OUTTEN & GOLDEN LLP

Advocates for Workplace Fairness

April 19, 2023

Submitted Electronically via Regulations.gov
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington D.C. 20580

Re: Comments on RIN 3084-AB 74: Non-Compete Clause Rulemaking

Dear FTC Commissioners:

Outten & Golden LLP submits these comments in response to the Federal Trade Commission's Notice of Proposed Rulemaking for the proposed Non-Compete Clause Rules (the "Proposed Rule").

Outten & Golden is a 60+ attorney law firm with offices in New York, Washington D.C, and California. Outten & Golden focuses exclusively on representing employees, executives, and partners in all areas of employment law. From combating worker exploitation and systemic discrimination in class action and impact litigation, to representing executives and professionals in contract negotiations, to protecting individuals' civil rights in the workplace, Outten & Golden is focused solely on the field of employment law. Through advocacy in the courts and legislatures, Outten & Golden supports and promotes policies and laws that advance workplace fairness and employee rights. Outten & Golden has a robust practice group that focuses on representing executives and professionals in contractual matters of all types, with particular expertise and experience in negotiating agreements and counseling employees - both domestically and internationally - on non-competes. In addition, Outten & Golden litigates non-competes and defends TROs and injunctions across the U.S on behalf of all types of employees: salespeople, software engineers, executives, financial services professionals, medical professionals, and many others.

Also, we have attached, as Appendix A, an anonymized story from a firm client that exemplifies how non-compete clauses can deeply impact an employee's professional life and personal life.

Outten & Golden writes in support of the Proposed Rule.

I. The Scope of the Proposed Rule Should Cover All Restrictive Covenants Between Employees and Employers that Have the Effect of Limiting Competition.

Even in the most contractarian jurisdictions, case law recognizes that non-compete provisions are not ordinary contractual provisions: they require additional judicial scrutiny to ensure they are reasonable and enforceable in light of the facts and circumstances.[1] This reflects the fundamental nature of non-competes: there are no "magic words" to render a non-compete enforceable; rather, the factual circumstances themselves dictate the impact that a contractual provision may have on an employee's ability to work. For this reason, some jurisdictions have banned non-competes by prohibiting all contractual "restraints on trade."[2]

Although the Proposed Rule does not go so far as to prohibit *all* such contractual restraints, it has the foresight and flexibility to recognize that contractual provisions can have the impact of a non-compete without using the term "non-compete" expressly.[3] Moreover, the Commission's comments recognize that a non-compete can be prohibitive no matter the method of enforcement.[4] We support the Proposed Rule in this respect, and we suggest that the Commission affirmatively state that certain commonplace contractual provisions (as addressed in this letter) be explicitly recognized as violative of the Proposed Rule. We further implore the Commission to extend the Proposed Rule to certain restrictions on competition that run concurrent with ongoing employment (commonly referred to as "garden leave"), which we anticipate will be the next frontier for unreasonable restrictive contractual terms.

A. The Proposed Rule Should Ban All Restrictive Covenants that Prohibit or Limit Competition, Regardless of the Remedy.

As a firm that has deep roots in New York, we are well-versed in the nuances of New York law, including its atypical approach to forfeiture-for-competition provisions. These provisions are contractual prohibitions on competition that are enforceable not through injunctive relief but instead through the employee's forfeiture of a monetary benefit. New York courts have held that contractual provisions that permit an employee to choose to compete – albeit for a hefty financial penalty – are not subject to the same judicial scrutiny as non-competes that are enforceable through

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[1] *See generally* Restatement (Second) of Contracts § 188.
[2] *See e.g.*, Cal Lab. Code. §§ 16600; N.D. Cent. Code § 9-08-06.
[3] *See* FTC Proposed Rule Section 910.1(b)(2).
[4] *See* FTC Notice of Proposed Rulemaking ("NPRM"), Part V (stating that non-compete clauses that require workers to pay damages in order compete against the employer would constitute a non-compete as defined under Section 910.1(b)(1)).

injunctive relief.[5] We believe that this approach is fundamentally flawed because a financial inducement to avoid competing with a former employer may be as serious a threat to the employee as injunctive relief.[6]

Forfeiture-for-competition clauses also stifle competition and innovation on a broader scale: while such forfeited compensation often is negotiated as part of an employee's sign-on package with a prospective new employer, a smaller entity or start-up (including a start-up founded by the employee) typically cannot shoulder that cost. Explicitly prohibiting forfeiture-for-competition clauses would align with decisions in several jurisdictions that have eschewed this doctrine because of its fundamental unfairness.[7]

For the same reasons, non-competes enforced through liquidated damages or an obligation to repay earned compensation also are detrimental and should be treated as non-compete provisions pursuant to Section 910(b)(1). These types of contractual provisions – common in the financial services industry where they are sometimes tied simply to departure for any reason and not for competition alone – have the same detrimental impacts on employee mobility as non-competes enforceable through other means.[8] We urge the Commission to adopt a Proposed Rule that explicitly recognizes that non-compete provisions that are enforceable through any legal mechanism, including through monetary damages alone, are banned.

