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February 25, 2020

Chair Joseph Simons and Members of the Commission
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: FTC Workshop on Non-Compete Clauses Used in Employment Contracts

Docket ID: FTC-2019-0093

Via Online Submission

Dear Chairman Joseph Simons and Members of the Commission:

Thank you for holding this important workshop to highlight the issue of non-compete clauses, and to consider a rulemaking to prohibit their use as an unfair method of competition. It was notable how there appeared to be near unanimous consensus during the workshop that the use of non-compete clauses is indefensible, anticompetitive, harms workers by lowering wages, and excludes competitors from fairly competing for talent.

While we appreciate the need to establish an evidentiary record when seeking to undertake a rulemaking, we believe that overreliance on economic evidence is a potential trap that will impede your effort.

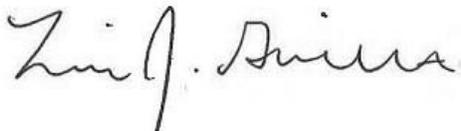
The Federal Trade Commission has broad authority to interpret “unfair methods of competition”.¹ By their name and nature, non-compete clauses are designed to prevent competition. As such, they should be per se illegal under the FTC Act. The potential economic harm of a non-compete clause is far less relevant than the intent behind their use: to prevent employees from leaving, and to prevent competitors from hiring employees bound by a non-compete clause.

Exploring the potential harm, or lack thereof, misses the point entirely. These clauses are designed to be anticompetitive and should be prohibited regardless of their effectiveness. When they are working effectively, non-competes give employees fewer options on the labor market, competitors are unable to compete for the best talent, and workers are often paid less than the market would otherwise demand. The mere fact that a competitor providing better wages, benefits, and work setting cannot compete for labor due to non-competes should be enough to declare them anticompetitive. Most notable at the workshop was the evidence presented about the negative influence non-compete clauses have on employees in states where they are unenforceable – demonstrating that federal intervention is necessary.

¹ 15 U.S.C. § 45.

The workshop on January 9, 2020, combined with the workshop held at the Department of Justice on September 23, 2019, as well as these public comments and submissions should provide all the evidence necessary to move forward with a rulemaking to end this exploitive and anticompetitive practice as soon as possible.

Sincerely,

A handwritten signature in black ink that reads "Lisa Gilbert". The signature is written in a cursive style with a large initial "L".

Lisa Gilbert
Vice President of Legislative Affairs
Public Citizen

A handwritten signature in blue ink that reads "Alex Harman". The signature is written in a cursive style with a large initial "A".

Alex Harman
Competition Policy Advocate
Public Citizen