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March 27, 2023

**SUBMITTED VIA REGULATIONS.GOV**

The Honorable Lina M. Khan  
Chair  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**RE: RIN 3084-AB74, Non-Compete Clause Rule**

Dear Chair Khan:

I write to express concerns with the Federal Trade Commission's (FTC) Notice of Proposed Rulemaking titled "Non-Compete Clause Rule" (proposed rule).<sup>1</sup> This proposed rule would impose a sweeping ban on non-compete clauses in employment contracts. A ban on non-compete clauses exceeds the FTC's authority and inappropriately meddles in labor and employment issues in which the FTC lacks expertise and enforcement experience. Such a far-reaching ban could also reduce companies' investment in their employees.

**Regulating Non-Compete Clauses Exceeds the FTC's Authority**

As my colleagues at the Committee on the Judiciary noted in a recent letter, "the FTC has no authority in federal statute to initiate this type of rulemaking ... and ... lacks the 'clear congressional authorization' required to adopt this sweeping rule."<sup>2</sup> Former FTC Commissioner Christine Wilson agreed in her dissent to the proposed rule, writing that it "defies the Supreme Court's decision in *West Virginia v. EPA*, which held that an agency can't claim 'to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority.'"<sup>3</sup>

<sup>1</sup> Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023).

<sup>2</sup> Letter from Rep. Jim Jordan, Chairman, House Judiciary Comm., et al. to Lina Khan, Chair, FTC, et al. (Feb. 14, 2023), <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-02-14-jdj-dei-tm-sf-to-ftc.pdf>.

<sup>3</sup> Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, Comm'n File No. P201200-1 (Jan 5, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p201000noncompetewilsondissent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf).

The *West Virginia v. EPA* holding is very clear. If an agency seeks to decide an issue of major national significance, its actions must be supported by clear congressional authorization. The FTC cannot demonstrate clear congressional authority for its rulemaking since it was granted no such authority under federal law. By continuing to assert such authority in the face of the Supreme Court's clear pronouncement, the FTC is disregarding the law and the constitutional separation of powers.

### **The Limits of Section 5 Authority**

Under Section 5 of the *Federal Trade Commission Act*, the FTC has no authority to declare a practice unlawful on the grounds that it is an unfair method of competition unless it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>4</sup> Academic research on non-compete clauses does not show they cause or will likely cause consumers substantial injury.

An economist at the FTC conducted a literature review of research on the topic of non-compete agreements. The findings of this review found that further research on the topic is necessary to determine the impact of non-competes on consumers, workers, and companies:

Although the literature has made important strides in studying non-competes and their effects on workers, firms, and end consumers, further work is needed. Due to the limited availability of data and a paucity of natural experiments (e.g., law changes) to assess the impact of noncompetes, much of the literature relies on cross-sectional comparisons of signers and nonsigners, or high-enforceability states and low-enforceability ones. The more credible empirical studies tend to be narrow in scope, focusing on a limited number of specific occupations (e.g., executives) or potentially idiosyncratic policy changes with uncertain and hard-to-quantify generalizability (e.g., banning non-competes for technology workers in Hawaii). There is little evidence on the likely effects of broad prohibitions of non-compete agreements. Further research, perhaps exploiting more recent law changes or new sources of data, is necessary to establish the causal impact such agreements have on market participants.<sup>5</sup>

Furthermore, one study found that *not* enforcing non-compete clauses harmed consumers.<sup>6</sup> This study examined a pact among financial advisory firms not to enforce post-employment restrictions. It found that clients of these financial advisory firms “paid higher fees and experienced higher levels of broker misconduct.”<sup>7</sup>

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<sup>4</sup> 15 U.S.C. § 45(n).

<sup>5</sup> JOHN M. MCADAMS, FTC, BUREAU OF ECON., NON-COMPETE AGREEMENTS: A REVIEW OF THE LITERATURE (Dec. 31, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3513639](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639).

<sup>6</sup> Umit G. Gurun et al., *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 J. FIN. ECON. 1218 (2021).

<sup>7</sup> Wilson Dissenting Statement, *supra* note 4, at 1.

## **The Proposed Rule Would Disrupt Congress' Balance between Employment and Consumer Policies**

The proposed rule's adventure in regulating employment issues would also disrupt the balance Congress struck between consumer and employment concerns. Laws enacted by Congress to govern consumer protection and the welfare of employees have different goals. Anti-trust legislation was enacted to promote competition leading to lower consumer prices. Labor laws seek to improve the bargaining power of workers and promote their welfare.

