International
Center for
Law & Economics

Comments of Scholars of Law & Economics and the International Center for Law & Economics

In the Matter of Non-Compete Clause Rulemaking, Matter No. P201200

Before the

Federal Trade Commission

April 19, 2023

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Introduction and Executive Summary

We appreciate the opportunity to comment on the Commission's Notice of Proposed Rulemaking regarding non-compete clauses, Matter No. P201200 ("NPRM").[1] The authors and contributors to these comments are scholars of law and economics with an interest in ensuring the effective functioning of the antitrust laws and of the Federal Trade Commission. The full list of signatories can be found in Appendix A, *infra*.

The Commission's interest in non-compete agreements, non-compete clauses, non-compete terms, or covenants not to compete (collectively, "NCAs") is understandable and, at some level, laudable. NCAs have been prominent in recent public policy debates, and numerous NCAs may be overbroad, inefficient, or otherwise objectionable. While most policy concerns regarding NCAs are not antitrust concerns (and most NCA-focused litigation not antitrust litigation), a given employer might possess significant market power in one or more specific local labor markets, and might exploit that market power to, e.g., foreclose entry or expansion by would-be competitors. In that regard, a specific NCA, under specific facts and circumstances, might well prompt antitrust concern and, potentially, a finding of liability.

Nevertheless, as explained below, we cannot recommend that the Commission adopt the proposed Non-compete Clause Rule ("Proposed Rule"). It is not supported by the evidence—empirical and otherwise—that is reviewed in the NPRM; neither is it supported by the Commission's experience, authority, or resources.

First, while the NPRM amply catalogs *potential* problems associated with non-competes, NCAs, like other vertical restrictions in labor agreements, are not *necessarily* inefficient, anticompetitive, or harmful to either labor or consumer welfare; they can be efficiency-enhancing and pro-competitive. NCAs can solve a range of potential hold-up problems in labor contracting.[2] For example, both firms

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[1] Non-Compete Clause Rule, 88 Fed, Reg, 3482 (RIN 3084, proposed Jan. 19, 2023) (to be codified at 16 C.F.R. Part 910) [hereinafter NPRM].

[2] *See infra.*, Section II. *See also, e.g.*, Daron Acemoglu & Robert Shimer, *Holdups and Efficiency with Search Frictions*, 40 INT. ECON. REV. 827 (1999). The potential benefits of NCAs, and the importance of context in evaluating them, were discussed at the FTC's 2020 workshop on NCAs. FTC, *Non-competes in the Workplace: Examining Antitrust and Consumer Protection Issues* (Jan. 9, 2020) [hereinafter FTC 2020 NCA Workshop; references to the workshop transcript will be cited by speaker and transcript page number ("Tr.")]. A web page for the workshop, with links to the agenda, speaker biographies, public comments, and a transcript of the proceedings, is at https://www.ftc.gov/news-events/events/2020/01/non-competes-workplace-examining-antitrust-consumer-protection-issues. FTC 2020 NCA Workshop, Kurt Lavetti, Tr. at 144 ("context matters. So although non-compete agreements can reduce earnings on average, in some contexts there's evidence they might systematically increase earnings."); *id.*, the Hon. Noah Phillips, Tr. at 218 ("non-competes can serve good purposes, incentivizing investment in workers and protecting trade secrets, worthy goals in our increasingly knowledge-based economy"); *id.*, Ryan Williams, Tr. at 175-6 (can "say some good things about non-compete contracts"); *id.*, Ryan Nunn, Tr. at 126 (questioning utility of NCAs in various contexts, but noting NCAs can address a hold-up problem in training, and

and workers have incentives to invest in employee training, but employees often lack the resources required to acquire adequate training—especially, but not only—job-specific training on their own. Employers, for their part, may have resource advantages; at the same time, employers may reasonably worry about their likely return on investment in employee training: because experienced labor is alienable, firms may worry that competitors will free ride on their investments by poaching trained employees; employees, for their part, may walk out the door or renegotiate compensation before their employer has recouped its investment. Facing those prospects, firms may tend to under-invest in employee training. Appropriately tailored NCAs can mitigate employers' investment risks, and thereby encourage additional employee training. Firms can face analogous hold-up concerns when it comes to sharing private or privileged information—such as trade secrets or client lists—with their employees.[3] NCAs can mitigate the risk (and risk of hold-up) that firms would face if there were no constraints on job switching. NCAs can also reduce search and training costs by reducing turnover; and the benefits of reduced search costs may be shared, at least to some extent, with employees.[4] As we explain below, these potential benefits find support in both the economic literature and common-law standards of "reasonable" restraints.[5]

Second, and most critically, the emerging body of economic literature regarding the effects of NCAs—or the effects of what is purported to be the relative "enforceability" of NCAs—does not support the categorical ban on NCA usage contemplated by the NPRM.[6] Although the Commission proposes to prohibit NCAs across the economy, there appear to be numerous and broad gaps in the literature. For many sectors, industries, and occupations, there appear to be no studies of NCA's effects. Moreover, the Commission cites only a single study of the impact of NCA enforceability on downstream prices, and that regards a specific occupation (physicians) delivering heavily regulated services. There are studies investigating wage and mobility effects, but even partial equilibrium analyses of labor markets provide an incomplete picture of the total impact of NCAs on labor markets, even if existing studies are taken at face value. And while some studies do suggest the potential for NCAs to reduce wages or worker mobility under certain circumstances, findings are mixed rather than unidirectional, and many of the relevant studies suffer significant data and methodological limitations. As a working

that "[f]irm-sponsored training is more common in states that more stringently enforce their non-compete agreements."). *See also, e.g.*, Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 505 (2016) ("Despite the potential cost of noncompetes for individuals and regions, the use and enforcement of noncompetes may also provide both private and social benefits.").

[3] *See, e.g.,* Aandrei Iancu & David Kappos, *Banning Non-compete Agreements Hurts US Companies and Workers*, THE HILL (Mar. 23, 2023) (discussing importance of NCAs in protecting trade secrets); FTC 2020 NCA Workshop, Ryan Williams, Tr. at 178; *id.*, Orly Lobel, Tr. at 12; *id.*, Ryan Nunn, Tr. at 122-5, 134.

