

April 17, 2023

Via electronic submission: <http://www.regulations.gov>

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

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Noncompete Clause Rule; 88 Fed. Reg. 3482-3546 (January 19, 2023)

The undersigned organizations, who together represent businesses that provide goods and services to virtually every American in every corner of the country, submit these comments regarding the proposed Noncompete Rule. We strongly oppose the proposal because noncompetes serve vital business and employee interests and because the FTC lacks legal authority to issue the proposed rule.

Most importantly, noncompetes serve pro-competitive interests. Courts, scholars, and economists all have found that noncompetes encourage investment in employees and help to protect intellectual property. In every sector of the economy, employers rely on noncompetes to protect investments in their workforce, to protect trade secrets and other confidential information, and to structure their compensation programs. As the FTC's own economist John McAdams recently explained, noncompetes "allow firms to reduce recruitment and training costs by lowering turnover," encourage firms to offer higher wages to compensate new employees, and "increase the returns to research and development," thereby promoting innovation.¹ Unfortunately, the Commission ignored or downplayed this evidence, thereby undermining "confidence in the integrity of the rulemaking process or the ultimate outcome."²

Moreover, noncompetes promote pro-competitive interests far more effectively than alternatives such as trade-secret laws or nondisclosure agreements. By relying on noncompetes over nondisclosure agreements or trade-secret law, "employers avoid the difficulties of proving an actual or threatened misappropriation of trade secrets to secure an injunction," a costly and time-consuming process.³ Scholars have found that noncompetes "may represent a more efficient mechanism to prevent proprietary knowledge transfers in certain circumstances, particularly when monitoring and the enforcement of trade secrets law is costly."⁴

¹ McAdams, *Non-Compete Agreements: A Review of the Literature*, Bureau of Economics Research Paper, 6 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639.

² Dissenting Statement of Commissioner Wilson, at https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

³ Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107, 117 (2008).

⁴ Camila Ringeling, Joshua D. Wright, et. al, *Noncompete Clauses Used in Employment Contracts*, Comment of the Global Antitrust Institute 4-5, & n.7, n.9 (Feb. 7, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374.

Noncompetes are also often used as part of contractual arrangements between the employer and the employee that result in additional compensation to the employee, in the form of added pay, retention bonuses, stock awards, deferred compensation or as part of a severance package. Noncompetes are also essential to the sale of a business. Businesses often have multiple owners with ownership levels beneath the 25 percent threshold recognized by the proposed rule, yet noncompetes would be banned in these instances as well. Employers often make significant investments in providing upskilling for their employees. These investments often require the employee to agree to stay with the employer for a period of time. The proposed rule fails to appropriately recognize any of these applications, all of which fail to demonstrate a clear harm to competition or harm to the employee.

In addition to the damage the proposal would inflict on businesses and employees, the FTC lacks the statutory authority under the FTC Act to issue the rule. Section 5 of the FTC Act empowers the Commission to pursue individual enforcement actions against “unfair methods of competition,” and Section 6(g) provides narrow authority to develop internal procedural rules. Neither provision, nor any other, authorizes the FTC to adopt generally applicable substantive rules defining unfair methods of competition. In contrast, Congress has repeatedly granted the FTC the authority to promulgate substantive rules on “unfair or deceptive acts and practices” and other discrete topics, but has declined to authorize regulations addressing unfair methods of competition.

Without express authorization from Congress, the FTC also lacks the constitutional authority to promulgate the proposed rule. As the Supreme Court recently explained, the major-questions doctrine requires that Congress speak clearly if it wishes to assign decisions of “vast economic and political significance” to an agency.⁵ That doctrine recognizes that “extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices,” even when there is a “colorable textual basis” for the agency’s position.⁶ Nothing in the FTC Act shows a hint of a decision by Congress to allow the Commission to invalidate contracts affecting tens of millions of workers, particularly given that Congress itself has recently considered legislation that would regulate noncompetes.

