both a sweeping ban on non-competes and various alternatives pursuant to the Administrative Procedure Act, not the Magnuson-Moss Act. Stakeholders should note that ***this solicitation for public comment is likely the only opportunity they will have to provide input not just on the proposed ban, but also on the proposed alternatives.*** For this reason, I encourage all interested parties to respond fully to all parts of the NPRM's solicitation of public comments.

Non-Compete Clauses Merit Fact-Specific Inquiry

Based on the current record, non-compete clauses constitute an inappropriate subject for rulemaking. The competitive effects of a non-compete agreement depend heavily on the context of the agreement, including the business justification that prompted its adoption. But don't take my word for it – the need for fact-specific inquiry aligns with hundreds of years of precedent. When assessing the legality of challenged non-compete agreements, state and federal courts (and English courts before them) have examined the duration and scope of non-compete clauses, as well as the asserted business justifications, to determine whether non-compete clauses are unreasonable and therefore unenforceable.²

The NPRM itself acknowledges, at least implicitly, the relevance of the circumstances surrounding adoption of non-compete clauses. For example, the NPRM proposes an exception to the ban on non-compete clauses for provisions associated with the sale of a business, acknowledging that these non-compete clauses help protect the value of the business acquired by the buyer.³ Recognizing that senior executives typically negotiate many facets of their employment agreements, the NPRM distinguishes situations in which senior executives are subject to non-compete provisions.⁴ And to stave off potential legal challenges, the NPRM proposes more carefully tailored alternatives to a sweeping ban on non-compete clauses that instead would vary by employee category.

² See, e.g., *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), *aff'd in relevant part*, 175 U.S. 211 (1899); *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711).

³ NPRM Part V, Section 910.3.

⁴ Accordingly, the Commission seeks comments on whether senior executives should be treated differently from the proposed ban on non-compete clauses. See NPRM Parts IV.A.1.b, IV.A.1.c. In a similar vein, recent consent agreements issued for public comment that prohibit the use of non-compete agreements in the glass container industry do not prohibit non-compete clauses for senior executives and employees involved in research and development. See *O-I Glass, Inc.*, File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglassdraftorderappxa.pdf (Jan. 4, 2023) (Decision and Order Appendix A); *Ardagh Glass Group S.A.*, File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghdraftorderappxa.pdf (Jan. 4, 2023) (Decision and Order Appendix A); Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement regarding *In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Group S.A.* (Jan. 4, 2023), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-regarding-matters-o-i-glass-inc-ardagh-group-sa>.

Despite the importance of context and the need for fact-specific inquiries, the Commission instead applies the approach of the newly issued Section 5 Policy Statement⁵ to propose a near-complete ban on the use of non-compete clauses. Pursuant to this approach, the Commission invokes nefarious-sounding adjectives – here, “exploitive and coercive” – and replaces the evaluation of actual or likely competitive effects with an unsubstantiated conclusion about the “tendency” for the conduct to generate negative consequences by “affecting consumers, workers or other market participants.”⁶

Using the approach of the Section 5 Policy Statement that enables the majority summarily to condemn conduct it finds distasteful, the Commission today proposes a rule that prohibits conduct that 47 state legislators have chosen to allow.⁷ Similarly, the Commission’s proposed rule bans conduct that courts have found to be legal,⁸ a concern the Commission dismisses with a claim that the Section 5 prohibition on “unfair methods of competition” extends beyond the antitrust laws. But the majority’s conclusions and today’s proposed rule forbid conduct previously found lawful under Section 5 of the FTC Act. Specifically, applying FTC Act Section 5, the Seventh Circuit found that “[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]”⁹ In other words, the Seventh Circuit found that a fact-specific inquiry is required under Section 5.

The NPRM announced today conflicts not only with the Seventh Circuit’s holding, but also with several hundred years of precedent. With all due respect to the majority, I am dubious that three unelected technocrats¹⁰ have somehow hit upon the right way to think about non-competes, and that all the preceding legal minds to examine this issue have gotten it wrong. The current rulemaking record does not convince me otherwise.

⁵ Fed. Trade Comm’n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

⁶ *Id.* at 9.