[4] *See, e.g.*, John McAdams, *Non-Compete Agreements: A Review of the Literature*, Working Paper (2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639.

[5] For an early case, see *Mitchel v. Reynolds*, 24 E.R. 347 (1711) (upholding a noncompete contract between a bakery and a baker, upon finding the contract's terms, including a geographic restriction to the same parish as the bakery, reasonable).

[6] *See infra.*, Section I.

paper from the Commission's Bureau of Economics notes, the "more credible empirical studies tend to be narrow in scope, focusing on a limited number of specific occupations . . . or potentially idiosyncratic policy changes with uncertain and hard-to-quantify generalizability."[7] That is not to say that none of the research is useful, but rather that the literature is not comprehensive or settled, and that it cannot support the adoption of sweeping federal regulations that preempt the development of a more nuanced body of state labor and NCA law.

Part of the problem is that measuring this so-called "enforceability" is far from trivial. There is no objective measure of enforceability, and no proven metric for making such a measurement. Studies of enforceability employ similar measurement schema, but these vary in their implementation, and there is no evident benchmark by which to evaluate the alternatives. As we explain in some detail in Section I, below, most of the literature investigating the effects of NCA policy changes—nominally, changes in NCA enforceability—employs one or another version of a triply-subjective scoring rubric. The taxonomy of relevant legal markers, the relative import (that is, weighting) of those markers, and the coding of legal changes all depend on subjective assessments of specific judicial decisions and legislative acts against no specified baseline. None represents the universe of potential policy reforms. And none specifies a theory of enforceability that it seeks to implement. Collectively, the enforceability studies depend on what is, at best, an essentially soft, variable, and heavily coding-dependent method; at worst, it's a black box. The problem might be avoided going forward. Given recent, clear, income-based restrictions on enforcement in nine states and the District of Columbia, the Commission might well collect data to enable event studies without the artifice of enforceability ordering.[8] But those data do not yet exist and have not been analyzed. The absence of such data, and of any objective enforceability metric, tend to undermine many of the results on which the Commission relies.

In addition, the Commission should consider that most labor markets are local, rather than statewide or national.[9] As a corollary, research suggesting that, e.g., certain wage changes associated with changes in NCA enforceability, *on-average and state-wide*, do not resolve the question whether observed effects obtain across all (or nearly all) labor markets in the state or, in the alternative, are dominated by effects in those local labor markets in which key employers enjoy heightened market power. Of direct relevance to the Proposed Rule, "[t]there is little evidence on the likely effects of broad prohibitions of non-compete agreements."[10] Indeed, they do not resolve the question how

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[7] *Id.*

[8] *See infra* note 150, and accompanying text.

[9] *See* Bur. Labor Stats., *Local Area Unemployment Statistics Geographic Concepts* (Mar. 20, 2020), https://www.bls.gov/lau/laugeo.htm; *see also* Ioana Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search*, 10 AM. ECON. J. MACRO. 42, 42 (2018) ("[J]ob seekers are 35 percent less likely to apply to a job 10 miles (mi.) away from their zip code of residence.").

[10] *Id.*

wage changes are distributed across workers, or whether the observed effects are due to workers receiving raises or, rather, to firm efforts to mitigate hold-up problems by hiring more experienced or better trained workers at higher wages.[11] This remains a developing body of economic literature and—as a related matter—improved data sources. The FTC can and should foster the further development of pertinent economic research before adopting a general rule or, in the alternative, before advising Congress on potential statutory restrictions on NCAs.[12]

Third, the Commission has very little experience with NCAs, several very recent settlement agreements notwithstanding.[13] The three 2023 matters discussed in the NPRM were concluded with consent orders announced the day before the Commission's announcement of the NPRM. The Commission's decisions contained no finding or stipulation of an antitrust violation, whether under Section 5 or any other antitrust statute.[14] That does not, of course, establish that the Commission erred in its complaints. Still, the settlements established no legal precedents, and the complaints and orders do little to set forth guidance on the Commission's applications of Section 5 to the specific facts and circumstances underlying the three matters.[15]

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[11] *See, e.g.*, Stephen G. Bronars, *FTC Evidence that Noncompetes Reduce Wages is Inconclusive*, EDGEWORTH INSIGHTS (Mar. 7, 2023), https://www.edgewortheconomics.com/insight-ftc-evidence-that-non-competes-reduce-earnings-is-inconclusive.

[12] *See* 16 U.S.C. 46(f) ("To make public from time to time such portions of the information obtained by it hereunder as are in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use." *Id.*)

[13] *See infra.*, Section III. *See also* Press Release, *FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers* (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers. Since publishing the NPRM, the Commission has announced a fourth NCA settlement, also in the glass container industry. *In the Matter of Anchor Glass Container, Corp.*, FTC Matter No. 211 0182 (Mar. 15, 2023) (decision and order).

[14] *In the Matter of Prudential Security, et al.*, FTC File No. 2210026 (Jan. 4, 2023) at 2, https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecurityacco.pdf ("This Consent Agreement is for settlement purposes only and does not constitute an admission by Proposed Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts are true."); *In the Matter of Ardagh Group, et al.*, FTC File No. 2110182 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2110182-c4785-ardagh-decision-and-order.pdf; *In the Matter of O-I Glass, Inc.*, FTC File No. 2110182 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2110182_c4786-o-i-glass-inc-decision-and-order.pdf.

[15] Dissenting Statement of Commissioner Christine S. Wilson, *id.* at 2 ("[E]ach Complaint runs three pages, with a large percentage of the text devoted to boilerplate language. Given how brief they are, it is not surprising that the complaints are woefully devoid of details that would support the Commission's allegations.").