B. The Proposed Rule Appropriately Applies to Contractual Provisions that Have the De Facto *Effect of Prohibiting or Limiting Competition.*

We have seen all types of contractual restrictions have the same detrimental impacts as direct non-competes. We support the Commission's functional test to determine whether a contractual clause has the effect of prohibiting or limiting competition.

We believe that this is consistent with approaches taken by multiple jurisdictions that have banned or limited the use of client non-solicitation provisions because of their anti-competitive effect.[9] We also agree with the Commission that overly broad non-disclosure provisions can likewise prevent an employee from seeking gainful employment and can therefore function as a non-

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[5] *See Kristt v. Whelan*, 164 N.Y.S.2d 239 (1st Dept. 1957), *aff'd without opinion*, 6 N.Y.2d 807 (1958).

[6] *See Ainslie v. Cantor Fitzgerald L.P.* 2023 WL 106924 (Del. Ch. Jan. 4, 2023) *20-25 (refusing to apply the employee-choice doctrine because it will have an *in terrorem* effect and operate as an unreasonable restraint on trade where the underlying contractual instruments would result in an employee forfeiture of sums that are "meaningful" to the employee).

[7] *See e.g.*, *Ainslie*, 2023 WL 106924; *Deming v. Nationwide Mut. Ins. Co.*, 905 A.2d 623, 634-38 (Conn. 2006); *Snarr v. Picker Corp.*, 504 N.E.2d 1168 (Ohio App. 1985).

[8] *See e.g.*, Sarah Butcher, *Credit Suisse's Clawbacks are Stopping Rivals Poaching People*, EFinancialCareers (Apr. 3, 2023) https://www.efinancialcareers.com/news/2023/04/credit-suisse-clawbacks-exits.

[9] *See e.g.*, Nev. Rev. Stat. § 613.195-200(2) (limiting contractual provisions that limit an employee's ability to provide services to a former employer's clients); 820 ILCS 90/ *et seq*. (limiting application of non-solicitation provisions); *Edwards v. Arthur Andersen, LLP*, 44 Cal 4th 937 (2008) (holding that a prohibition on soliciting a firm's clients constitutes an unlawful restraint on trade under California law).

compete. Finally, we urge the Commission to extend the *de facto* rule to contractual provisions that require employees to provide their current employer with notice of any future employment with a competitor or otherwise. Such contractual obligations have a chilling effect on employees who feel limited in accepting employment during any period during which they are under such obligation, even though a remedy for a breach of such provisions may not be recognizable.[10]

By creating a functional test that focuses on the *effect* of the contractual provision, the Commission strikes an appropriate balance that permits employers to use other contractual and legal tools to protect legitimate business interests without unduly burdening employees.[11]

C. The Proposed Rule Should Provide Guidance Regarding the Appropriate Use of "Garden Leave" Provisions.

Our experience suggests that, regardless of the Proposed Rule, employers will try to fashion restrictive covenants that impede an employee's ability to work for a competitor. We suspect that employers will begin by turning to "garden leave" provisions.[12] Indeed, we have already seen employers that have shifted from the use of lengthy non-compete provisions to the use of lengthy garden leave provisions. Although this is an improvement from unpaid restricted periods, garden leave periods are rarely a benefit to employees because the employees are precluded from seeking professionally enriching experiences or more remunerative work.

Like non-competes, garden leaves are detrimental to the labor market in that they stifle innovation and literally compensate individuals to *not* contribute to the broader economy. In addition, garden leave typically is compensated solely at the employee's base salary rate, not inclusive of incentive compensation.[13] Moreover, employers typically reserve the discretion whether to enforce garden leave periods and may unilaterally terminate the (paid) restricted period early without advance notice. This creates uncertainty for employees and their prospective employers. Although the

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[10] *See e.g., American Broadcasting Co. v. Wolf*, 52 N.Y.2d 394, 406 (1981) (holding that contractual obligations to inform or negotiate with an employer for future job opportunities constitute an implied post-employment non-compete); *Bridgewater Associates, LP v. Minicone et al.*, Am. Arb. Assoc. No. 01-17-0006-7329, Interim Award 7 (Harris & Mentlik, Jan. 24, 2020) (holding that failure to provide notice of new employment does not, alone, create any damage to the former employer).

[11] Management-side attorney and lobbyists for employer groups have frequently touted non-compete provisions as essential to protecting trade secrets and confidential information. This argument is a red herring. Employers have a varied toolbox to prevent the misappropriation of trade secrets and confidential information, including contractual non-disclosure provisions and the robust misappropriation of trade secrets laws on the federal and state level. Non-competes are a blunt instrument, whereas these contractual and statutory protections have been designed to protect against precisely the type of harm employers are railing against. The fact is that employers in 2023 have never been better suited to protect their trade secrets or proprietary information, thanks to advanced digital protections and an employer's ability to forensically monitor former employees' equipment, networks and systems.

