April 19, 2023

Federal Trade Commission, Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

CC: Shannon Lane, FTC Office of Policy Planning

Re: Non-Compete Clause Rulemaking, Matter No. P201200

Dear Ms. Lane,

Public Citizen is a nonprofit consumer advocacy organization with 50 years of experience in advancing the public interest in federal policy. Founded in 1971, the organization has 500,000 members and supporters throughout the country. On behalf of our members and supporters, Public Citizen strongly supports the Federal Trade Commission (FTC) effort to ban non-compete clauses ("non-competes") in employment contracts.

Non-competes are not compatible with the public interest. We agree with the Commission's determination that non-compete clauses are an unfair method of competition and support that designation under Section 5 of the Federal Trade Commission Act. We urge the FTC to promulgate a robust final rule that includes: (1) a categorical ban with no exceptions for senior executives, and (2) a rescission and notice requirement that employers revoke existing non-competes and inform workers of the change.[1] The business community's arguments against the rule are insubstantial, superficial, and rooted in profit-seeking self-interest.

The use of non-compete clauses by employers across the economy does ongoing damage to the public interest. Consumers are best served by a labor market free of unnecessary restrictions on the power to change employers or start a new enterprise or leverage another job offer for improved work conditions, benefits or pay. Research shows that non-compete clauses serve to depress wages, limit worker mobility and increase market concentration.[2] More concentrated markets may, in some instances, drive up prices for consumers. Non-competes cause discrete harm to women and people of color[3] and compound the power imbalance between marginalized people and their employers.[4]

[1] NPRM proposed §910.2(b)(1).
[2] Alexander Colvin and Heidi Shierholz, Noncompete agreements**:** Ubiquitous, harmful to wages and to competition, and part of a growing trend of employers requiring workers to sign away their rights, Economic Policy Institute, Dec. 10, 2019. https://www.epi.org/publication/noncompete-agreements/
[3] Najah Farley, FAQ on Noncompete Agreements, National Employment Law Project, May 18, 2022. https://www.nelp.org/publication/faq-on-non-compete-agreements/#_ftnref23
[4] Ayesha Bell Hardaway, The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations, The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations, 39 Seattle U. L. Rev. 957, 959 (2016).

A strong national categorical ban with no exceptions is the only way to eradicate the use of non-competes and remedy "the adverse effects of non-compete clauses on competition in labor markets and product and service markets."[5] The alternatives outlined in the NPRM, including a legal presumption against non-competes and a different standard for senior executives, would be ineffective in addressing the problem.

A legal presumption against the use of non-competes would be useless in preventing the widespread use of the clauses. Non-senior executive workers are not in a practical position to litigate against the terms of their employment contract. The adoption of a rebuttable presumption against the clauses would not change the *status quo*. In most states, contract law already requires a court to evaluate the reasonableness of a non-compete during litigation over the enforcement of the clause. That analysis often requires an employer to demonstrate the need for the non-compete.[6] The FTC should adopt a categorical ban rather than instituting a legal presumption.

An exception to the non-competes ban for senior executives would harm consumers and will undermine the rule's effectiveness in rooting out unfair methods of competition in the economy. The NPRM solicits comments on its analysis that "Non-compete clauses for senior executives may also block potential entrants, or raise their costs, to a high degree, because such workers are likely to be in high demand by potential entrants. As a result, prohibiting non-compete clauses for senior executives may have relatively greater benefits for consumers than prohibiting non-compete clauses for other workers."[7]

We agree that prohibiting non-competes at the senior executive level would benefit consumers. Senior executive mobility is related to the formation of new firms and serves to keep markets competitive. Whether it would benefit consumers marginally more than a non-competes ban for other types of workers is an interesting question, but not one that should define the rule. Clarity and uniformity are paramount, especially considering that one exception may beget others. A senior executive exception may open the door for creative corporate lawyers to misclassify or intentionally define non-senior executives as such.

The NPRM makes the finding that because senior executives have more bargaining power, non-compete clauses are not coercive at the time of contracting and departure. That finding underscores that senior executives have the means and knowledge to negotiate for the various other less-restrictive means of protecting intangible investments (*e.g.* narrowly tailored non-disclosure agreements, fixed term contracts).[8] Sophisticated parties should be able to devise a precise contractual solution rather than use the blunt instrument that are non-compete clauses. Companies and senior executives do not need non-competes to accomplish their objectives – permitting the use of the clauses for a discrete group runs contrary to the goals of the rule. The public is best served by a clear categorical ban that applies to all workers.

Non-competes are especially pernicious because employers exploit worker's understandable ignorance of the clause's legality or enforceability. The mere existence of a non-compete or threat of legal action under the clause is enough to intimidate most workers, with the possible exception of senior executives. It's important that the rule not leave workers currently under non-competes in the dark. If the rule does

[5] NPRM at 682 https://www.federalregister.gov/d/2023-00414/p-682
[6] *Id.* at 284 https://www.federalregister.gov/d/2023-00414/p-284
[7] *Id.* at 453 https://www.federalregister.gov/d/2023-00414/p-453
[8] *Id.* at 574 https://www.federalregister.gov/d/2023-00414/p-574

not require employers to rescind and notify, millions of workers could very well continue to labor under the impression they are bound by a non-compete.

Employers argue that non-compete clauses are essential, especially for highly specialized workers, to protect sensitive business information and innovation.[9] This perspective reflects a desire for a convenient and less costly tool to retain workers, rather than an actual imperative for industry. Employers would rather coerce workers into staying at a job through contract terms, instead of improving pay or benefits. The appropriate response to situations where a company believes its trade secrets are divulged illegally is civil litigation. Businesses are understandably less enthusiastic about going to court, but cost aversion is not a legitimate justification for undermining competition and worker rights. The NPRM correctly identifies the various means outside of the use of non-competes through which an employer can protect valuable investments.[10]

The incredibly flexible and vague concept of innovation is a commonly used by industry to argue against regulatory interventions. In this case, it serves the opposite role, and makes clear for the need to ban these contract terms via regulatory engagement. Innovation, or the process of generating new ideas, is better served in an economy where workers are free to move between firms or start new businesses. Non-compete clauses hamper the development of novel products, business models and new modes of thinking by limiting worker's freedom. The NPRM correctly observes that "weight of the evidence indicates non-compete clauses decrease innovation."

We urge the FTC to promulgate a final rule that categorically bans the use of non-competes. The use of the clauses run contrary to the public interest. The alternatives presented in the NPRM – an exception for senior executives or a legal presumption against – would not achieve the goal of eliminating this unfair method of competition from the American economy. Additionally, the FTC must keep the notice and rescission requirements or risk undermining the entire rule.

Thank you for the opportunity to be a part of this critical effort and provide a comment on this important undertaking.

Sincerely,

Matt Kent
Competition Policy Advocate

[9] "Lifting noncompetes could also threaten business innovation, said Clark, by endangering 'secret-keeping' among former employees who freely transition to another company." https://www.cnbc.com/2023/01/12/us-chamber-of-commerce-threatens-to-sue-the-ftc-over-proposed-ban-on-noncompete-clauses.html

[10] See NPRM IV.B.2. Employers can devise narrowly tailored non-disclosure (confidentiality) agreements to protect business information as long as they are not so broad to serve as *de facto* no-competes.