At common law, NCAs might be found reasonable or unreasonable restraints of trade based on their terms, under specific facts and circumstances.[16] Federal law[17] and state laws[18] have tended to hew to this common law tradition, even if state laws vary in their criteria of reasonability. And while some states impose significant limitations on the ability of employers to enforce NCAs in court, *no state* has adopted the general prohibition on NCA usage that the FTC has proposed. No state chiefly restricts NCAs via a regulatory ban; and no state has adopted the seemingly arbitrary 25% share restriction that the Commission has proposed for permitting certain NCAs in conjunction with the sale of a business.[19] In addition, as noted by several participants in the FTC's 2020 NCA workshop,[20] courts have tended to find that NCAs do not violate the antitrust laws,[21] even if certain NCAs may

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[16] *Compare Mitchel v. Reynolds*, *supra* note 5 (upholding specific NCA restrictions as reasonable) *with John Dyer's Case*, Year-Book Mich. 2 Hen. V, fo. 5, pl. 26 (1414) (rejecting NCA terms in an indenture contract as void under the common law).

[17] *See Nat'l Soc'y of Prof'l Engrs. v. United States*, 435 U.S. 679, 689 (1978) ("The Rule of Reason suggested by *Mitchel v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business." (*citing Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711))); *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899) ("It was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers.").

[18] For a recent overview of state NCA laws, see, e.g., Russell Beck, *Employee Noncompetes: A State-by-State Survey* (last updated Feb. 11, 2023), *available at* https://beckreedriden.com/50-state-noncompete-chart-2.

[19] The only express exception in the Proposed Rule regards NCAs executed in conjunction with the sale of a business, where the NCA applies to a seller who "is a substantial owner of, or substantial member or substantial partner in, the business at the time the person enters into the non-compete clause. Proposed § 910.1(e) would define substantial owner, substantial member, or substantial partner as an owner, member, or partner holding at least a 25% ownership interest in a business entity." NPRM at 3515. While an exception providing for NCAs in conjunction with the sale of a business is common in states with some general hostility to NCAs, as under Cal. Bus. & Prof. Code § 16601, the identification of a 25% ownership requirement appears arbitrary and excessive. For example, California law permits certain NCAs for, *inter alia*, "[a]ny person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interesting in the business entity." Cal. Bus. & Prof. Code § 16601. We have not found any authority restricting such ownership to anything like a 25% share. That proposed restriction may prove far too narrow, not just when natural persons owning a startup or small business number more than four, but when, e.g., venture capital investment reduces the founders' shares of a startup.

[20] FTC 2020 NCA Workshop, *supra* note 2.

[21] *See, e.g.,* FTC 2020 NCA Workshop, *supra* note 2, Eric Posner, Tr. at 72-73 (("I took upon myself the dreary task of trying to read every antitrust case ever decided involving non-competes, but it turned out not to be that dreary because there are only a handful of such cases ~ a few dozen or maybe more. Virtually none of them successful, basically they all fail. The plaintiffs always lose in these cases."); *id.*, Randy Stutz, Tr. at 60-68 (discussing difficulties of making out an antitrust case against an NCA under the rule of reason); *Cf.* Business Electronics Corp. v. Sharp Electronics Corp. 485 U.S. 717, 729 n. 3 (1988) (Justice Scalia citing the English common law case of *Mitchel v. Reynolds* in support of the proposition that "[t]he classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market.") The NPRM notes that the Commission has identified 17 antitrust matters brought by private parties or state or federal antitrust authorities, under either the Sherman Act or state antitrust law, NPRM at 3496, suggesting that two of the matters the plaintiffs "were

violate some state labor or commercial laws. Yet the NPRM contemplates what would be tantamount to a *per se* prohibition of NCA usage.

The Commission's view that NCAs are generally, or even typically, anticompetitive seems to lack any basis in antitrust jurisprudence. Looking beyond the Sherman Act jurisprudence, we have not found any decisions by a federal court holding that an NCA violates Section 5 of the FTC Act or, specifically, the Commission's standalone Section 5 authority over unfair methods of competition. Importantly, while the complaints in the three settled matters identified specific NCA terms, as well as other facts and circumstances, under which the NCAs in question were alleged to violate Section 5, there is no reason to expect that those specific terms or circumstances are representative of the very diverse terms in NCAs, as they are employed across industries, firms, labor markets, and individual employees.

The Commission's limited experience with NCAs—or any vertical restrictions in labor agreements—undercuts the rationale for a general prohibition of NCAs, but it also undercuts the proposal that the Commission serve as a federal regulator of NCAs generally. Specifically, it does not bode well for likely court challenges to the Proposed Rule or the Commission's authority to issue it. And while the Commission notes hearings and workshops it has conducted to gather information about NCAs and other labor competition issues,[22] neither the Commission nor its staff has issued any report summarizing or synthesizing information gathered through those inquiries. Such reporting would be consistent with the FTC's mission under Section 6 of the FTC Act,[23] and it would be an important prologue to any consideration of rulemaking.

Fourth, the Commission lacks the resources required for effective enforcement of the Proposed Rule.[24] According to some survey evidence and the NPRM, NCAs now apply to roughly one fifth of all employed persons in the U.S. labor force; that is, nearly 30 million workers.[25] Regulations are not self-enforcing. And while regulation may be, in certain regards, more streamlined than case-by-case enforcement, it still requires investigation of alleged infractions, administration, and, in addition to regulatory challenge mechanisms, the resources to defend at least some challenges to

successful to some degree." *Id.* In a 2015 matter, the "degree" of success reported was a federal district court's denial of a motion to dismiss. *Id.* In the other matter—*American Tobacco*—the Supreme Court, in 1911, held that certain covenants not to compete were among a number of practices that, collectively violated the Sherman Act, although the Court expressly did not consider the various practices "legality, isolatedly viewed." *U.S. v. Am. Tobacco Co.*, 221 U.S. 106, 183 (1911). The other 15 matters did not reflect some degree of success. NPRM at 3496.

[22] NPRM at 3497-8.

[23] 15. U.S.C. § 46 (especially subsections (a), (b), and (f)).

[24] *See infra.*, Section III.