[12] A "garden leave" provision is a period of time between the date on which a party has provided notice of intent to terminate an employment relationship and the final date of employment, during which employees are stripped of their duties and access to the employer's systems and premises. During this period, employees are told to stay home and "work in the garden" – and they may not work or perform services for any other entity (whether a competitor or not).

[13] In the financial services industry where many of our clients work, this can be particularly punitive because base compensation often is a fraction of an employee's total compensation.

Proposed Rule is limited to contractual terms that apply after the conclusion of the worker's employment with the employer,[14] we propose that this definition be expanded to include garden leave provisions that do not provide for an employee's total compensation and benefits during the garden leave period or that are terminable by the employer unilaterally and without notice (unless the employee is paid for the remainder of the leave period).

II. The Proposed Rule Appropriately Addresses Economic Harms through Retroactive Application and Rescission.

The Commission has identified several economic harms that result from the use and abuse of non-compete provisions. These economic harms do not cease on the effective date of the agreement; by their very nature, they extend beyond the point of contracting for years – and even decades – into the future. For that reason, a rule that would ban non-competes only on a going-forward basis would fail to address the ongoing economic hardships that existing non-competes impose: Employees who have already entered into non-competes would still be prevented from leaving their jobs. Entrants into the job market would still be precluded from positions filled by dissatisfied workers whose mobility is limited by non-competes. Innovation would continue to be stymied to the extent that would-be entrepreneurs remain subject to non-compete provisions.

Moreover, a rule that applies only on a going-forward basis would have two detrimental effects. First, it would create a perverse incentive for employers to enter into non-compete provisions with employees before the Proposed Rule's effective date. Second, it would create two classes of workers: those who are subject to non-compete provisions and those who are not. This would result in depressing employee mobility – and, as a result, earnings potential – for the more senior members of the labor market, with a disparate impact on our nation's older workers. While we already see hiring preferences for younger workers, we would undoubtedly see further increases in this conduct where employers view younger job candidates as being presumptively more mobile, given that they would not be subject to restrictive non-competes.

But retroactive application alone will not be enough, particularly without a private cause of action.[15] A change in enforceability is not self-enforcing: it requires the parties to each contract to understand the change and to conduct themselves in a manner consistent with that understanding.

Based on our firm's decades of experience as representatives of employees, we can confirm that many workers who are subject to unenforceable non-competes are not aware of their unenforceability.[16] Whether and to what extent a contractual provision is enforceable has become increasingly challenging for a layperson to understand, in particular because the patchwork of state

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[14] *See* FTC Proposed Rule Section 910.1(b)(1).
[15] Given the scope of non-compete use, we believe that the FTC's resources would be depleted quickly if it were to enforce each violation of this Proposed Rule.
[16] *See also* J.J. Prescott & Evan Starr, *Subjective Beliefs About Contract Enforceability* 2 (2022) (finding that "70% of employees with unenforceable non-competes mistakenly believe their non-competes are enforceable").

laws has become more complex and divergent over the past decade.[17] Most workers lack the means to seek legal counsel as to the enforceability of a non-compete and, if determined to be unenforceable, to mount a costly legal challenge to seek to have the non-compete declared unenforceable or to defend against an employer's lawsuit seeking to enforce such a restriction.[18] Moreover, setting aside the inherently deeper pockets that employers have, the money spent dollar-for-dollar on non-compete litigations are not equal between employees and employers: employers may deduct these costs as a business expense, but employees may not seek such a deduction. As a result, even unenforceable restrictions have a chilling effect on employees who are financially unable to seek legal counsel on enforceability, to risk enforcement of a non-compete, or to challenge the enforceability of a non-compete.

Further, our clients often have spent decades building a professional reputation that could be tarnished by the implication that they will renege on their promises, even if those promises were non-negotiable to begin with.[19] In our experience, employers that use non-competes are often those that are most likely to foster toxic or hostile work environments. When employee attrition is limited by contractual commitments, employers do not need to respond to the pressures of the labor market to improve working conditions. Employees with contractual non-competes lack an escape hatch.

Unenforceable non-competes have an even further reach. Not only do they deter a worker's conduct in seeking new employment, but they also chill a competitor's desire to extend offers of employment to workers who are bound by such restrictions. In our experience, most non-compete disputes are not litigated; instead, they are resolved through negotiation and settlement. Competitors seeking to recruit talent must choose between passing up the opportunity to hire a desirable job candidate or paying the cost of litigation or settlement in order to seek closure on a restriction, even when unenforceable.[20] In doing so, a prospective employer often must consider the broader view of maintaining amicable relations between other industry players. As a result, we have seen clients lose employment opportunities because a prospective employer does not want to "pick a fight" with the client's current or former employer – regardless of whether the non-compete has any chance of being held up in court. This pressure to create tacit arrangements between competitors is precisely the type of competition that the FTC has been tasked with preventing.