Similarly, the proposed rule also runs afoul of the nondelegation doctrine. A statutory delegation is constitutional only so “long as Congress lays down by legislative act an intelligible principle” to cabin the agency’s discretion.⁷ If the term “unfair methods of competition” is divorced from history and precedent, and if the Commission can condemn any business practice as unfair based on nothing more than “nefarious-sounding adjectives,”⁸ then there is effectively no limit to what the Commission could condemn under Section 5.⁹

Finally, the proposed rule also violates bedrock principles of federalism. For centuries, noncompetes have been a matter of state law, and today, forty-seven States enforce reasonable noncompete clauses. If Congress “intends to alter the usual constitutional balance between the

⁵ See *Nat’l Fed. of Indep. Bus. v. Occupational Health & Saf. Admin.*, 142 S. Ct. 661, 665 (2022).

⁶ *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).

⁷ *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

⁸ See Wilson, dissenting, at note 2.

⁹ See, e.g., *A. L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935).

States and the Federal government,” it must be “unmistakably clear,”¹⁰ particularly when an agency’s regulation would disrupt areas of “traditional state regulation.”¹¹

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While there are many ways for this proposal to be narrowed, because the FTC lacks the authority to issue any regulation on this issue, it should withdraw its proposed rule, and revert to the authority granted to it by Congress to address questions of unfair methods of competition through its adjudicative function.

Sincerely,

National/Regional

ACA International

ACT | The App Association

Advanced Medical Technology Association

Aerospace Industries Association (AIA)

Alternative Investment Management Association

American Bakers Association

American Bankers Association

American Beverage Association

American Coatings Association

American Council of Life Insurers

American Financial Services Association

American Hotel & Lodging Association

American Property Casualty Insurance Association

American Staffing Association

American Trucking Associations

ANA - Association of National Advertisers

Associated Builders and Contractors

Associated Equipment Distributors

Associated General Contractors of America

Computer & Communications Industry Association (CCIA)

Consumer Brands Association

Consumer Technology Association

CTIA - The Wireless Association

Direct Selling Association

Electronic Transactions Association

Federation of American Hospitals

Financial Services Institute (FSI)

FMI - The Food Industry Association

Foodservice Equipment Distributors Association

Futures Industry Association

Heating, Air-conditioning, & Refrigeration Distributors International

Independent Community Bankers of America

Independent Electrical Contractors

Independent Insurance Agents & Brokers of America (Big "I")

¹⁰ *Gregory v. Ashcroft*, 501 U.S. 452, 460 461 (1991).

¹¹ *Metro Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

Independent Lubricant Manufacturers Association (ILMA)
Industrial Fasteners Institute
International Franchise Association
ISSA, The Worldwide Cleaning Industry Association
Managed Funds Association (MFA)
Medical Alley
MEMA, The Vehicle Suppliers Association
Metals Service Center Institute
Mortgage Bankers Association
National Association of Benefits and Insurance Professionals
National Association of Convenience Stores
National Association of Electrical Distributors
National Association of Manufacturers
National Association of Mutual Insurance Companies
National Association of Security Companies (NASCO)
National Association of Wholesaler-Distributors (NAW)
National Automobile Dealers Association
National Convenience Distributors
National Federation of Independent Business
National Funeral Directors Association
National Independent Automobile Dealers Association (NIADA)
National Lumber & Building Material Dealers Association
National Mining Association
National Newspaper Association
National Pest Management Association
National Propane Gas Association

National Retail Federation
National Roofing Contractors Association
National Truck Equipment Association
National Waste & Recycling Association
NCTA – The Internet & Television Association
NetChoice
North American Association of Food Equipment Manufacturers (NAFEM)
Reinsurance Association of America
Retail Industry Leaders Association
Securities Industry and Financial Markets Association
SIFMA Asset Management Group
U.S. Chamber of Commerce
USTelecom - The Broadband Association
Western States Trucking Association
Wholesale & Specialty Insurance Association (WSIA)
Window Covering Manufacturers Association
Window Covering Safety Council
World Millwork Alliance

Alabama

Selma and Dallas County Chamber of Commerce and Tourism Information

Alaska

Alaska Chamber of Commerce

Arizona

Apache Junction Area Chamber of Commerce

Arizona Chamber of Commerce and Industry
Buckeye Valley Chamber of Commerce
Chandler Chamber of Commerce
Gilbert Chamber of Commerce
Glendale Chamber of Commerce
Greater Flagstaff Chamber of Commerce
Greater Phoenix Chamber of Commerce
Green Valley Sahuarita Chamber of Commerce & Visitor Center
Kingman Area Chamber of Commerce
Lake Havasu Area Chamber of Commerce
Nogales Santa Cruz County Chamber of Commerce
Peoria Chamber of Commerce
Queen Creek Chamber of Commerce
Southwest Valley Chamber of Commerce
Surprise Regional Chamber of Commerce
Tucson Metro Chamber of Commerce
West Valley Chamber of Commerce Alliance
Wickenburg Chamber of Commerce
Yuma County Chamber of Commerce

