Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

March 20, 2023

Re: Comments of FTC Alumni
Non-Compete Clause Rulemaking, 16 CFR Part 910, RIN 3084-AB74

Dear Chair Khan and Commissioners Bedoya, Slaughter, and Wilson,

As alumni of the Federal Trade Commission, we are providing these comments in response to the agency's proposed Non-Compete Clause Rule. As we explained in a letter dated September 20, 2022 (attached), we have devoted significant portions of our careers to protecting consumers and competition and we continue to care deeply about the agency and its mission. Moreover, many of us agree that non-compete clauses can unreasonably limit competition, depending on factors such as the clause's scope and duration. We applaud the FTC for examining this issue and offer no comments on the rule's merits.

Instead, we write to express a number of concerns with the rulemaking process and with the rule's potential impact on the FTC's ability to fulfill its mission:

- *First*, as compared to prior rulemakings, the FTC lacks a firm factual foundation for this rule. The FTC has brought only a handful of enforcement actions involving non-competes, all very recent, and the empirical literature provides only mixed support for the rule.
- *Second*, the rule rests on a very thin legal basis. The FTC has not attempted a competition rulemaking in decades, and the courts are limiting the ability of administrative agencies to exercise authority without a clear basis in statutory language.
- *Third*, this proposal could imperil the FTC's future. In the past, Congress has responded to overly aggressive rulemaking by limiting the FTC's authority. This rulemaking could easily lead to a diminished FTC that is less able to protect consumers in the future.
- *Fourth*, if promulgated, this rule could swallow the FTC's enforcement resources. As the agency acknowledges, employers likely would respond with contracts that attempt to circumvent the rule. This could, and likely would, draw the FTC into an endless stream of litigation around the country about the rule's scope.
- *Fifth*, the proposal would transform the States from allies into adversaries. Forty-seven States currently permit non-competes. By overriding all these States' laws, the FTC would cause many of them to litigate and resist the rule, even though the FTC's effectiveness depends in part on the States' cooperation and resources.

Instead of promulgating a rule of questionable legality, the FTC should combat unreasonable non-competes through its traditional tools of case-by-case litigation, competition advocacy, and even informal guidance. These tools all fall squarely within the FTC's statutory authority and competence.

I. The FTC Lacks a Sufficient Factual Foundation for this Rule

In our prior letter, we explained how the FTC has undertaken successful rulemakings in the past:

> "Beginning with the Pay-Per-Call rulemaking in the 1990s, the Commission first used a case-by-case approach to build a record demonstrating industry or technology-specific law violations and harms to consumers, and *then* took this record to Congress to support a request for specific statutory authority pursuant to Section 553 of the Administrative Procedure Act. This approach resulted in such successful rulemaking efforts as the 900 Pay-Per-Call, Telemarketing Sales, Do- Not-Call, and CANSPAM rules."

Unlike these prior rules, however, the proposed Non-Compete Clause Rule lacks a firm factual foundation. With only a handful of enforcement actions, all disclosed the day before the Notice of Proposed Rulemaking (NPRM) issued, the FTC has not yet built a sufficient record demonstrating harms to consumers. Moreover, the FTC has not yet shared even this limited record with Congress or requested specific statutory authority. For prior rules, in contrast, the agency built an enforcement record over years, not weeks, and had regular dialogue with Capitol Hill prior to issuing the NPRMs.

Lacking this strong enforcement history, the existing rulemaking record fails to provide adequate support for the rule. The NPRM ultimately rests on the academic literature, but those studies show mixed results.[1] To be sure, some studies conclude that non-competes can lower wages, and raise prices in health care markets. As the NPRM itself notes, however, "There is evidence noncompete clauses increase employee training and capital investment." There are also studies concluding that non-competes increase hiring, compensation, and innovation as measured by patent filings. Similarly, the NPRM repeatedly acknowledges studies finding that certain non-competes, such as for senior executives, may ultimately prove pro-competitive, yet the agency still proposes to ban them.