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[17] *See generally* NPRM, *supra* note 4, Part II.C.1 (outlining the landscape of state law governing non-competes, including recent legislative changes).
[18] *Id.* at 3 (noting that employees who believe their non-competes are unenforceable are still less likely to breach their terms, seemingly to avoid the specter of a lawsuit or risk the reputational harm associated with breaching a contract).
[19] *See* Harlan M. Blake, *Employee Agreements Not To Compete*, 73 Harv. L. Rev. 625, 682-83 (Feb. 1960) ("For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations… Thus, the mobility of untold numbers of employees is restricted by intimation of restrictions whose severity no court would sanction.").
[20] *See* NPRM, *supra* note 4, Part IV.A.1.a.ii.

In this regard, the Proposed Rule's rescission requirement, as set forth in Section 910.2(b), provides for an elegant and impactful solution. Every employee would be provided an individual, written notice that any restrictions are no longer in effect. This written rescission would make employees more aware of their rights and therefore would increase employee mobility within the labor market.[21] Further, the ability to provide a prospective employer with a written rescission of a non-compete provision would give job-seekers the ability to assuage any concerns of litigation risk held by a prospective employer.

III. The Proposed Rule Should Address Choice of Law Issues by Making Any Non-Compete that Violates the Rule Unenforceable Against Individuals Working in the United States.

As indicated above, the current interplay of different state laws on non-competes has made it nearly impossible for many workers with such clauses to even understand whether their non-compete is likely enforceable. Moreover, we have seen employers take advantage of choice-of-law clauses to choose a state law that is more likely to enforce a non-compete than the state where the employee actually works. Disputes regarding the appropriate choice-of-law have become a proxy for disputes regarding enforceability.[22] Even where explicit statutory protections have been enacted to prevent such an abuse of choice-of-law provisions, the exceptions often swallow the rule. For example, California's statutory provision requiring employment terms and conditions to be subject to California law has an exception where employees are represented by counsel – an exception that has been used to enforce contractual provisions that would otherwise violate California law.[23] An exception like this one influences employees to forego legal representation in negotiating their employment agreements so as to avoid a non-compete, which has broader detrimental effects on their rights: as representatives of employees, our experience is that employees have far less traction to change any terms of an employment agreement – from the "boilerplate" provisions to more substantive provisions like a non-compete – when they are not represented by skilled and capable counsel. The use of a choice-of-law provision to force an employee to be subject to an onerous non-compete provision is particularly common in the context of partnership or LLC agreements and equity plans that govern an employee's equity-based compensation, sometimes enforceable by injunctive relief, sometimes by forfeiture, and often by both.

We urge the Commission to explicitly provide that choice-of-law provisions cannot provide an exception to the Proposed Rule for employers employing workers in the United States. To date, we have already seen an increase in U.S.-based employers making use of off-shore corporate structures to house employees' equity-based compensation and including restrictive covenants in

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[21] Prescott & Starr, *supra* note 16, 26 (concluding that information campaigns, such as individualized notice to workers, regarding the unenforceability of a non-compete will likely improve an employee's ability to take a competitive job).

[22] *See e.g., NuVasive Inc. v. Miles*, C.A. No. 2017-0720-SG (Del. Chan. Ct. Sep. 28, 2029); *Ascension Ins. Holdings, LLC v. Underwood*, C.A. No. 9897-VCG (Del. Chan. Ct. Jan. 28, 2015).

[23] *See e.g., Jefferies, LLC v. Geggenheimer*, No. 19 Civ. 3147 (S.D.N.Y. June 17, 2020).

those documents. The Proposed Rule should clearly provide that such provisions in any such agreements will not be enforceable within the U.S., and that employers may not enforce foreign law clauses against U.S.-based workers. This would be consistent with the principle that uniform standards should create certainty for all parties - particularly for employees who currently need to retain counsel in multiple jurisdictions to understand whether and to what extent restrictions are enforceable.

IV. The Proposed Rule Should Have a Clear Sale-of-Business Exception for a *Bona Fide* Corporate Transaction.

The Commission's Proposed Rule's single exception, as outlined in Section 910.3, as applicable to the sale of an ownership interest by a substantial owner, substantial member or substantial partner should be further limited to apply only to those corporate transactions that constitute a *bona fide* transfer of assets or ownership interests to an independent third party. As drafted, the Proposed Rule would permit a non-compete with a substantial owner, member or partner in the context of a repurchase right or a mandatory stock redemption program that is triggered upon the termination of the service relationship. These terms are particularly common in the context of private companies' equity incentive plans, which have become increasingly common terms and conditions of employment in light of the increase of venture capital-backed employers. Although the threshold ownership percentage of 25% does require that the person hold a truly substantial ownership in the selling entity,[24] we fear that employers will use wholly-owned subsidiary entities to create an ownership structure that might meet this threshold percentage on paper, but that is considerably less than the ownership in the parent or holding entity where the actual assets of the company lie.[25] We believe that limiting Section 910.3 to a *bona fide* corporate transaction with an independent third party would prevent employers from creating a major loophole out of this exception.