⁷ NPRM Part II.C.1. Further, the NPRM explains “[s]tates have been particularly active in restricting non-compete clauses in recent years.” *Id.* The Commission’s rulemaking will end states’ varying approaches to address non-compete agreements. The Commission’s preemption of states’ approaches is premature to the extent that the Commission admits that it does not know where to draw lines regarding the treatment of non-compete provisions (i.e., the Commission seeks comments on alternatives to the proposed ban based on earnings levels, job classifications, or presumptions). The Commission ignores the advice of Justice Brandeis and instead proposes to end states’ experimentation to determine the optimal treatment of non-compete clauses. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

⁸ *See United States v. Empire Gas Corp.*, 537 F.2d 296, 307-08 (8th Cir. 1976); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 267 (7th Cir. 1981); *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1081-83 (2d Cir. 1977); *Bradford v. New York Times Co.*, 501 F.2d 51, 57-59 (2d Cir. 1974).

⁹ *Snap-On Tools Corp. v. Fed. Trade Comm’n*, 321 F.2d 825, 837 (7th Cir. 1963).

¹⁰ This characterization is not an insult, but a fact. I, too, am an unelected technocrat.

I. Non-Compete Agreements – the First Application of the Section 5 Policy Statement

The proposed Non-Compete Clause Rule “would provide that it is an unfair method of competition – and therefore a violation of Section 5 – for an employer to enter into or attempt to enter into a non-compete clause with a worker; [or] to maintain with a worker a non-compete clause . . .”¹¹ The proposed ban on non-compete clauses is based only on alleged violations of Section 5 of the FTC Act; it is not premised on the illegality of non-compete clauses under the Sherman or Clayton Acts.

When the Commission issued the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (“Policy Statement”) in November 2022, I warned that the approach described by the Policy Statement would enable the Commission majority to condemn conduct it disfavors, even when that conduct repeatedly has been found lawful.¹² I predicted that the approach to Section 5 enforcement contained in the Policy Statement would facilitate expansive enforcement, often without requiring evidence of anticompetitive effects. And I cautioned that subjects of investigations would not be able to defend their conduct because procompetitive justifications would not be credited. The Non-Compete Clause Rule NPRM provides a graphic illustration of these concerns.

A. The NPRM’s Determination that Non-Compete Clauses are Unfair

The NPRM states that there are 3 *independent* ways for classifying non-compete clauses as an “unfair” method of competition.¹³ In November, I objected to the enforcement approach described in the Section 5 Policy Statement – specifically, permitting the Commission majority to condemn conduct merely by selecting and assigning to disfavored conduct one or more adjectives from a nefarious-sounding list.¹⁴ Here, two of the three explanations the Commission provides for concluding that non-compete clauses are unfair rely on invocation of the adjectives “exploitive and coercive.”¹⁵ The third explanation for the illegality of non-compete clauses demonstrates how little evidence the majority requires to conclude that conduct causes harm.

According to the NPRM, “non-compete clauses are exploitive and coercive at the time of contracting.”¹⁶ The NPRM explains that the “clauses for workers other than senior executives

¹¹ NPRM Part I.

¹² See Christine S. Wilson, Comm’r, Fed. Trade Comm’n, Dissenting Statement Regarding the “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act” (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf.

¹³ NPRM Part IV.A.1.

¹⁴ See Wilson, *supra* note 12.

¹⁵ The Policy Statement claimed that determinations of unfairness would be based on a sliding scale. Here, the NPRM identifies independent ways to determine that non-compete clauses are unfair; no sliding scale is applied.

¹⁶ NPRM Part IV.A.1.b The NPRM explains that this conclusion does not apply to senior executives and also seeks comment on whether there is a broader category of highly paid or highly skilled employees for whom the conclusion is inappropriate. *Id.*

are exploitive and coercive because they take advantage of unequal bargaining power[.]”¹⁷ The business community will be surprised to learn that “unequal bargaining power” can lead to a conclusion that any negotiated outcome may be condemned as “exploitive and coercive,” which then can be parlayed into a finding that the conduct violates Section 5. Indeed, this assertion is particularly troubling not merely because it presages an approach that is literally limitless, but also because the imbalance of bargaining power, as in this setting, arises wholly apart from any conduct by the business.¹⁸ The reader may note that the NPRM cites legal decisions to support the assignment of adjectives. Yet, a careful reading of the courts’ discussions of the imbalance of bargaining power between employers and employees reveals that while the imbalance may provide a reason to scrutinize non-compete clauses, it is not used to condemn or invalidate them.¹⁹ Remarkably, in each case cited in footnote 253 of the NPRM, the court found the non-compete clauses to be enforceable.

Next, the NPRM finds that “non-compete clauses are exploitive and coercive at the time of the worker’s potential departure from the employer[.]”²⁰ The NPRM reaches this conclusion regardless of whether the clauses are enforced. This conclusion is contrary to legal precedent, which requires enforcement of non-compete provisions before finding harm.²¹

Finally, the NPRM finds that “non-compete clauses are restrictive conduct that negatively affects competitive conditions.”²² Although this basis for concluding that non-compete provisions are unfair does not rely solely on the selection of an adjective, here, the NPRM demonstrates how little evidence the majority requires before finding that conduct is unfair pursuant to the Section 5 Policy Statement.