Arkansas

Arkansas State Chamber of Commerce / Associated Industries of Arkansas
Little Rock Regional Chamber of Commerce

California

Brea Chamber of Commerce
Carlsbad Chamber of Commerce
Chino Valley Chamber of Commerce

Coalition of California Chambers - Orange County
El Dorado County Chamber of Commerce
Gateway Chambers Alliance
Greater Conejo Valley Chamber of Commerce
Greater San Fernando Valley Chamber of Commerce
La Mesa Chamber of Commerce
Laguna Niguel Chamber of Commerce
Modesto Chamber of Commerce
Norwalk Chamber of Commerce
Palm Desert Area Chamber of Commerce
Port Hueneme Chamber of Commerce
Rancho Cordova Area Chamber of Commerce
Roseville Area Chamber of Commerce
San Juan Capistrano Chamber of Commerce
San Marcos Chamber of Commerce
Santa Barbara South Coast Chamber of Commerce
Sherman Oaks Chamber of Commerce
Simi Valley Chamber of Commerce
Tulare Chamber of Commerce
West Ventura County Business Alliance

Colorado

Colorado BioScience Association
Colorado Chamber of Commerce
Greater Woodland Park Chamber of Commerce

Connecticut

Connecticut Business and Industry Association

Florida

Coral Gables Chamber of Commerce
Greater Boca Raton Chamber of Commerce
Stuart/Martin County Chamber of
Commerce

Georgia

Barrow County Chamber of Commerce

Hawaii

Chamber of Commerce Hawaii

Idaho

Boise Metro Chamber of Commerce
Cascade Chamber of Commerce
Meridian Chamber of Commerce
Pocatello-Chubbuck Chamber of Commerce

Illinois

Chicagoland Chamber of Commerce
Cook County Black Chamber of Commerce
Edwardsville/Glen Carbon Chamber of
Commerce
Effingham County Chamber of Commerce
Garfield Park Chamber of Commerce
GLMV Chamber of Commerce
Greater Springfield Chamber of Commerce
Illinois Association of Mutual Insurance
Companies
Illinois Chamber of Commerce
Illinois Manufacturers' Association
Joliet Region Chamber of Commerce &
Industry
Lombard Area Chamber of Commerce

Naperville Area Chamber of Commerce
Pekin Area Chamber of Commerce
Sauk Valley Area Chamber of Commerce
West Suburban Chamber of Commerce &
Industry
Winnetka-Northfield-Glencoe Chamber of
Commerce

Indiana

Decatur Chamber of Commerce
Indiana Chamber of Commerce
South Bend Regional Chamber of
Commerce
Wayne County Area Chamber of Commerce

Iowa

Council Bluffs Area Chamber of Commerce

Kansas

Wichita Regional Chamber of Commerce

Kentucky

Commerce Lexington
Greater Louisville Inc. - The Metro
Chamber of Commerce
Kentucky Chamber of Commerce
Northern Kentucky Chamber of Commerce
Union County Chamber of Commerce

Louisiana

Bossier Chamber of Commerce
Central Louisiana Regional Chamber of
Commerce
Greenwood Chamber of Commerce

Maryland

Maryland Chamber of Commerce

Massachusetts

North Shore Chamber of Commerce

Michigan

Associated Builders & Contractors of Michigan

Detroit Regional Chamber of Commerce

Grand Rapids Area Chamber of Commerce

Holly Area Chamber of Commerce

Lansing Regional Chamber of Commerce

Michigan Biosciences Industry Association (MichBio)