[25] U.S. Bur. Labor Stats., Monthly Labor Review (Jun. 2022) (reporting 149,785 total employed), https://www.bls.gov/opub/mlr/2022/article/us-labor-market-shows-improvement-in-2021-but-the-covid-19-pandemic-continues-to-weigh-on-the-economy.htm.

regulatory determinations and penalties in federal court. Detection alone may often be a challenge to the extent that many "workers are totally uninformed about the law."[26]

Effective enforcement need not entail detecting, much less penalizing, every violation, but it does require sufficient enforcement activity to establish a credible threat that violations will be penalized, without raising concerns about selective enforcement.[27] Yet the NPRM contains no assessment of the resources required for adequate enforcement of the Proposed Rule or any alternative NCA regulation. Enforcement staff in the Commission's Bureau of Competition ("BC") have substantial antitrust expertise in mergers and diverse conduct matters, but little experience in labor matters and none in the enforcement of competition regulations. Moreover, the Commission has recently reported that BC staff are barely able to meet the Commission's already established and important workload.[28] Adding an obligation to monitor restrictions in labor agreements across all industries and occupations in the U.S. would drain the staff's ability to scrutinize mergers and conduct under settled antitrust law.

Fifth, it is not clear that the Commission has the authority to adopt the Proposed Rule.[29] There is a grant of *some type* of rulemaking authority in Section 6(g) of the FTC Act; And there is a 1973 D.C. Circuit opinion in which the court defers to the Commission's interpretation of the scope of its own regulatory authority. But as participants in the FTC workshop and numerous administrative law scholars have recognized, contemporary courts are unlikely to uphold that degree of agency deference. Recent decisions of the Supreme Court have declined to recognize broad grants of regulatory authority without express statutory language that is both specific and cabined in its grant of authority, and the Court has read the plain language of FTC Act narrowly on the specific question of the FTC's remedial powers.

Finally, the economic import and the sweep of the Proposed Rule amplify each of the concerns stated above. Subject to very limited exceptions,[30] the Commission proposes to ban the use of NCAs of

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[26] FTC 2020 NCA Workshop, *supra* note 2, Evan Starr, Tr. at 171.

[27] For a general discussion, see, e.g., A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of the Law*, *in* HANDBOOK OF LAW AND ECONOMICS, VOL. 1, C. 6 (A. Mitchell Polinsky & Steven Shavell, eds., 2007); Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J. LAW & ECON. 255 (1993).

[28] *See, e.g.*, Oversight and Enforcement of the Antitrust Laws, Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights, 117th Cong. (2022) (Prepared Statement of the Fed. Trade Comm.) ("While we constantly strive to enforce the law to the best of our capabilities, there is no doubt that—despite the increased appropriations Congress has provided in recent years—we continue to lack sufficient funding."), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf.

[29] *See infra.*, Section IV.

[30] The only express exception in the Proposed Rule regards NCAs executed in conjunction with the sale of a business, where the NCA applies to a seller who "is a substantial owner of, or substantial member or substantial partner in, the business at

any duration, and of any geographic or occupational scope, adopted under any business contexts, across the entire U.S. workforce. Moreover, the Commission proposes to ban the maintenance of any existing NCAs, no matter what compensation may have been negotiated or conferred conditional on acceptance of the terms of an NCA. The scope of the Proposed Rule poses a tremendous challenge to the Commission's experience and resources; it greatly outstrips the evidentiary basis cited on behalf of the Proposed Rule; and it increases the very real legal risk the Commission faces, with regard to both the substance of a rule that the Commission might adopt and the Commission's regulatory and enforcement authority.

The Commission's interest in NCAs is laudable. And the Commission is well-positioned to contribute to the further development of economic research regarding NCAs and, specifically, to the further application of Industrial Organization economics to research on NCAs and labor market competition. New research, and a critical synthesis of the relevant hearings and FTC workshops cited in the NPRM, could contribute to case-by-case antitrust enforcement, and to policy debates involving NCAs in Congress and in the states.[31] The Commission is also well positioned to help develop the antitrust case law where NCAs and related vertical restrictions on labor agreements demonstrably harm competition and consumers. These tasks are potentially important; they are tractable, given the Commission's resources, including its human capital; and they fit well within the Commission's jurisdiction. They should precede, not follow, a proposed federal NCA regulation.

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the time the person enters into the non-compete clause. Proposed § 910.1(e) would define substantial owner, substantial member, or substantial partner as an owner, member, or partner holding at least a 25% ownership interest in a business entity." NPRM at 3515. While an exception providing for NCAs in conjunction with the sale of a business is common in states with some general hostility to NCAs, as under Cal. Bus. & Prof. Code § 16601, the identification of a 25% ownership requirement appears arbitrary and excessive. For example, California law permits certain NCAs for, *inter alia*, "[a]ny person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interesting in the business entity." Cal. Bus. & Prof. Code § 16601. We have not found any authority restricting such ownership to anything like a 25% share. That proposed restriction may prove far too narrow, not just when natural persons owning a startup or small business number more than four, but when, e.g., venture capital investment reduces the founders' shares of a startup.

[31] For an example of a current legislative proposal, see, e.g., S.379—Freedom to Compete Act of 2023, 118th Cong. (2023-24) (which would amend the Fair Labor Standards Act to prevent the use of NCAs in employment contracts for certain non-exempt employees).

I. Empirical Evidence on the Effects of NCAs and NCA "Enforceability" Does Not Support the Commission's Proposed Federal Ban

There is a significant and developing body of literature investigating the economic import of NCAs, but it does not support the Commission's Proposed Rule. Much of the NPRM is devoted to a review of the literature regarding NCA usage and the effects of NCAs (or, in many cases, the effects of the relative "enforceability" of NCAs under the laws of the various states). The Commission's attention to the empirical literature is welcome, and many parts of the discussion comprise useful summaries of published studies or research in progress. Overall, however, the NPRM's discussion of the literature seems uneven. Some acknowledged limitations in the literature are discussed at some length, and others obliquely or not at all. It is not always clear how reliable the Commission finds the relevant methods or how accurate it deems relevant findings. In addition, some of the NPRM's extrapolations from the literature seemed strained.[32] The scope of the Proposed Rule—a sweeping federal ban on the use of NCAs, including those already in effect, even if bargained-for—would seem to demand a far more settled and comprehensive body of economic literature, and far less mixed results, than we see in evidence.