In addition, we propose that the Commission further clarify that any non-compete permitted under the exception outlined in Section 910.3 must run from the consummation of the transaction and not the termination of a worker's service relationship (*e.g.*, employment or contracting). This would prevent companies from using this exception as an end-run around the ban on post-employment non-competes. Non-competes in the context of a corporate transaction are intended to provide the seller the benefit of the goodwill it just purchased. To permit a non-compete to run post-employment rather than post-transaction does not serve to protect that legitimate business

[24] We support the use of a clear threshold percentage rather than a vague definition that would require adjudication and interpretation by courts. As previously noted, this makes the law more accessible and understandable to employees who often are not represented by their own counsel.

[25] To prevent employers from generally circumventing the total ban on non-competes through contracts with parents or affiliated entities, we also support a definition of "Employer" that encompasses agreements between a "person" as such term is defined in 15 U.S.C. 57b-1(a)(6) or any "person" that controls, is controlled by or is under common control of the hiring or contracting entity.

interest, [26] and it has the harmful economic effects outlined by the Commission with respect to the labor market. [27]

V. The FTC's Suggested Alternatives to the Proposed Rule would Render it Less Effective.

A. The Proposed Rule Should Not Include A Carve-Out For Senior Executives.

The Commission seeks comment specifically on whether it should adopt different standards for non-compete clauses with senior executives. In our experience, a carve-out for senior executives would circumvent the true objective of the rule in three ways: (1) thwarting the contributions and innovation that high-level executives, highly-skilled and highly-compensated people, bring to the workforce; (2) exacerbating the economic and professional harms inflicted upon historically marginalized communities, in particular women and people of color; and (3) increasing the inevitability of misclassification.

First, as the Commission notes, non-compete clauses burden the ability of a worker to quit by forcing workers to either remain in their current job or take an action – such as leaving the workforce for a period of time or taking a job in a different field – that would likely affect their livelihood. This reality is still true for highly-paid or highly-skilled workers, including senior executives. In our experience, this category of worker has spent years cultivating a profession, including their reputation; and an absence from their industry can have a serious negative impact on their professional trajectory, as well as the innovative contributions and impact they provide to the world. This is especially true in fast-paced, innovative sectors like technology, medicine, finance, and commerce. Furthermore, we find that our clients have little interest in "sitting out" for extended periods of time. In short, they want to work, to innovate, and to contribute to the broader economy and society. Forcing executives to refrain from contributing to the economy simply because they may be highly compensated has no legitimate justification other than inhibiting the mobility of the most highly-compensated individuals.

Second, the Commission assumes that non-compete clauses for workers other than senior executives are exploitative and coercive because they take advantage of unequal bargaining power between employers and workers – which is true. The Commission goes on to assume that many senior executives negotiate their non-compete clauses with the assistance of expert counsel – which often is true. In our experience, however, historically marginalized groups, including women and people of color, are still subjected to unequal bargaining at the highest levels of an organization; furthermore, even if they negotiate, they often do it without counsel and are subjected to discriminatory pay and leveling practices. Finally, even executives who have counsel can be

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[26] *Compare Fillpont, LLC v. Maas*, 208 Ca. App. 4th 1170, 1182-83 (2012); *Reed Mill & Lumber Co., Inc. v. Jensen*, 165 P.3d 733, 737-38 (Colo. Ct. App. 2006) *with Arthur J. Gallagher & Co. v. Peteree*, 2022 WL 1241232 (E.D. Cal. Apr. 27, 2022); *Newmark Ptrs. v. Hunt*, No. 2021-07065 (N.Y. App. Div., Dec. 16, 2021).
[27] *See* NPRM, *supra* note 4, Part II.B.

and are subject to coercive pressures to accept restrictions as a condition of getting (or keeping) a job.

Third, implementing categories of highly-paid or highly-skilled workers to whom the ban should not apply creates the likelihood that employers will misclassify some of their employees in an attempt to circumvent the ban.[28]

Ultimately, this type of carve-out has the potential to create a great deal of harm.

B. The Proposed Rule Should Not Include An Exception For An Income Threshold.

The Proposed Rules includes potential discrete alternatives to banning almost all non-compete clauses as it relates to earnings thresholds, including: (1) a categorical ban on non-compete agreements for employees earning below a wage threshold (*e.g.*, $100,000 per year) with no changes to the law of non-compete agreements for employees earning above that threshold; (2) a categorial ban on non-compete agreements for employees earning below a wage threshold with a rebuttable presumption that non-compete agreements are unlawful for employees earning above that threshold; (3) a rebuttable presumption of unlawfulness on non-compete clauses for all workers; and (4) a rebuttal presumption that non-compete agreements are unlawful for employees earning below an earnings threshold with no changes to the law of non-compete agreements for employees earning above that threshold.

For the reasons described throughout our comments, and in line with the Proposed Rule's objective, applying the rule uniformly will advance the benefits to a greater degree than differentiating among workers, including across earnings thresholds. For employees earning $100,000 or less, we have seen that non-compete clauses block workers from switching to jobs in which they would be better paid and more productive, especially if the worker knows that their advancement comes with restrictions with far-reaching implications on their careers. For lower-earning workers, non-competes are detrimental to their ability to survive and achieve a basic quality of life. Unfortunately, these workers are often without the means to fight these overly burdensome non-competes or to retain counsel to negotiate the terms. On the other end of the spectrum, non-competes levied against higher-earning workers can have negative repercussions, as described in Part V(A) of our comments. In short, non-competes have detrimental effects on workers, on competition, and on the economy - no matter the worker's compensation level.