Michigan Chamber of Commerce

Minnesota

Austin Area Chamber of Commerce

Greater Stillwater Chamber of Commerce

Lonsdale Area Chamber of Commerce

Marshall Area Chamber of Commerce

Minnesota Chamber of Commerce

Shakopee Chamber and Visitors Bureau

Missouri

Missouri Chamber of Commerce and Industry

Montana

Billings Chamber of Commerce

Helena Area Chamber of Commerce

Kalispell Chamber of Commerce

Montana Chamber of Commerce

Nebraska

Broken Bow Chamber of Commerce

Columbus Area Chamber of Commerce

Kearney Area Chamber of Commerce

Lincoln Chamber of Commerce

Nebraska Chamber of Commerce & Industry

Nevada

Carson City Chamber of Commerce

Henderson Chamber of Commerce

Reno + Sparks Chamber of Commerce

Vegas Chamber of Commerce

New Jersey

Chamber of Commerce Southern New Jersey

Greater Westfield Area Chamber of Commerce (GWACC)

HealthCare Institute of New Jersey (HINJ)

New Jersey Civil Justice Institute

New Mexico

Greater Las Cruces Chamber of Commerce

New Mexico Business Coalition

New York

Business Council of New York State

Capital Region Chamber of Commerce

North Country Chamber of Commerce

North Carolina

NC Chamber

North Dakota

Chamber Grand Forks / East Grand Forks

Ohio

Chillicothe Ross Chamber of Commerce

Cincinnati USA Regional Chamber

Dayton Area Chamber of Commerce

Ohio Chamber of Commerce

Toledo Regional Chamber of Commerce

Union County Chamber of Commerce

Oklahoma

Greater Oklahoma City Chamber

State Chamber of Oklahoma

Oregon

Grants Pass & Josephine County Chamber of Commerce

Oregon Business & Industry

Oregon State Chamber of Commerce

Springfield Area Chamber of Commerce

Pennsylvania

Alle Kiski Strong Chamber of Commerce

Cambria Regional Chamber of Commerce

Carlisle Area Chamber of Commerce

Chester County Chamber of Business and Industry

Greater Latrobe Laurel Valley Chamber of Commerce

Hanover Area Chamber of Commerce

Harrisburg Regional Chamber of Commerce

Indian Valley Chamber of Commerce

Lancaster Chamber of Commerce

Mechanicsburg Chamber of Commerce

Pennsylvania Chamber of Business and Industry

Pennsylvania Food Merchants Association

Peters Township Chamber of Commerce

Pittsburgh Airport Area Chamber of Commerce

Schuylkill Chamber of Commerce

Somerset County Chamber of Commerce

South West Regional Chamber of Commerce

Westmoreland County Chamber of Commerce

Rhode Island

Greater Newport Chamber of Commerce

South Carolina

Anderson Area Chamber of Commerce

Berkeley County Chamber of Commerce

Charleston Metro Chamber of Commerce

South Carolina Chamber of Commerce

Tennessee

Kingsport Chamber of Commerce

Texas

Del Rio Chamber Of Commerce

Fort Worth Chamber of Commerce

Greater Irving-Las Colinas Chamber of Commerce

Greater Waco Chamber of Commerce

League City Regional Chamber of Commerce

Longview Chamber of Commerce

North Texas Commission

Rowlett Area Chamber & Visitors Center

Sherman Chamber of Commerce

Texas Association of Business

Utah

Cache Valley Chamber of Commerce

ChamberWest

Payson Santaquin Area Chamber of Commerce

South Valley Chamber of Commerce

St. George Area Chamber of Commerce

Virginia

Blackstone Chamber of Commerce

Central Fairfax Chamber of Commerce

Roanoke Regional Chamber of Commerce

Virginia Chamber of Commerce

Washington

Association of Washington Business

Auburn Area Chamber of Commerce

Greater Grays Harbor, Inc.

Greater Yakima Chamber of Commerce

Mercer Island Chamber of Commerce

Moses Lake Chamber of Commerce

Puyallup Sumner Chamber of Commerce

Shelton-Mason County Chamber of Commerce

South Kitsap Chamber of Commerce

Washington Retail Association

West Plains Chamber of Commerce

West Virginia

West Virginia Chamber of Commerce

West Virginia Manufacturers Association

Wisconsin

Metropolitan Milwaukee Association of Commerce

Wisconsin Manufacturers and Commerce

Wyoming

Greater Cheyenne Chamber of Commerce

Jackson Hole Chamber of Commerce