Some studies do suggest the potential for NCAs to reduce wages or worker mobility, at least under certain circumstances. But findings on the effect of NCAs on wages are mixed, rather than unidirectional, and many of the relevant studies evidence significant data and methodological limitations. Some of those limitations cast doubt on the extent to which certain findings may be generalized; others may impugn the findings themselves. Moreover, as discussed at the FTC 2020 NCA Workshop, available findings tend to address *average* effects rather than the distribution of those effects.[33] A substantial number of observations of workers' wages might vary from the average not just in magnitude but in sign; that is, it may be that wages were observed to increase for a large number of workers, which would be of no small import to antitrust (or to contract law). And a key question turns on the local nature of most labor markets,[34] and is—or should be—of special relevance to merits of antitrust intervention: if a wage effect is observed on average, state-wide, is that effect ubiquitous or is it chiefly driven by local labor markets in which key employers enjoy outsize market power? Also, because these studies cannot distinguish the workers *whose* wages appear to increase with legal reform, they do not resolve the question whether the observed average wage effects are due to

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[32] *See infra* Section I.D.

[33] FTC 2020 NCA Workshop, *supra* note 2, Kurt Lavetti, Tr. at 139.

[34] *See* Local Area Unemployment Statistics Geographic Concepts, BLS, https://www.bls.gov/lau/laugeo.htm (Mar. 20, 2020); *see also* Marinescu & Rathelot, *supra* note 9 ("more than 80% of [all] job applications occur where the applicant and prospective employer are within the same 'commuting zone.'"); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 552 (5th ed. 2022) (explaining that "commuting costs" limit a supplier's ability to operate in a distant geographic market).

workers receiving raises or, rather, to substitute hiring practices, with some firms seeking to mitigate hold-up problems by hiring more experienced or better trained workers at higher wages.[35]

One notable omission from the NPRM's substantial discussion of the literature is a 2016 paper by Bishara and Starr, leading contributors to the economic literature on NCAs. Bishara and Starr observed serious research challenges, as well as significant data and methodological limitations to the then-available body of research:

> First… identifying the causal effects of noncompete enforceability is a challenging task. Cross-sectional studies must somehow disentangle the effect of noncompete policies across states from the myriad of other potential state policies or state differences that are correlated with noncompete policies. Similarly, studies that examine the before and after effects of a noncompete policy change within a state must separately identify the impact of the noncompete laws from other trends or state level changes that might be occurring simultaneously. These are challenging identification issues to overcome, especially given that very few states have significantly changed their noncompete policies in the last 30 years.[36]
>
> Second, since not all policy changes equally affect the noncompete-signing population, the measurement of noncompete enforceability is necessarily error-ridden without data on who signs noncompetes.[37]
>
> Third, because enforceability is the key variable, not noncompete signing status, assumptions about knowledge of noncompete policies among the various actors must be made.[38]
>
> Fourth, analyses comparing outcomes in high-enforceability versus low-enforceability states cannot disentangle the impact of the potentially increased use of noncompetes in higher-enforceability states from the impact of the noncompete policy on those who do and do not sign noncompetes.[39]
>
> Fifth, the aggregate perspective cannot directly identify the potential micro-mechanisms at work, and thus limits the potential policy options. For example, how exactly might noncompete enforceability reduce mobility?[40]

While the literature has grown since Bishara and Starr's review, their concerns remain salient. Not incidentally, the NPRM cites at least ten papers cited in the Bishara and Starr critique. However, the

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[35] *See, e.g.*, Stephen G. Bronars, *supra* note 11.

[36] Bishara & Starr, *supra* note 2, at 537.

[37] *Id.* at 538.

[38] *Id.*

[39] *Id.* at 539.

[40] Id.

Commission seems more confident than Bishara and Starr about the implications of the academic research. For example, when discussing Samila and Sorenson, Bishara and Starr say:

> The authors ambitiously conclude that noncompete enforceability "significantly impedes entrepreneurship and employment growth." Such a conclusion may be too strong, however… [I]t could be that the causal effect of noncompete enforceability on entrepreneurship is positive, but that it is diminished in high venture-capital areas.[41]

Unfortunately, the NPRM recognizes no such qualifications when discussing Samila and Sorenson's results with respect to new business formation,[42] although the Commission is more reserved when discussing the paper's results for innovation.[43]

Other research by Bishara and Starr—jointly and separately—is discussed at length, and cited liberally, throughout the NPRM,[44] and Professor Starr participated as a panelist at the FTC 21st C. Hearings, the FTC 2020 NCA Workshop, and the FTC/DOJ 2021 Labor Competition Workshop. Yet Bishara and Starr's critical review, and the concerns raised therein, are neither cited nor discussed in the NPRM.

Another puzzling omission is a 2019 literature review conducted by staff in the FTC's Bureau of Economics.[45] That literature review was much discussed in comments submitted to the FTC 2020 NCA Workshop, and at the workshop itself.[46] Yet the McAdams paper is not even mentioned in the NPRM. McAdams observes that economic research regarding NCAs "has made important strides."[47] However, he also observes mixed results, and he describes numerous data and methodological limitations running throughout the body of literature. Overall, he finds that the "more credible empirical studies tend to be narrow in scope, focusing on a limited number of specific occupations… or potentially idiosyncratic policy changes with uncertain and hard-to-quantify

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[41] Bishara & Starr, *supra* note 2, at 525.

[42] *See* NPRM at 3491.

[43] *See id*. at 3492. For example, the Commission admits the paper is not causal: "The study by Samila and Sorensen examines the enforceability of noncompete clauses across all states but does not consider changes in enforceability: they are therefore unable to rule out that their results could be due to underlying differences in the states rather than non-compete clause enforceability."

[44] The NPRM discusses at least 10 of Professor Starr's articles (and co-authored articles) repeatedly, and at length, with more than 40 citations.

[45] *See* McAdams, *supra* note 4. We also note that the named staff author of the review, John McAdams, moderated a session at the FTC 2020 NCA Workshop.

[46] *See, e.g.*, FTC 2020 NCA Workshop, Kurt Lavetti, Tr. at 140 ("There's also a new working paper by John [McAdams] that provides a great overview of this literature.")