Furthermore, an earnings threshold on higher earners has the potential to undercut one of the primary positive impacts expected by the Proposed Rule. As the Commission acknowledges, studies indicate that a nationwide ban on non-compete clauses stands to increase average earnings

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[28] As noted throughout our comments, employees have limited access to legal counsel. Employees are frequently misclassified as "executives" to evade wage-and-hour obligations - but also, in jurisdictions where it is legally significant, to enforce non-compete provisions. *See e.g.*, *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 843 (Colo App. 2007.

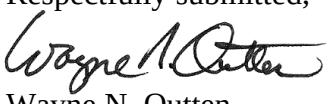
by 3.3 - 4%.[29] An earnings threshold could force some workers to choose between earning higher compensation or maintaining their workplace mobility. An earnings-based threshold also could create geographic disparities, given the broad range of average incomes and cost of living in different parts of the country. Finally, an earnings-based threshold would necessarily require cost-of-living indexing, which can result in the actual threshold becoming subject to frequent change. As a result, the Proposed Rule would become more difficult to understand and to implement, including determining whether the threshold should apply at the time of contracting or at the time of separation.[30]

C. A Rebuttable Presumption Would Fail to Address the Harms Identified by the Commission.

The Commission's Notice of Proposed Rulemaking requests comments on a potential alternative in which a rebuttable presumption of enforceability would be used in lieu of a categorical ban. We strongly oppose a rule that would include such a presumption. For the reasons described in Part III of our comments, a rule that would require employees to know both the contours of the law and when it is being overstepped has a chilling effect on both an employee's desire and ability to consider new job prospects and on a prospective employer's desire and ability to hire a restricted candidate. We need look no further than existing state laws to see that statutes with a rebuttable presumption of enforceability can still have a detrimental impact on employee mobility and, consequently, on labor markets. Florida, which has a statute that sets forth presumptive enforceability standards,[31] is considered the state with the highest enforceability of non-competes and, consequently, a more depressed labor market in terms of wages for even the most senior employees.[32]

For the reasons set forth above, we urge the Commission to ban non-competes completely, except for a narrow sale-of-business carveout.

Respectfully submitted,



Wayne N. Outten
Chair

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[29] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381; Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan, & Evan Starr, *Locked In? The Enforceability of Non-Compete Clauses and the Careers of High-Tech Workers*, 57 J. Hum. Res. S349, S349 (2022).

[30] To the extent the Commission adopts a rule that contains carveouts allowing for non-competes to be enforceable against workers, the Proposed Rule should require that workers are adequately compensated for any period they are subject to a non-compete, equivalent to the worker's total compensation and benefits, not just their base salary or a portion thereof.

[31] F.S.A. § 542.335.

[32] *See* NPRM, *supra* note 4, Part VII.B.1.a.iv.

Appendix A

A. Overview

I am writing in support of the proposed FTC rule prohibiting non-compete agreements in employment. A broad, bright-line, no-exceptions prohibition is necessary to restore competitiveness and worker mobility in America.

1. I am a scientist with several decades of experience in research and data science. I have experienced first-hand the detrimental effects of non-compete restrictions, and I am aware of numerous other cases when restrictive employment agreements have prevented high-caliber professionals from realizing their full potential and have deprived the American economy of the full benefits of their knowledge and ability.
2. Non-compete restrictions, especially when coupled with forced arbitration, create a modern functional equivalent of serfdom, even if sometimes a well-paid one. A mere threat of a legal proceeding is often enough to terrorize the employee into staying put and to prevent other potential employers from extending job offers. That's why any regime that uses a fact-specific inquiry or a balancing test will not succeed. For the employer, going to court is simply one more aspect of its day-to-day business; for an individual, however, it becomes a major disruption to his or her life. Even if the employee were to prevail eventually, the stress and the legal fees make the whole effort a Pyrrhic victory.
3. Even worse, the current tax law tilts the playing field in favor employers. If both an employer and employee spent the equal amount of $100,000 on legal fees, the employer can deduct these fees as a business expense, resulting in the net after-tax cost that could be as little as $50,000. The employee cannot get this tax advantage and must pay the full amount from his after-tax earnings.
4. I am aware that certain employers, especially in states where very long non-competes are considered "unenforceable," are using compulsory deferred compensation plans to get around the restrictions. A significant part of the employee's compensation is deferred for several years and is forfeited if the employee leaves (voluntarily or involuntarily). If the employee signs a non-competition agreement, however, some or all of the deferred compensation may be paid out during or at the end of the noncompete period. While the employee does not have to sign, there is nothing truly "voluntary" about such noncompetes. Therefore, the Commission should prohibit the involuntary deferral of compensation where the employee forfeits the money if he accepts a job with a competitor. The Commission should consider that an employer may arrange for such a non-compete to be signed during the first few days after the employee is no longer employed - to buttress the false impression of "voluntary choice."
5. Employers often justify noncompetes by their perceived need to protect trade secrets and confidential information, which they seek to define as broadly as possible. Yet, sharing

true company secrets with employees is never done out of mere benevolence. Employers do it because they expect to make more profits that way. Therefore, it is the employers who should bear the attendant costs of protecting their secrets. Noncompetes shift the costs to the individual employees instead, while the benefit continues to accrue primarily to the employer. In my experience, the companies with the best training and education for employees have been the ones that did not have noncompetes, not the other way around.