Because Congress created the FTC to regulate consumer policy, the agency has scant experience enforcing non-compete clauses or regulating employment. Former Commissioner Wilson noted in her dissent that until January 2023 the agency "had announced no cases (and therefore had no experience and no evidence) to conclude that non-compete clauses harm competition in labor markets."<sup>8</sup> It is difficult to understand how the FTC, without congressional authorization or expertise on employment issues, could assert that nearly all employment contracts containing non-compete clauses are unenforceable and are an unfair method of competition.

## **Unintended Consequences from Banning Non-Compete Clauses**

An outright ban on nearly all non-compete clauses would disrupt approximately one-fifth of all employment contracts and would render millions of contracts unenforceable in the United States.<sup>9</sup> One such potential unintended consequence is that it could reduce employer investment in employees.

Academic research suggests that one business justification for non-competes, and the reason workers voluntarily accept them, is that they solve what is known as the "holdup" problem for investments in workforce development. A report published by the U.S. Department of the Treasury explains this:

Firms and workers use non-competes to encourage more investment in workers. In general, firms are reluctant to pay for training that improves a worker's "general" skills and makes her more valuable to it and other firms alike. Economists usually think of general training as occurring when workers accept wage cuts to compensate their employer for its expenses in providing the training. For various practical reasons, however, workers may be unwilling to pay for training. Non-competes offer an alternative: firms get an assurance that workers are unlikely to leave for some period of time, allowing the firm to capture more of the increased productivity from costly training it provides, and workers receive more training than they otherwise would.<sup>10</sup>

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<sup>8</sup> *Id.* at 5.

<sup>9</sup> Non-Compete Clause Rule, 88 Fed. Reg. at 3485.

<sup>10</sup> OFF. OF ECON. POL'Y, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (Mar. 2016),

One of the most pressing problems facing the nation is the shortage of skilled workers. President Biden commented on the country's ongoing workforce shortage and skills gap: "It's the first time we have high-paying jobs and not enough people to do them."<sup>11</sup> Recent data supports such claims. A survey on talent shortage finds three of every four companies have reported talent shortages and difficulty hiring—a 16-year high.<sup>12</sup> Another study projects that the manufacturing skills gap in the U.S. could result in 2.1 million unfilled manufacturing jobs by 2030.<sup>13</sup> The proposed rule will directly undermine efforts to expand and improve workforce development opportunities in America, as employer investments in skills education currently constitute a significant share of overall U.S. spending on workforce development.<sup>14</sup> By discouraging companies' investment in their employees, the proposed rule will result in fewer opportunities for America's workers to gain the skills necessary to compete in the modern economy.

## Conclusion

Congress created the FTC to promote competition and protect consumers. In this proposed rule, the FTC flagrantly overreaches beyond its congressionally delegated authority. By attempting to ban non-compete clauses, the FTC wades into a policy area outside of its jurisdiction and expertise. The proposed rule would greatly decrease investment by employers in their workforce at a time when American workers need more skills. I strongly urge the FTC to reconsider this rulemaking.

Sincerely,



Virginia Foxx  
Chairwoman

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[https://home.treasury.gov/system/files/226/Non\\_Compete\\_Contracts\\_Economic\\_Effects\\_and\\_Policy\\_Implications\\_MAR2016.pdf](https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf).

<sup>11</sup> Austin Landis, 'A 21st century workforce': Biden puts focus on effort to boost infrastructure training, jobs, SPECTRUM NEWS NY1, Nov. 2, 2022, <https://www.ny1.com/nyc/all-boroughs/news/2022/11/02/biden-puts-focus-on-effort-to-build-infrastructure-workforce>.

<sup>12</sup> MANPOWERGROUP, THE TALENT SHORTAGE, <https://go.manpowergroup.com/talent-shortage>.

<sup>13</sup> PAUL WELLENER ET AL., DELOITTE, CREATING PATHWAYS FOR TOMORROW'S WORKFORCE TODAY (May 4, 2021), <https://www2.deloitte.com/us/en/insights/industry/manufacturing/manufacturing-industry-diversity.html/#executive-overview>.

<sup>14</sup> CREDENTIAL ENGINE, COUNTING U.S. POSTSECONDARY AND SECONDARY CREDENTIALS: BUDGET REPORT, <https://credentialengine.org/wp-content/uploads/2023/01/Final-Budget-Report-2022.pdf>.