Until yesterday, the Commission had announced no cases (and therefore had no experience and no evidence) to conclude that non-compete clauses harm competition in labor markets. In fact, the only litigated FTC case challenging a non-compete clause found that a non-compete

¹⁷ *Id.*

¹⁸ According to the NPRM, unequal bargaining power arises because employees depend on job income to pay bills, job searches entail significant transaction costs, the prevalence of unions has declined, employers outsource firm functions, employers have more experience negotiating because they have multiple employees, employees typically do not hire lawyers to negotiate agreements, and employees may not focus on the terms of their contracts. *Id.*

¹⁹ See *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22, 29 (Mass. App. Ct. 1986) (finding injunction to enforce non-compete agreement proper); *Diepholz v. Rutledge*, 659 N.E. 989, 991 (Ill. Ct. App. 1995) (finding non-compete agreement enforceable, but also finding no violation of terms of non-compete agreement); *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 818 S.E.2d 724, 731 (S.C. 2018) (finding non-compete agreement enforceable).

²⁰ NPRM Part IV.A.1.c. Again, the NPRM explains that this conclusion does not apply to senior executives and also invites comments on whether there is a broader category of highly paid or highly skilled employees for whom the conclusion is inappropriate. *Id.*

²¹ See, e.g., *O’Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1065-66 (7th Cir. 1997) (“to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation.”); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 267 (7th Cir.1981) (“a section 1 violation requires proof that the defendant knowingly enforced the arguably overbroad section of the ancillary noncompetition covenant”).

²² NPRM Part IV.A.1.a.

provision covering franchise dealers did *not* violate Section 5 of the FTC Act.²³ Notably, the NPRM omits any reference to this case. The Commission has accepted settlements regarding non-compete clauses in contracts between businesses,²⁴ but the majority itself has distinguished those cases from non-compete clauses in labor contracts.²⁵ And in those B2B cases, the non-compete clauses were associated with the sale of a business, a situation that falls within the narrow exception to the ban provided in the proposed Non-Compete Clause Rule.

Just yesterday, though, the Commission rushed out the announcement of three consent agreements that resolve allegations that non-compete provisions constitute an unfair method of competition.²⁶ The first consent involves security guard services, and the other two involve the manufacturing of glass containers. These consents undoubtedly were designed to support assertions that the FTC now has experience with non-compete agreements in employee contracts. But even a cursory read of the complaints reveals the diaphanous nature of this “experience.”

Remarkably, none of these cases provides evidence showing the anticompetitive effects of non-compete clauses beyond the conclusory allegations in the complaints. The complaints in the glass container industry assert that non-compete provisions may prevent entry or expansion by competitors, but contain no allegations regarding firms that have tried unsuccessfully to obtain personnel with industry-specific skills and experience.²⁷ Regarding the effects on employees, the complaints make no allegations that the non-compete clauses were enforced by respondents²⁸ and the Analysis to Aid Public Comment accompanying the consent agreements points only to studies not tied to the glass container industry. These cases provide no evidence that the non-compete provisions limited competition for employees with industry-specific expertise, thereby lowering wages or impacting job quality. Similarly, in the case against Prudential Security,

²³ See *Snap-On Tools Corp. v. Fed. Trade Comm’n*, 321 F.2d at 837.

²⁴ See ARKO Corp., FTC File No. 211-0187, https://www.ftc.gov/system/files/ftc_gov/pdf/2110087C4773ArkoExpressComplaint.pdf (Aug. 5, 2022); DTE Energy Co., FTC File No. 191-0068, https://www.ftc.gov/system/files/documents/cases/191_0068_c-4691_dte-enbridge_complaint.pdf. (Dec. 13, 2019).

²⁵ See Lina M. Khan, Chair, Fed. Trade Comm’n, Joined by Rebecca Kelly Slaughter and Alvaro M. Bedoya, Comm’rs, Fed. Trade Comm’n, Statement regarding In the Matter of ARKO Corp./Express Stop, https://www.ftc.gov/system/files/ftc_gov/pdf/2110187GPMExpressKhanStatement.pdf (June 10, 2022) (distinguishing non-compete clauses in labor contracts and effects on workers from non-compete clause in merger agreement where both parties remain in market).