6. Setting aside the technicalities, the Commission's argument that the free-functioning labor market provides the best match of employees to jobs is the most important one. How many remain in subpar jobs that they cannot leave? How much harder is it to be promoted if the only option you have is to stay at one company? I was looking for a medical specialist and inquired about a particular doctor working at a respected hospital. Someone who knew him told me this: "He is one of the best, but he is subject to a non-compete and he is currently staying in his job only because if that. Avoid him for the time being, he is unhappy."
7. How can we as a society allow such situations to continue? The FTC proposal should be approved.

B. Specific Questions of the FTC and Individual Commissioners

In this second part, I will address the specific questions on which the FTC and individual Commissioners requested comments.

1. The Commission is correct that noncompete agreements are a method of competition - and an unfair one at that. They make it much more difficult, expensive, and dangerous to start a new company. They give an unfair advantage to big well-established incumbents with accumulated litigation experience and large legal departments. They are sometimes used also to restrict investments in competing startups, in addition to restricting employment.
2. The Commission asked for comments on alternative standards, such as a possible "rebuttable presumption" that the noncompete agreements are unlawful. Such a limited approach is a bad idea for two reasons. First, the main way these agreements work is by bullying employees and other potential employers into submission. Once a lawsuit begins, even winning it may leave the employee worse off. Therefore, there should be a simple, bright-line rule that does not call for any fact-specific inquiries. These inquiries result in lengthy discovery processes and benefit primarily the lawyers and the arbitrators who get to charge large fees. Second, by delineating the circumstances in which the Commission does not wish to regulate, it might actually cause an increase in the use of noncompetes under those circumstances. While today some employers may be reluctant to try noncompetes, given the stench associated with them, the Commission - by implicitly blessing them in some cases - may normalize, and therefore increase, their use. That would be very unfortunate - and for those working in these fields, devastating. The Commission's proposed categorical prohibition is unquestionably the right solution.
3. The Commission also asked about differentiated approaches, based on wage thresholds or, possibly, occupation. These approaches should be avoided for the same reason. There is

simply no set of circumstances that justify effectively indenturing employees to employers. In our age of extreme specialization, many learned professionals, technical specialists, and scientists work in narrow fields where they have become experts. If they are not allowed to apply to a competitor, they become virtually unemployable. The Commission's main proposal is unquestionably the right solution.

4. The Commission sought comments about the applicability of its findings to senior executives. In my experience, which I will describe in more detail later, noncompetes are both exploitative and coercive even for such executives. The simple reality is that the entity almost always has more resources than most of its executives, and a lawsuit would have a bigger impact on the executive's life than on the business of the entity. In addition, the company enjoys a tax advantage in these fights, being able to deduct its legal fees from income, while the executive cannot. And, if the company is litigious, it gains a lot of experience while litigating repeatedly, especially in secret arbitrations, which creates information asymmetry in favor of the company. In fact, the recent trend of wide adoption of forced secret arbitration by companies is yet another important reason why regulation is so needed. The blanket prohibition of noncompetes is the right solution.
5. The Commission asked about a disclosure requirement or a requirement to file reports. I fail to see what this would achieve in practice. By now, the extent of the problem is well understood, the battle lines are drawn, and more data on the prevalence of this practice will change little.
6. Commissioner Wilson in her dissent has raised several questions, some of which I have already addressed above. I disagree with the Commissioner's view that noncompetes can be non-exploitative or non-coercive. I have yet to meet a person who, having been subject to a noncompete, told me it was a fair bargain. The Commissioner stated that there could be no harm unless the noncompete was enforced. Respectfully, real life is very different. It is the threat, not the enforcement itself, that does the job most often. And the uncertainty in the law contributes a great deal to that. Consider, for example, a simple question: is the noncompete enforceable when the employer fires the employee without cause? Basic equity and common sense say it should not be. What is the situation in New York, a very important state where a lot of contracts are made? Despite large sums of money spent litigating many cases over the decades, the answer remains unclear, with most legal commentaries saying only that "cases are split." This engenders great uncertainty for employees, who risk being sued by their former employers even after being terminated without cause. Following Justice Brandeis, Commissioner Wilson has spoken about states being "laboratories of democracy." But in this case, employees are the laboratory rats, while the companies try relentlessly to sway the courts into enforcing noncompetes in more and more circumstances. For this reason, many companies put terms into their noncompete agreements that are overbroad and probably unenforceable. Unenforceable here and now may become enforceable in other jurisdictions and in the future. The Commission needs to put the end to wasteful and protracted litigation and ban the noncompetes.