[47] McAdams, s*upra* note 4, at 4.

generalizability."[48] Of direct relevance to the Proposed Rule, "[t]here is little evidence on the likely effects of broad prohibitions of non-compete agreements."[49]

Research on NCAs is ongoing. Still, most of the studies cited in the NPRM predate the FTC 2020 NCA Workshop and the BE review, and many predate the 2016 Bishara and Starr critique. Not a few of the shortcomings identified in that work were revisited by panelists at the 2020 workshop;[50] these discussions, too, are absent from the NPRM. As a general matter, citations to the records of the workshops and the hearings seem both sparse and highly selective. The NPRM strains to discount positive findings by, among other things, disfavoring research regarding the effects of NCAs themselves in favor of research regarding changes in NCA "enforceability,"[51] conspicuous limitations in the more supporting research notwithstanding. *Ad hoc* and uneven critical scrutiny aside, the implications of the "enforceability" studies are far less clear than they might seem. As we discuss below, there is no objective metric for "enforceability." Instead, relative "enforceability" scores result from various—if related—means of scoring disparate provisions of state statutory and judge-made law on a subjective basis.[52] None of these means is authoritative. And even as soft measurement tools, they fail to account for, much less reliably order, the universe of policy options.

A. The Existing Studies of NCAs Yield Mixed Results

1. The evidence shows ambiguous effects of NCAs on wages and mobility and supports the argument that they provide procompetitive benefits

Evidence regarding the impact of NCAs on wages is neither definitive nor unidirectional. Rather, as McAdams observed, it "is mixed." While the NPRM correctly observes that several studies report negative wage effects associated with increased "enforceability" of NCAs[53] or, inversely, positive wage

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[48] *Id.*

[49] *Id.*

[50] *See*, e.g., FTC 2020 NCA Workshop, Evan Starr, Tr. at 158 (noting "much harder to estimate causal effects using noncompete agreements); Tr. at 159 (lack of studies isolating random variation in use of noncompetes); *Id.*, Ryan Williams, Tr. at 192 (regarding identification issues); *Id.,* Ryan Nunn, Tr. at 192.

[51] The NPRM's misapplication of a model in the Lavetti, Simon, and White paper is one example of a strained attempt to discount—and indeed invert—research findings. NPRM at 3501, 3524. The presentation of an alternative model—one that leads to merely "suggestive" observations, to make an *ad hoc* adjustment to account for an unobserved base rate of "enforceability" is simply conjecture. As we explain below, the "enforceability" assessment itself is deeply problematic. More than that, the NPRM seems to be suggesting a weak rewrite of the paper at issue, without any replication of the original work, all in the service of a finding that no existing study demonstrates or suggests. That is not credible evidence that anyone has demonstrated a negative impact of NCAs or NCA enforceability on physician wages.

[52] For a discussion of some of the difficulties raised by studies' use of "enforceability" assessments, see Jonathan Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953 (2020).

[53] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility*, Working Paper (2020) at 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.

effects associated with decreased or limited "enforceability," other studies suggest positive wage effects, at least for certain categories of highly compensated workers.

Studies also suggest that the effects of NCAs (or enforceability) are context dependent. For example, Starr, Prescott, and Bishara exploit their 2014 survey on NCA usage to study the impact of signing an NCA on wages and other factors, such as training.[54] They find a significant positive association between NCAs and wages, although they also find that the wage differential depends when employees receive notice of their NCAs: their results suggest that employees who learn of their NCAs before accepting a job offer have 9.7% *higher* earnings, but employees who learn of their NCAs after accepting a job offer have "no observable boost in wages or training."[55]

As Alan Meese notes, the top-line lesson of this study is that the *typical* NCA *increases* wages, and distinguishing between properly disclosed and improperly disclosed NCAs—and *encouraging*, not prohibiting, the former—could have significant positive wage effects:

> [Starr, et al.] has also found that 61 percent of employee noncompete agreements are disclosed *before* employees accept employment. Moreover, when employers do disclose such agreements, employees bound by them earn significantly *higher* wages than similarly situated employees not bound by such agreements. Taken together and viewed in their entirety, these data suggest two distinct results. First, the average impact of employee noncompete agreements is to reduce wages, and this result is driven by a subset of *atypical* employee noncompete agreements, i.e., those not initially disclosed to employees. Second, where employee noncompete agreements are disclosed, and the *typical* agreement *is* disclosed, employees receive higher wages than they would have received had they not entered into such agreements. These higher wages presumably reflect the parties' expectations—confirmed by the data—that such agreements will induce additional training and/or the production of information.[56]

Further research into the impact of timing—of when employees become aware of a job's NCA terms—could have significant policy implications. Government intervention to lower workers' information costs, and reduce employee/employer information asymmetries, might be very different from—and

[54] Evan P. Starr, James J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force,* 64 J.L. & ECON. 53 (2021). Note that, whereas the prior Starr study considered the impact of NCA enforceability, this finding by Starr, Prescott, and Bishara has to do with *signing* an NCA.

[55] *Id.* at 75. In a footnote, the authors explain that this is among the observations that may be driven by unobservables. *Id.* at n. 34-35. We are not suggesting that the finding is definitive. Indeed, we spend a large part of these comments on data and methodological questions arising across the body of empirical literature. For those reasons, we suggest that this is an area that merits additional research.

[56] Alan J. Meese, *Don't Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 702 (2022). On the inducement of additional training and/or production of information, see *infra* notes 85-90 and accompanying text, and Section II.

less costly than—interventions that prohibit NCA usage. They may also have implications for the distribution of policy effects across workers, firms, and (downstream) consumer welfare.