²⁶ On December 28, 2022, the Commission voted to accept for public comment three consent agreements involving non-compete agreements. For two of those matters, the Commission vote occurred less than a week after the Commission received the papers. See *Ardagh Glass Group S.A.*, File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghacco.pdf (Jan. 4, 2023) (Agreement Containing Consent Order (signatures dated Dec. 21, 2022)).

²⁷ See *O-I Glass, Inc.*, File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglasscomplaint.pdf (Jan. 4, 2023) (complaint ¶¶ 6, 8); *Ardagh Glass Group S.A.*, File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghcomplaint.pdf (Jan. 4, 2023) (complaint ¶¶ 6, 8).

²⁸ See *Wilson*, Dissenting Statement regarding In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Glass Group S.A., *supra* note 4.

Inc.,²⁹ the complaint alleges that individual former employees were limited in their ability to work for other firms in the security guard industry,³⁰ but contain no allegations that the firm’s non-compete provisions had market effects on wages or effects in a properly defined market for security guard services.

The NPRM also asserts FTC experience with non-compete provisions by pointing to Commission merger consent agreements that restrict the use of non-compete agreements. The complaints in those cases did not allege harm from non-compete clauses and the provisions in the consent agreements were included to ensure that the buyers of divestiture assets could obtain employees familiar with the assets and necessary for the success of the divestitures at issue.

Finally, the NPRM claims Commission experience with non-compete agreements to support the Non-Compete Clause Rule from a Commission workshop in January 2020.³¹ But the NPRM fails to reflect the variety of views expressed during that workshop, including testimony that the economic literature is “[s]till far from reaching a scientific standard for concluding [that non-compete agreements] are bad for overall welfare . . . Also [we] don’t yet fully understand the distribution of effects on workers . . . Welfare tradeoffs are likely context-specific, and may be heterogeneous.”³²

Indeed, the NPRM ignores that testimony and instead focuses on economic literature that purportedly demonstrates that non-compete clauses are unfair because they negatively affect competitive conditions. But an objective review of that literature reveals a mixed bag. For example, the first study described in the NPRM³³ finds that “decreasing non-compete clause enforceability from the approximate enforceability level of the fifth-strictest state to that of the fifth-most-lax state would increase workers’ earnings by 3-4%.” Yet, this study also finds that these effects vary strongly across different groups of individuals. For example, the authors find that “enforceability has little to no effect on earnings for non-college educated workers” and instead find that enforceability primarily impacts college-educated workers. Similarly, it finds that strict non-compete clause enforceability has very different effects for different demographic groups: it has little to no effect on men, and much larger effects on women and Black men and women. The NPRM interprets these differential effects as facts in favor of the Non-Compete Clause Rule, as it would diminish race and gender wage gaps, but there is no corresponding discussion of the Rule’s effect on the wage gap based on education. An alternative interpretation

²⁹ Prudential Security, Inc., File No. 221-0026, https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecuritycomplaint.pdf (Dec. 28, 2022) (consent agreement accepted for public comment).

³⁰ *Id.* (complaint at ¶¶ 23, 25).

³¹ Fed. Trade Comm’n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, <https://www.ftc.gov/news-events/events/2020/01/non-compete-clauses-workplace-examining-antitrust-consumer-protection-issues>.

³² Kurt Lavetti, *Economic Welfare Aspects of Non-Compete Agreements*, Remarks at the Fed. Trade Comm’n Workshop on Non-Compete Clauses in the Workplace (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete=workshop-slides.pdf.

³³ Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381 (2020).

of these findings is that the scientific literature is still muddled as to who is helped and who is harmed by non-compete clauses, and that it would be better for the Commission to tailor a rule to those settings where a scientific consensus exists.

Similarly, the NPRM often bases its conclusions about the effects of non-compete clauses on limited support. For example, the NPRM contends that increased enforceability of non-compete clauses increases consumer prices. Yet, under the current record, this conclusion is based on only one study in healthcare markets and another study that considers the relationship between non-compete clauses and concentration.³⁴ The NPRM does not provide a basis to conclude that findings with respect to the market for physicians and healthcare are generalizable, instead acknowledging that no comparable evidence exists for other markets.³⁵ Also, the study that considers the effects of non-compete clauses on concentration does not draw conclusions about prices; the NPRM's conclusion that non-compete provisions lead to higher prices requires assumptions about a relationship between concentration and prices. Moreover, the NPRM omits studies showing that reducing the enforceability of non-compete restrictions leads to higher prices for consumers. A study by Gurun, Stoffman, and Yonker finds that an agreement not to enforce post-employment restrictions among financial advisory firms that were members of the Broker Protocol led brokers to depart their firms, and consumers to follow their brokers, at high rates. The study found, however, that clients of firms in the Broker Protocol paid higher fees and experienced higher levels of broker misconduct.³⁶ In other words, suspending non-competes resulted in higher prices and a decrease in the quality of service provided. These unintended consequences illustrate the inevitably far-reaching and unintended consequences that today's NPRM will visit upon employees, employers, competition, and the economy.