7. Commissioner Wilson also asked for comment on whether noncompetes negatively affect competitive conditions. They do. Creating a start-up becomes much harder, because you must focus on threatened or actual litigation, instead of focusing on building the business. And some employers prohibit their employees from investing in competing startups even as passive investors (even through funds managed by other companies). In some industries, entire segments have adopted the noncompete requirement as a wide de-facto standard. Thus, even if I leave my current workplace and then sit out the noncompete period by doing nothing, my new employer will have another noncompete ready for me. Over the past twenty years, binding employees to noncompetes has become a focal point that dictates the default employment terms in financial, technical, and knowledge-intensive industries. If I start a company in a field where every of my competitors binds their talent to noncompetes, I would be a fool to not do the same. By prohibiting this practice, the Commission would create a new focal point (no noncompetes), which is more efficient and better for the economy as a whole, is morally superior, and is more competitive.
8. Commissioner Wilson also quotes a paper arguing that more broker misconduct occurs in the financial industry when noncompetes were suspended. I have not seen many cases of broker misconduct personally, but I would like to point out the following: many cases of misconduct are outed by whistleblowers, whatever the industry. And as is well-known, the whistleblower typically must leave the employing firm, as the laws against retaliation simply do not work well. Now, if a prospective whistleblower is bound by a noncompete, he will think longer and harder about reporting misconduct, given the inability or limited ability to find a new job in the field. And in many cases, the potential whistleblower will keep quiet, because his current employer is the only game in town when a noncompete is in place. That alone justifies banning the practice. And yes, if employees are free to leave, they probably will report more misconduct, so it would look like there was an increase in misconduct.
9. One may argue that, if you are unhappy with your current employer, you just comply with the agreement - look for a job after one or two years (or whatever the term is). Leaving aside the question of how to pay the bills and how to get the health insurance in the meantime (COBRA continuation covers only 18 months at best), it is a reality of recruiting in America that it is so much harder to find a job unless you already have one. A person out of work is viewed by many as “damaged goods,” and his or her resume is more likely to go straight to the wastebasket.
10. Commissioners Slaughter and Bedoya requested a description of lived experiences. I will share mine, but without naming names or being too specific. I am a highly paid specialist. I have several decades of experience in the field and have seen several very different work environments. When I joined my current employer, I was told that a noncompete agreement was necessary because the company did not use deferred compensation arrangements to retain employees. I asked for assurances that, if I complied with a one-year provision, I could go to any competitor and I was told yes, that would be no problem.

Now things have changed. My employer now defers a significant portion of our compensation, which we forfeit unless we sign a very long noncompete when we leave. Employees are told that they will be sued if they go to work for any other company in the industry. In addition, the company imposes a sweeping non-disparagement clause that prohibits criticizing not only the company, but all other activities and businesses of its directors, officers, and managers; and the company requires any and all disputes to be resolved through secret restrictive arbitration. Not surprisingly, it is very hard and dangerous to leave and the possibilities for promotion are quite limited.

How had all this become possible? After the tech collapse of the early 2000's, the employer sent us a new employment agreement and demanded that we immediately sign it, on the pain of immediate firing. That shows how a noncompete can be used to boil the proverbial frog. Several people were fired for not signing, and then the employer tried to block their new employment - to "teach the lesson to the rest of us." Because I was already bound by a noncompete, I signed. The coercion worked. Later, when the employer imposed an even more abusive employment agreement with the non-disparagement clause, I considered simply refusing to sign it. The company threatened to fire me and possibly to sue me if I found another job within my field. As a result of these threats a member of my family had a heart crisis, and I eventually signed the new agreement. This shows how the noncompetes destroy much more than earnings. Because our jobs or our businesses are such important parts of our lives they affect our families, our health and our dignity.

There are several lessons from this. First, an employment contract, like all contracts, cannot foresee all future circumstances. In employment, your ability to leave your current job is the important safety valve that allows you to get better terms, to be promoted - at another place if not the current one - or simply to avoid dealing with a bad boss or a boss that you just do not get along with. With noncompetes in place this is very hard, if not impossible. The tensions simmer and the abuse intensifies – and the employee is stuck, invariably causing substantial emotional (as well as financial) distress for the employee and the employee's family. Employees are unable to negotiate employment terms that would address all such situations ahead of time.

Second, the litigation and intimidation opportunities that noncompetes open up for companies facilitates their bad behavior. None of this would be possible in a company where people could simply leave and go to another place. Commissioner Wilson wants to know about the costs and benefits; but how do you measure the cost of lives ruined, health destroyed, and dignity shattered? When I joined my employer, forced arbitration was not yet the norm, and I did not anticipate the immense rise in the power of companies over workers that has occurred over the past two decades. These changes alone justify the need for regulation. At its best, good regulation reduces transaction costs by bringing certainty and uniform standards. Now is the time to reinvigorate the labor markets - especially for talented executives and professionals - by banning that the serfdom that is created by noncompetes.