There are other studies suggesting contexts in which NCAs might increase wages or compensation. For example, Lavetti, Simon, and White conducted a survey of primary care physicians in five states.[57] Nearly 2,000 respondents provided input into panel data on both the use of noncompetes and various labor market outcomes of interest, such as earnings, incentive-based payments, and patient characteristics. Those survey data were analyzed with and without the findings from a 2011 survey by Bishara on the relative strength of enforceability across the states.[58] The results suggest that—at least for physicians—greater enforceability is associated with higher, not lower, compensation:

> Using three years of longitudinal earnings data per physician, we estimate that [NCAs] increase the annual rate of earnings growth by an average of 8 percentage points in each of the first 4 years of a job, with a cumulative effect of 35 percentage points after 10 years on the job.[59]

Analyzing wage growth in terms of enforceability amplifies the difference: cumulative earnings gain over the first ten years is estimated to be 70% among those with NCAs but only 35% for those without them, on average; "comparable estimates are 89% and 36% respectively in the model using variation in state enforceability."[60]

They also find a higher incidence of patient referrals associated with NCAs,[61] which may imply allocative and search efficiencies, and potentially patient benefits, in addition to whatever benefits accrue to the physicians. As the authors note, physicians present an interesting and distinctive occupational case study, in part because the practitioner-patient relationship may be a distinctive and durable form of human capital[62] (or, in the alternative, of good will), and in part because legal restrictions—notably anti-kickback laws—restrict both explicit and implicit payments or revenue-sharing for referrals.[63] Those distinctions may suggest other occupations worth scrutiny; they also suggest limits to the generalizability of the physician organization findings.

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[57] Kurt Lavetti, et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUMAN RESOURCES 1025 (2020). We note that while many of these workers may be employees, others may be partners, other types of co-owners of a practice, or independent contractors.

[58] NPRM at 3495 (citing Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Non-Compete Clauses, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 778–79 (2011)).

[59] Lavetti, et al., *supra* note 57.

[60] *Id.*

[61] *Id.* at 1055-7

[62] *Id.* at 1049.

[63] *Id.* at 1031.

A 2019 study by Kini, Williams, and Yin examines the impact of NCAs on Chief Executive Officer (CEO) compensation. CEOs are distinctive in several ways. For one, due to SEC filings, CEOs are an exception to our typical inability to know which workers are signing NCAs. Second, CEOs are likely to be relatively well informed about the terms of their employment and better equipped to bargain over terms such as NCAs and non-disclosure terms, as well as compensation.[64] The study exploits staggered, state-level changes in NCA enforceability to estimate the relationship between NCA usage on both the CEO compensation and the monitoring of CEO performance.[65] Results suggest that increases in NCA usage and enforceability are both associated with higher total CEO compensation: among other things, the annual total compensation for CEOs with NCAs is 18.4% higher than it is for CEOs without NCAs.[66] Also,

> As stricter enforcement enhances the likelihood that a CEO with an NCA [NCA] will be fired for poor performance and limits the CEO's outside options, the CEO will demand an increase in total compensation for bearing increased job risk. The board agrees to the higher compensation but increases alignment of interest and risk-taking incentives to reduce the possibility of the CEO taking actions that can harm long-term shareholder value but reduce the CEO's short-term job risk.[67]

Other studies also suggest potential efficiencies associated with NCAs, if not higher wages. Garmaise (2011), for example, studied the effects of NCA enforceability on both executive compensation and firm investment by analyzing both time series and cross-sectional variation in enforceability across the states.[68] He found that greater enforceability reduces both compensation growth and total compensation.[69] In addition, he found greater enforceability to be associated with a shift in compensation towards salary, and increased salary growth, relative to other forms of compensation.[70] These

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[64] Omesh Kini, et al., *CEO Non-Compete Agreements, Job Risk, and Compensation*, 34 REV. FIN. STUD. 4701 (2021).

[65] *Id.* Data regarding CEO contracts were compiled by hand based on SEC filings. The authors were able to identify 7,661 unique CEOs from ExecuComp, but found employment contracts for only 3,192; that is "only 41.67% of all CEOs in the ExecuComp database have employment contracts during our sample period." Still, the study incorporates data on nearly half of all CEOs of publicly traded firms.

[66] *Id.* at 25-6.

[67] *Id.* at 26.

[68] Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J. L. ECON. & ORG. 376 (2011). Data regarding executive compensation and board participation were taken from Standard and Poor's ExecuComp database, which includes such data on the five most highly paid executives for 2,610 large publicly traded U.S. firms; on R&D investment, capital expenditures, and acquisitions were obtained at the firm level from Compustat. *Id.* at 388.

[69] *Id.* at 21 ("For a given executive, a shift to a tougher enforcement regime reduces compensation growth by 8.2%, which is 25% of the mean growth rate."). Garmaise defines total compensation as the sum of salary, bonus, "other annual," total value of restricted stock granted, total value of stock options granted, long-term incentive payouts, and "all other total" as defined and reflected in the ExecuComp data.

[70] *Id.* at 22.

compensation effects represent benefits to the firms: that is, greater enforceability was found to be associated with lower turnover and greater Board of Directors participation, not just lower total compensation growth.[71]

Gurun, Stoffman, and Yonker find decidedly mixed effects. The authors exploit a commercial policy change, rather than a statutory one, to study the impact of NCAs on financial advisors and their industry.[72] Specifically, they use firms' adoption of the "Protocol for Broker Recruiting" ("Protocol") as an event. The Protocol permitted a financial adviser to take client lists and contact information, from a firm participating in the Protocol, to a new place of employment without fear of legal action.[73] In effect, the Protocol reduced both NCA enforceability and enforcement for numerous firms and advisors, even in states with permissive enforcement regimes. Unlike other enforceability studies, this was based on firm-specific data that reflect actual changes in both NCA usage and NCA enforcement.[74]

Adviser turnover was observed to increase, initially and temporarily, after firms join the protocol.[75] Because advisors could decamp for new firms without fear of suit, firms became less willing to fire advisors for misconduct, and broker misconduct increased.[76] In addition, by the second year after adopting the Protocol, "client fees increased by about 13% from pre-adoption levels. After three years, fees remain about 18% higher than pre-adoption fee levels."[77] As the authors note, "[t]hese findings, along with those on higher misconduct rates, call into question whether unlocking clients makes them better off."[78]

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[71] *Id.* at 25. Garmaise did not, however, find significant impact on firm value or profitability. *Id.* at 27-8.

[72] Umit G. Gurun, Noah Stoffman, & Scott E. Yonker, *Unlocking Clients: Non-compete Agreements in the Financial Advisory Industry*, 141 J. FIN. ECON. 1218 (2021).

[73] *See id.* at 1219. Eventually, over 1,500 firms adopted the Protocol. Prior to implementation of the Protocol, NCAs and NCA-related litigation had both been common in the industry.