Finally, at times, the NPRM appears internally inconsistent. At one point, the NPRM claims that the rule would reduce health care spending by $148 billion, but at another, it claims that the rule would increase workers' earnings by nearly $300 billion per year. How can the rule both raise the price of labor by hundreds of billions of dollars yet simultaneously lower prices for consumers by a significant amount?

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[1] In 2020, the FTC hosted a forum on "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues." See https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf, 117-216. According to the testifying economists, many studies find that non-competes can lower wages, but other studies find that "when workers are provided with non-competes up front, they appear to have higher earnings," and that "in some contexts, there's evidence that they might systematically increase earnings." In terms of training, studies find that "workers do receive more training [because of non-competes]," and that "firms can basically be incentivized to invest because they're not scared that their employee is going to go and join a competitor." On balance, one economist concluded that, "we're still far from reaching a scientific standard of concluding that non-compete agreements are bad for overall welfare." *See also* John McAdams, *Non-Compete Agreements: A Review of the Literature*, FTC – Bureau of Economics Research Paper (2019), at https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=3513639.

Given this academic ambiguity, the FTC has an even greater responsibility to develop an enforcement record, over time, to evaluate non-competes in court. A robust litigation record, evaluating non-competes based on their impact on competition, would go a long way in placing a proposed rule on firmer footing. Based on prior rulemakings, however, the FTC should withdraw this proposed rulemaking until it has laid an adequate foundation.

II. The Rule Rests on a Very Thin Legal Foundation

There is an ongoing debate about the FTC's legal authority to issue a competition rulemaking, particularly one as sweeping as this, in light of the text of the FTC Act and the Magnuson Moss Act, as well as judicial decisions that implicate the major questions doctrine, non-delegation doctrine, and principles of federalism. In this comment, we do not offer any views on whether the FTC ultimately has the legal authority to issue the rule.

Instead, we note the indisputable point that the FTC lacks a *firm* legal basis for this rule, particularly given recent court cases. As we explained in our prior letter,

> "In recent decisions, the courts have limited the ability of administrative agencies to exercise authority without a clear basis in statutory language. For instance, in *AMG Capital Management LLC v. FTC*, the Supreme Court unanimously held that the FTC lacks statutory authority to seek equitable monetary relief in federal court under Section 13(b) of the FTC Act. Similarly, in *West Virginia v. Environmental Protection Agency*, the Supreme Court, invoking the "major questions doctrine," held that the Clean Air Act did not grant the EPA authority to devise carbon emission caps. Finally, in *Jarkesy v. Securities and Exchange Commission*, the Fifth Circuit held that Congress unconstitutionally delegated legislative power to another multimember agency."

Accordingly, the FTC should stand down on this rulemaking. Again, from our prior letter:

> "Against this backdrop, the FTC should ensure that its actions have a firm basis in both the statutory text and past practice. The FTC should *not* base a significant action, such as a rulemaking, on a thin statutory reed that lacks a consistent history of use. Any overreaching activities, not clearly grounded in statute and precedent, could damage long-term support for the agency and, at a minimum, could distract from the agency's core mission of protecting consumers. Already, various courts and commentators have called into question the ongoing validity of *Humphrey's Executor v. United States*, which upheld the FTC's design in part due to its nonpartisan nature. *Axon v. FTC*, currently pending in the Supreme Court, raises some of these same issues."

The FTC has not attempted a competition rulemaking since the early 1970s, across multiple commissioners, chairs, and presidential administrations of both parties. As a result, this rulemaking unfortunately rests on "a thin statutory reed that lacks a consistent history of use."

III. The Rule Could Imperil the FTC's Future

For these reasons, this rulemaking could imperil the FTC's ability to fulfill its mission. As in *AMG*, the courts have shown a willingness to constrain an agency that exceeds its statutory authority. Congress has done so as well. As we explained,

> "Congress itself could revisit the agency's ongoing authority. In the 1980s, in response to aggressive rulemakings that led some to deem the FTC the "national nanny," Congress cabined the FTC's discretion. Today, Congress could easily respond to agency overreach by reducing the FTC's funding, limiting its functions, or even dismembering the agency entirely. … In the worst case, with ongoing scrutiny of administrative agencies, departure from these norms could imperil long-term support for the agency itself."