B. The NPRM's Treatment of Business Justifications

The NPRM explains that “the additional incentive to invest (in assets like physical capital, human capital, or customer attraction, or in the sharing of trade secrets and confidential commercial information) is the primary justification for use of non-compete clauses.”³⁷ It acknowledges that “there is evidence that non-compete clauses increase employee training and other forms of investment,”³⁸ and describes two studies demonstrating that increased non-compete clause enforceability increased firm-provided training and investment.³⁹ It also

³⁴ NPRM Part II.B.2.a.

³⁵ NPRM Part VII.B.2.c.

³⁶ Umit G. Gurun, Noah Stoffman, & Scott E. Yonker, *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 J. Fin. Econ. 1218 (2021)

³⁷ NPRM Part II.B.2.e.

³⁸ *Id.*

³⁹ Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R. Rev. 783, 799 (2019) (moving from mean non-compete enforceability to no non-compete clause enforceability would decrease the number of workers receiving training by 14.7% in occupations that use non-compete clauses at a high rate); Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 22 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040393 (knowledge-intensive firms invest 32% less in capital equipment following decreases in the enforceability of non-compete clauses).

describes studies that examine non-compete clause use and investment.⁴⁰ Despite the studies, the NPRM concludes, “the evidence that non-compete clauses benefit workers or consumers is scant.”⁴¹ In other words, the NPRM treats asymmetrically the evidence of harms (mixed evidence given great credence) and benefits (robust evidence given no credence). These early examples of cherry-picking evidence that conforms to the narrative provide little confidence in the integrity of the rulemaking process or the ultimate outcome.

Implicitly, though, the NPRM credits some business justifications for non-compete provisions. It excludes from the ban those non-compete clauses associated with the sale of a business, implicitly acknowledging that these non-compete clauses are necessary to protect the goodwill of the transferred business. Also, the NPRM likely credits business justifications when it seeks comment on whether senior executives should be covered by the rule. Nonetheless, on its face, the NPRM expressly discounts business justifications and makes no effort to distinguish and determine circumstances where investment incentives are important.

The NPRM also discounts procompetitive business justifications by asserting that trade secret law, non-disclosure agreements, and other mechanisms can be used to protect firm investments. While the NPRM explains that these mechanisms may protect investments, the existing record provides no evidence that these mechanisms are effective substitutes for non-compete agreements.⁴² The NPRM cites no instances where these mechanisms have been used effectively in lieu of non-compete clauses, even though natural experiments exist and could be studied (*e.g.*, when states have changed the enforceability of non-compete clauses). “[M]erely identifying alternative mechanisms to solve a potential employee investment problem does not provide . . . guidance as to which mechanism achieves the objective at the lowest social cost.”⁴³ Moreover, the NPRM’s observation that firms successfully operate in states where non-compete clauses are not enforceable is unpersuasive; the NPRM offers no meaningful cross-state comparisons and the observation does not show that firms and competition are equally or even more successful in those states than in states where non-compete clauses are permissible.

II. The Proposed Non-Compete Clause Rule Will Trigger Numerous And Likely Successful Legal Challenges Regarding the Commission’s Authority to Issue the Rule

⁴⁰ Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 700 (2022) (finding firms that use non-compete clauses in hair salon industry train employees at 11% higher rate and increase investment in particular customer-attraction device by 11%); Evan P. Starr, James J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & Econ. 53, 53 (2021) (finding no statistically significant impact on training and trade secrets from use of non-compete clauses, but unable to examine other types of investments).

⁴¹ NPRM Part IV.B.3.

⁴² There is a limited literature regarding the efficacy of trade secret protection and non-disclosure agreements. See Jie Gong & I.P.L. Png, *Trade Secrets Law and Inventory Efficiency: Empirical Evidence from U.S. Manufacturing*, <https://ssrn.com/abstract=2102304> (July 8, 2012) (investigating effects of operational know-how information spillovers under various levels of enforcement of trade secret law).

⁴³ Camila Ringeling, Joshua D. Wright, et. al, *Noncompete Clauses Used in Employment Contracts*, Comment of the Global Antitrust Institute 6 (Feb. 7, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374.

This section describes the numerous, and meritorious, legal challenges that undoubtedly will be launched against the Non-Compete Clause Rule. Defending these challenges will entail lengthy litigation that will consume substantial staff resources. I anticipate that the Rule will not withstand these challenges, so the Commission majority essentially is directing staff to embark on a demanding and futile effort. In the face of finite and scarce resources, this NPRM is hardly the best use of FTC bandwidth.

There are numerous paths for opponents to challenge the Commission’s authority to promulgate the Non-Compete Clause Rule. First, I question whether the FTC Act provides authority for competition rulemaking. The NPRM states that the Commission proposes the Non-Compete Clause Rule pursuant to Sections 5 and 6(g) of the FTC Act. Section 6(g) of the FTC Act authorizes the Commission to “make rules and regulations for the purpose of carrying out the provisions of the subchapter” where Section 6(g) otherwise provides that the Commission may “from time to time classify corporations.”⁴⁴ Section 6(g) was believed to provide authority only for the Commission to adopt the Commission’s procedural rules. For decades, consistent with the statements in the FTC Act’s legislative history, Commission leadership testified before Congress that the Commission lacked substantive competition rulemaking authority.⁴⁵

⁴⁴ 15 U.S.C. § 46(g). Section 6 of the FTC Act provides

§46. Additional powers of Commission

The Commission shall also have power . . .

(g) Classification of corporations; regulations

From time to time classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter.

⁴⁵ See *Nat’l Petroleum Ref’rs Ass’n v. FTC*, 482 F.2d 672, 696 nn. 38, 39 (D.C. Cir. 1973). See also Noah Joshua Phillips, *Against Antitrust Regulation*, American Enterprise Institute Report 3, <https://www.aei.org/research-products/report/against-antitrust-regulation/> (Oct. 13, 2022) (“[T]he Conference Committee [considering legislation that created the Federal Trade Commission] was between two bills, neither of which contemplated substantive rulemaking. . . . The legislative history does not demonstrate congressional intent to give the FTC substantive rulemaking power: The House considered and rejected it, the Senate never proposed it, and neither the Conference Committee’s report nor the final debates mentioned it.”); 51 Cong. Rec. 12916 (1914), reprinted in *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 4368 (Earl W. Kintner ed., 1982) (statement of Sen. Cummins) (“[I]f we were to attempt to go further in this act and to give the commission the authority to prescribe a code of rules governing the conduct of the business men of this country for the future, we would clash with the principle that we can not confer upon the commission in that respect legislative authority; but we have not made any such attempt as that, and no one proposes any attempt of that sort.”); *id.* at 14932, reprinted in *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 4732 (Earl W. Kintner ed., 1982) (statement of Rep. Covington) (“The Federal trade commission will have no power to prescribe the methods of competition to be used in the future. In issuing orders it will not be exercising power of a legislative nature The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, it is finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature.”); *id.* at 13317, reprinted in *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 4675 (Earl W. Kintner ed., 1982) (statement of Sen. Walsh) (“We are not going to give to the trade commission the general power to regulate and prescribe rules under which the business of this country shall in the future be conducted; we propose simply to give it the power to denounce as unlawful a particular practice that is pursued by that business.”).

Ignoring this history, the Commission embarked on a substantive rulemaking binge in the 1960s and 1970s.⁴⁶ The vast majority of these substantive rules pertained to consumer protection issues. Only one substantive rule was grounded solely in competition;⁴⁷ that rule was not enforced and subsequently was withdrawn.⁴⁸ Another substantive rule was grounded in both competition and consumer protection principles, and prompted a federal court challenge. There, the D.C. Circuit in 1973 held in *National Petroleum Refiners*.⁴⁹ that the FTC did have the power to promulgate substantive rules.

Two years later, however, Congress enacted the Magnuson-Moss Act,⁵⁰ which required substantive consumer protection rules to be promulgated with heightened procedural safeguards under a new Section 18 of the FTC Act. Notably, the Magnuson-Moss Act expressly excluded rulemaking for unfair methods of competition from Section 18. FTC Chairman Miles Kirkpatrick (1970-73) explained that it was not clear whether Congress in the Magnuson-Moss Act sought to clarify existing rulemaking authority or to grant substantive rulemaking authority to the FTC for the first time.⁵¹ If the latter, then the FTC only has substantive *consumer protection* rulemaking power, and lacks the authority to engage in substantive *competition* rulemaking. This uncertainty about the language of the statute will be a starting point for challenges of the Non-Compete Clause Rule.