In recent congresses, members have introduced bills to regulate non-competes – and other bills to strip the FTC of much of its authority. Given this backdrop, the FTC should allow elected officials to take the lead in regulating non-competes.

IV. The Rule Could Swallow the FTC's Enforcement Resources

If the rule goes into effect, it could swallow the FTC's enforcement resources. The NPRM cites an estimate that non-competes cover one in five American workers, roughly thirty million people. The NPRM also recognizes that employers would respond to a rule through other contractual provisions that attempt to protect their interests, including their investments in training and intellectual property. Employers could try any number of end-arounds, including deferred compensation agreements, training repayment provisions, liquidated damages clauses, aggressive non-solicitation clauses, and many others.

The result will be an avalanche of litigation to determine whether such provisions qualify as "non-compete clauses" under the rule. Although some employers may abandon the effort entirely, the FTC is likely to have to litigate the rule's scope in many, many cases all around the country – perhaps hundreds of them. As of now, the FTC simply lacks the capacity to handle this much litigation on its own. Plus, as explained below, the FTC is unlikely to have the ability to draw upon the resources of the States to help it enforce the rule.

V. The Rule Could Transform the States from Allies into Adversaries

The rule would transform the States from allies into adversaries, perhaps permanently damaging the States' willingness to cooperate with the FTC on law enforcement matters. Throughout American history, non-compete clauses have been treated primarily as an issue of state contract law. Forty-seven States, or 94% of them, currently permit non-competes in some fashion. In recent years, many States have restricted non-compete clauses to prevent abuses, to define the circumstances in which they will or will not enforce non-competes, and to ensure procedural protections.

If the FTC overrides all these States' laws, many of them likely will challenge the rule. Even if the FTC prevails, the States are unlikely to devote resources to helping enforce a rule with which

they disagree. Moreover, knowing that the FTC can overturn state law on a whim, the rule could take a toll on the States' willingness to cooperate with the FTC on other enforcement matters.

VI. The FTC Should Combat Unreasonable Non-competes through Traditional Tools

Instead of promulgating a rule of dubious legality that rests on a diaphanous factual record, the FTC should combat unreasonable non-competes through its traditional tools. As our prior letter explains,

> "Rather than sail into unchartered legal waters, the FTC should embrace its tried-and-true methods of fulfilling its mission. Most obviously, the agency should develop meritorious cases, grounded in empirical economics and demonstrable harm to consumers, and allow the courts to evaluate those cases."

Through these tools, as well as competition advocacy and perhaps even informal guidance, the FTC could effectively combat unreasonable non-competes and begin to build a meaningful record that might one day -- setting aside the questions of the agency's legal authority – provide a sufficient factual basis for a rule. Robust enforcement also would inform the policy choices of elected officials in Congress and the States, consistent with our democratic system of government.

Signed,

Alumni of the FTC[2]

Asheesh Agarwal
Former Assistant Director
Office of Policy Planning

Luke Froeb
Former Director
Bureau of Economics

Ginger Zhe Jin
Former Director
Bureau of Economics

Alden Abbott
Former General Counsel
Office of General Counsel
Senior Research Fellow, Mercatus Center at George Mason University

James M. Spears
Former General Counsel
Office of General Counsel

[2] Every signatory is signing in his or her individual capacity, rather than on behalf of an organization.