Second, the Commission’s authority for the Rule likely will be challenged under the major questions doctrine, which the Supreme Court recently applied in *West Virginia v. EPA*.⁵² Under the major questions doctrine, “where a statute . . . confers authority upon an administrative agency,” a court asks “whether Congress in fact meant to confer the power the agency has asserted.”⁵³ The Supreme Court explained in *West Virginia v. EPA* that an agency’s exercise of statutory authority involved a major question where the “history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.”⁵⁴

Challengers will ask a court to determine whether today’s NPRM constitutes a major question. Using Justice Gorsuch’s concurrence as a guide, agency action will trigger the application of the major questions doctrine if the agency claims, among other things, the power to (1) resolve a

⁴⁶ See TIMOTHY J. MURIS & HOWARD BEALES, III, THE LIMITS OF UNFAIRNESS UNDER THE FEDERAL TRADE COMMISSION ACT 13 (1991).

⁴⁷ FTC Men’s and Boy’s Tailored Clothing Rule, 16 C.F.R. § 412 (1968).

⁴⁸ Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994).

⁴⁹ Nat’l Petroleum Ref’rs Ass’n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

⁵⁰ Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

⁵¹ See Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective* 48 Antitrust L.J. 1561, 1561 (1979) (“One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC’s rulemaking powers.”).

⁵² *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

⁵³ *Id.* at 2608.

⁵⁴ *Id.*

matter of great political significance, (2) regulate a significant portion of the American economy, or (3) intrude in an area that is the particular domain of state law.⁵⁵ First, the regulation of non-compete clauses is a question of political significance; Congress has considered and rejected bills significantly limiting or banning non-competes on numerous occasions,⁵⁶ a strong indication that the Commission is trying to “work around” the legislative process to resolve a question of political significance.⁵⁷ Second, the Rule proposes to regulate a significant portion of the American economy through a ban on non-competes. According to the NPRM, the “Commission estimates that approximately one in five American workers – or approximately 30 million workers – is bound by a non-compete clause.”⁵⁸ Thus, the Non-Compete Clause Rule indisputably will negate millions of private contractual agreements and impact employer/employee relationships in a wide variety of industries across the United States. Third, regulation of non-compete agreements has been the particular domain of state law. As the NPRM explains, 47 states permit non-competes in some capacity, while three states have chosen to prohibit them entirely, and state legislatures have been active in this area recently.⁵⁹

If a court were to conclude that the Non-Compete Clause Rule is a major question, the FTC would be required to identify clear Congressional authorization to impose a regulation banning non-compete clauses. Yet, as discussed above, that clear authorization is unavailable. The language in Section 6(b) is far from clear, and largely discusses the Commission’s classification of corporations. I do not believe that Congress gave the FTC authority to enact substantive rules related to any provision of the FTC Act using this “oblique” and unclear language. In addition, the decision by Congress to omit unfair methods of *competition* rulemaking in the Magnuson-Moss Act, which immediately followed the decision in *National Petroleum Refiners*, is additional evidence that Congress has not clearly authorized the FTC to make competition rules that may have significant political or economic consequences. Moreover, Congress did not remove the known ambiguity when it enacted the FTC Improvements Act of 1980.⁶⁰

Third, the authority for the Non-Compete Clause Rule may be challenged under the non-delegation doctrine. The doctrine is based on the principle that Congress cannot delegate its legislative power to another branch of government, including independent agencies.⁶¹

⁵⁵ *Id.* at 2600-01 (Gorsuch, J. concurring).

⁵⁶ Russell Beck, *A Brief History of Noncompete Regulation*, FAIR COMPETITION LAW (Oct. 11, 2021), <https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/>.

⁵⁷ *West Virginia v. EPA*, 142 S.Ct. at 2600 (Gorsuch, J. concurring).

⁵⁸ NPRM Part II.B.1.a.

⁵⁹ *Id.* Part II.C.1.

⁶⁰ See H.R. Rep. No. 96-917, 96th Cong., 2d sess. 29-30 (1980), reprinted in *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 5862 (Earl W. Kintner ed., 1982) (conference report on FTC Improvements Act of 1980 explaining that when adopting a restriction on standards and certification rulemaking brought as an unfair or deceptive act or practice, conferees were not taking a position on the Commission’s authority to issue a trade regulation rule defining ‘unfair methods of competition’ pursuant to section 6(g). “The substitute leaves unaffected whatever authority the Commission might have under any other provision of the FTC Act to issue rules with respect to ‘unfair methods of competition.’”).