Bilal Sayyed
Former Director
Office of Policy Planning

Tom Pahl
Former Acting Director
Bureau of Consumer Protection

Theodore A. Gebhard
Former FTC Senior Attorney
Office of Policy & Evaluation

Dan Caprio
Former Attorney Advisor
Office of Commissioner Orson Swindle

Liad Wagman
Former Senior Economic and Technology Advisor
Office of Policy Planning

Daniel J. Gilman
Former Attorney Advisor
Office of Policy Planning

Neil Chilson
Former Chief Technologist
Federal Trade Commission

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Attachment

September 20, 2022

Dear Chair Khan and Commissioners Bedoya, Phillips, Slaughter, and Wilson,

As alumni of the Federal Trade Commission, we have devoted significant portions of our careers to protecting consumers and competition. We continue to care deeply about the agency and its mission. For instance, many of us have publicly encouraged Congress to grant the agency more funding and clearer remedial authority. Many of us support the FTC's current initiatives, including efforts to protect consumer privacy, and in fact many of us have long advocated for more vigorous enforcement of the antitrust laws.

In this spirit, we write to encourage you to commit to operate within the FTC's traditional norms and statutory bounds. Over the past several decades, the FTC has functioned with a large degree of consensus, seeking input from staff, stakeholders (including the private sector), and all commissioners. The FTC generally operated within the limits of its authority. We are concerned, however, that the agency seems to be moving away from some of these norms and that these changes may undermine the agency's credibility to enforce the law and to protect consumers. In the worst case, with ongoing scrutiny of administrative agencies, departure from these norms could imperil long-term support for the agency itself.

Nevertheless, the FTC can resume its historic and successful operations through a few simple steps: incorporate the input of staff, stakeholders, and all commissioners; recognize that, particularly given recent court decisions, administrative agencies must operate within their statutory bounds; and, finally, recommit to the agency's traditional enforcement tools and competition advocacy. Through these steps, the agency could fulfill its mission and leave a lasting and positive legacy.

A. Lead Through Consensus

Over the past several decades, the FTC has functioned with a large degree of consensus among the commissioners and with the career staff. Unfortunately, the latest results of the Federal Employee Viewpoint Survey show notable changes in the staff's opinions and morale.[3] The FTC has also seen an exodus of senior staff and a significant concentration of authority.

Fortunately, the remedy is simple. We encourage a return to the tradition of meaningful consultation among the agency's staff, stakeholders, and all commissioners. Based on our

[3] Compare https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2020/2020-agency-report.pdf with https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2021/2021-agency-report.pdf.

experience, agency personnel fully support the agency's mission, and with few exceptions, the private sector wants to comply fully with the law.

B. Operate Within Statutory Bounds and Norms

In recent decisions, the courts have limited the ability of administrative agencies to exercise authority without a clear basis in statutory language. For instance, in *AMG Capital Management LLC v. FTC*, the Supreme Court unanimously held that the FTC lacks statutory authority to seek equitable monetary relief in federal court under Section 13(b) of the FTC Act. Similarly, in *West Virginia v. Environmental Protection Agency*, the Supreme Court, invoking the "major questions doctrine," held that the Clean Air Act did not grant the EPA authority to devise carbon emission caps. Finally, in *Jarkesy v. Securities and Exchange Commission*, the Fifth Circuit held that Congress unconstitutionally delegated legislative power to another multimember agency.

Against this backdrop, the FTC should ensure that its actions have a firm basis in both the statutory text and past practice. The FTC should *not* base a significant action, such as a rulemaking, on a thin statutory reed that lacks a consistent history of use. Any overreaching activities, not clearly grounded in statute and precedent, could damage long-term support for the agency and, at a minimum, could distract from the agency's core mission of protecting consumers. Already, various courts and commentators have called into question the ongoing validity of *Humphrey's Executor v. United States*, which upheld the FTC's design in part due to its nonpartisan nature.[4] *Axon v. FTC*, currently pending in the Supreme Court, raises some of these same issues.

Similarly, Congress itself could revisit the agency's ongoing authority. In the 1980s, in response to aggressive rulemakings that led some to deem the FTC the "national nanny,"[5] Congress cabined the FTC's discretion.[6] Today, Congress could easily respond to agency overreach by reducing the FTC's funding, limiting its functions, or even dismembering the agency entirely.

As an alternate approach, we encourage the FTC to seek and rely upon specific statutory authority granted by Congress. Beginning with the Pay-Per-Call rulemaking in the 1990s, the Commission first used a case-by-case approach to build a record demonstrating industry or technology-specific law violations and harms to consumers, and *then* took this record to Congress to support a request for specific statutory authority pursuant to Section 553 of the Administrative Procedure Act. This approach resulted in such successful rulemaking efforts as the 900 Pay-Per-Call, Telemarketing Sales, Do- Not-Call, and CANSPAM rules.

Of course, we agree that it is entirely appropriate for the Commission to develop the contours of existing law by developing and bringing meritorious cases that show evidence of harm to consumers. If the Commission still believes that it is necessary and appropriate to make novel use of its rulemaking authority and expertise, we recommend that it follow the same process it

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[4] *E.g.*, *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177, (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

[5] See https://www.wsj.com/articles/return-of-the-national-nanny-ftc-activists-rulemaking-regulation-banning-mandates-illegal-11653596958.

[6] *E.g.*, https://library.cqpress.com/cqalmanac/document.php?id=cqal82-1164529.

has used to great success and public benefit: first develop an enforcement record demonstrating the need for rulemaking, and then ask Congress for specific statutory authority to use Section 553 rulemaking to address the specific problems that have been identified in its enforcement work.

C. Recommit to Vigorous Enforcement Through the Agency's Traditional Tools

Rather than sail into unchartered legal waters, the FTC should embrace its tried-and-true methods of fulfilling its mission. Most obviously, the agency should develop meritorious cases, grounded in empirical economics and demonstrable harm to consumers, and allow the courts to evaluate those cases. Likewise, the agency should review proposed mergers in a timely, predictable, and transparent manner. Finally, the FTC should continue to study ever-changing markets fairly and objectively, without presupposition.

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We hope that you will review this letter in the spirit in which it was written. All of us stand ready to work with you to help the agency fulfill its mission, now and for the future.

Signed,

Alumni of the FTC[7]

Asheesh Agarwal
Former Assistant Director
Office of Policy Planning

Theodore A. Gebhard
Former FTC Senior Attorney
Office of Policy & Evaluation

John Delacourt
Former Chief Antitrust Counsel
Office of Policy Planning

Bilal Sayyed
Former Director
Office of Policy Planning

Todd Zywicki
Former Director
Office of Policy Planning

[7] Every signatory is signing in his or her individual capacity, rather than on behalf of an organization.

Alden Abbott
Former General Counsel
Office of General Counsel
Senior Research Fellow, Mercatus Center at George Mason University

Dan Caprio
Former Attorney Advisor
Office of Commissioner Orson Swindle

Eileen Harrington
Executive Director (2012-2013)
Acting Director, Bureau of Consumer Protection (2009)
Deputy Director, Bureau of Consumer Protection (2004-2009)
Associate Director for Marketing Practices, BCP (1992-2004)

Liad Wagman
Former Senior Economic and Technology Advisor
Office of Policy Planning

Betsy Broder
Former Counsel for International Consumer Protection
Office of International Affairs

Neil Chilson
Former Chief Technologist
Federal Trade Commission

Tom Pahl
Former Acting Director
Bureau of Consumer Protection

Ginger Zhe Jin
Former Director
Bureau of Economics

Allen Hile
BCP Special Counsel for Regulatory Issues (2009-2012)
Assistant Director, Division of Marketing Practices (1994-2008)

David Torok
Associate Director Division of Consumer Response and Operations (formerly Division of Planning and Information) (2005-2016)
Assistant Director Division of Marketing Practices (2004-2005)
Initial National Do Not Call Registry Program Manager (2001-2003)

Julie Carlson
Economist, Bureau of Economics (2007-2021)
Advisor to the Director, Bureau of Economics (2021)
Economist Advisor to Chairman Simons (2020)
Economist Advisor to Commissioner Kovacic (2011)