⁶¹ Five Supreme Court justices have expressed interest in reconsidering the Court’s prior thinking on the doctrine, which increases the risk that a challenge may be successful. See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J. concurring) (stating with respect to the nondelegation doctrine that “[i]f a majority of this Court

Since the 1920s, the Supreme Court has found that Congress has not made an improper delegation of legislative power so long as Congress has set out “an intelligible principle to which the person or body authorized to fix [rules] is directed to conform.”⁶² Applying this principle in *Schechter Poultry*,⁶³ the Supreme Court approved Congressional authorization for the FTC to prohibit unfair methods of competition, relying on the Commission’s administrative enforcement proceedings where the Commission acts as “a quasi judicial body” and that “[p]rovision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review . . .”⁶⁴ The Court simultaneously found that provisions of the National Industrial Recovery Act to issue “codes of fair competition” were *improper* delegations of legislative power, distinguishing the impermissibly broad fair competition codes from the FTC Act’s approach to address unfair methods of competition that are “determined in particular instances, upon evidence, in light of particular competitive conditions[.]”⁶⁵

Notably, the Commission’s proposed ban on non-compete clauses abandons the Commission’s procedures that led the Supreme Court in *Schechter Poultry* to find that the Commission’s enforcement of “unfair methods of competition” does not constitute an improper delegation of legislative power. In addition, to the extent that the Commission’s Section 5 Policy Statement (which provides the basis for determining that non-compete clauses are an unfair method of competition) abandons the consumer welfare standard to pursue multiple goals, including protecting labor, the Commission’s action more closely resembles the National Industrial Recovery Act codes that also sought to implement multiple goals under the guise of codes of fair competition.

IV. Comments are Encouraged

The NPRM invites public comment on many issues. I strongly encourage the submission of comments from all interested stakeholders. After all, unlike rulemaking for consumer protection rules under the Magnuson-Moss process, ***this is likely the only opportunity for public input before the Commission issues a final rule. For this reason, it is important for commenters to address the proposed alternatives to the near-complete ban on non-compete provisions.*** To the extent that the NPRM proposes alternatives to the current proposed rule, if the Commission were subsequently to adopt one of the alternatives, which would be a logical outgrowth of the current

were willing to reconsider the approach we have taken for the past 84 years, I would support that effort”); *id.* at 2131 (Gorsuch, J., dissenting, joined by Chief Justice Roberts and Justice Thomas) (expressing desire to “revisit” the Court’s approach to the nondelegation doctrine); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J. respecting the denial of certiorari); Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014).

⁶² *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁶³ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁶⁴ *Id.* at 533.

⁶⁵ *Id.*

proposed rulemaking,⁶⁶ there would be no further opportunity for public comment. Moreover, the Commission believes that if it were to adopt alternatives that differentiate among categories of workers, the various rule provisions would be severable if a court were to invalidate one provision. Consequently, it is important for the public to address each of the alternatives proposed in the NPRM because the comment period on the proposed rule is the only opportunity for public input on those alternatives.

In addition to the issues for which the NPRM invites comments, I encourage stakeholders to address the following points:

- The NPRM references some academic studies regarding non-competes. What other academic literature addresses the issues in the NPRM, including the procompetitive justifications for non-compete provisions?
- The NPRM describes papers that exploit natural experiments to estimate the effects of enforcing non-compete clauses. While this approach ensures that the estimates are internally valid, it reflects the causal effects of non-compete agreements only in the contexts within which they are estimated. What should the Commission consider to understand whether and when these estimates are externally valid? How can the Commission know that the estimates calculated from the contexts of the literature are representative of the contexts outside of the literature?
- The NPRM draws conclusions based on “the weight of the literature,” but the literature on the effects of non-compete agreements is limited, contains mixed results, and is sometimes industry-specific. Which conclusions in the NPRM are supported by the weight of the literature? Which conclusions in the NPRM contradict the weight of the literature? Which conclusions in the NPRM require additional evidence before they can be considered substantiated?
- Where the evidence provided in the NPRM is limited, is the evidence sufficient to support either the proposed ban on non-compete clauses or the proffered alternative approaches to the proposed ban?
- What are the benefits and drawbacks of the currently proposed ban compared to the proposed alternative rule that would find a presumption of unlawfulness, including the role of procompetitive justifications in rebutting a presumption?

⁶⁶ See *Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 210 (D.C. Cir. 2007); see also *Agape Church, Inc. v. FCC*, 738 F.3d 397, 412 (2013) (holding that FCC “sunset” rule was a logical outgrowth when proposed rule gave public notice that a viewability rule was in danger of being phased out, *i.e.*, a sunset provision).