[74] *Id.* at 1219-20.

[75] *See* Gurun, et al., *supra* note 72, at 1228.

[76] *Id.* at 1220. From a sample of advisors at 100 large firms, it was observed that misconduct tends to increase the likelihood of being fired by 23%, absent the Protocol, "but that this discipline is effectively undone when firms join the protocol." *See also id.* at 1232 ("Once adviser fixed effects are included in the model, the coefficient estimates on "Firm in protocol" become both statistically and economically significant. The estimate in column 4, which is calculated using the sample of advisers working for employers with at least 100 advisers, indicates that the probability that an adviser engages in misconduct increases by 20 bps once his employer joins the protocol. Compared to an unconditional probability of misconduct of 47 bps, this is an increase in likelihood of over 40%.").

[77] *Id.* at 1220.

[78] *Id.*

A 2015 study of hair salons by Johnson and Lipsitz did not examine wage *per se*, but a wage-related aspect of NCAs,[79] surveying NCA use among hair salons by e-mail.[80] Specifically, the study examined the conjecture that NCAs may be used to transfer utility from employees to employers when the market-clearing wage is constrained.[81] Findings supported the hypothesis that the minimum wage will have a negative effect on employment when NCAs are unenforceable, but not when they are.[82] There was also evidence for the proposition that NCAs were surplus maximizing for some salons, but not others; that is, NCAs may be employed by salons that are wage constrained and lack access to credit, to the detriment of the joint surplus (salon plus employee).[83] Like many of the studies discussed in the NPRM, Johnson and Lipsitz depend centrally on survey evidence, and the cross-sectional convenience sample of 218 salon owners[84] is a conspicuous limitation. Still, the study suggests important questions about the total impact of NCAs on labor markets and, for low-income employees, about the potential interaction of NCAs with minimum wage policies on employment. Additional research into these issues with better data could be important, to the extent one is concerned about the total impact of NCAs on labor markets and, especially, on workers.

In the same paper, Johnson and Lipsitz investigate the impact of NCAs on on-the-job training.[85] They find that salons using NCAs are 14% more likely than the mean to provide training to newly hired workers.[86] Starr also observes a training effect—one similar in magnitude—across categories of workers.[87] His results suggest that, if a state were to adopt a policy change in which it moves from non-enforceability of NCAs to average enforceability, the likelihood of worker training would increase 14.7%.[88] Moreover, Starr's results demonstrate that "the positive correlation between noncompete enforceability and training… is driven almost entirely by firm-sponsored training. The relationship between noncompete enforceability and self-sponsored training is practically zero."[89] While Starr, Prescott, and Bishara did not find a relationship between training and the *timing* of employees

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[79] *See* Matthew S. Johnson & Michael Lipsitz, *Why are Low-Wage Workers Signing Noncompete Agreements?*, J. HUMAN RESOURCES 0619-10274R2 (May 12, 2020).

[80] *Id.*

[81] *Id.* at 2, 17.

[82] *Id.* at 30. ("employment elasticity of the minimum wage in the lowest NCA enforcement states is much more negative (-0.38) than the average effect (p = .024). On the other hand, the point estimate on the interaction term … implies that the employment elasticity of the minimum wage is significantly closer to zero when NCAs are available.")

[83] *Id.* at 28; *see also*, p. 43, Table 6.

[84] *Id.* at 16.

[85] Johnson & Lipsitz, *supra* note 79.

[86] *Id.* at 26.

[87] Evan Starr, *Consider This: Wages, Training, and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LABOR REL. REV. 783 (2019).

[88] *See id.* at 785, 796-7. Note that Starr also observes lower wages associated with increased NCT enforceability. *See id.*

[89] *See id.* at 797.

learning about NCA terms, these and other studies suggest that NCAs can, in fact, ameliorate hold-up problems associated with investments in employee training, as well as potential tradeoffs in labor markets, such as tradeoffs between wages and firms' investments in employee training.[90]

None of our discussion is meant to suggest that the various cited papers based on natural experiments[91] are without value. Indeed, in a body of literature based on so few natural experiments (relative to, e.g., the literature regarding the effects of minimum wages), we do not simply dismiss all the studies that lack a clear causal design. Our purpose, rather, is threefold. First, we mean to point out that the empirical basis for regulatory intervention is limited, especially when one considers federal regulations that would sweep as broadly as the Proposed Rule. Second, as we discuss below, the emerging empirical picture is more complex—and the results more mixed—than the Commission seems to recognize. Third, as discussed by Bishara and Starr, McAdams, and numerous participants in the FTC's 2020 workshop, there remain significant data and methodological limitations across the existing body of literature. Collectively, these undercut both the generality of the Commission's purported findings about the effects of NCAs (or NCA enforceability), and the confidence that the Commission and other policy makers ought to attribute to such findings.

2. *The downstream effects of NCAs on competition and consumers is theoretically ambiguous and empirically unestablished*

Setting aside the study of the Broker Protocol,[92] the NPRM notes precisely one study on the downstream price effects of either NCA usage or enforceability, stating that a 2021 paper by Hausman and Lavetti on the effects of physician NCAs, is "the only study of how non-compete clauses affect prices."[93] That suggests a gaping hole in the literature. Antitrust has not yet abandoned (and should not abandon) its concern with consumer welfare and downstream prices.[94]

At the outset, we might wonder how well a study of physician NCAs and health care services prices will generalize across occupations, products, and services. We might also wonder about endogeneity and identification issues, given data limitations on specialty distribution within firms, myriad state

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[90] *See* FTC 2020 NCA Workshop, Evan Starr, Tr. at 162, 166, 174 (regarding, e.g., evidence of training incentives and wage/training tradeoffs); *id.*, Kurt Lavetti, Tr. at 144-6 (regarding physician compensation and potential referral/patient sharing); *id.*, Ryan Williams, Tr. at 187, et seq. (NCAs and risk management for CEOs). *Cf. id.,* Howard Shelanski, Tr. at 263 (noting "ambiguity" in the research).

[91] The main natural experiment papers cited on wages are: Johnson, et al., *supra* note 53, Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements,* 68 MGMT. SCI. 143 (2021), and 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. HUMAN RESOURCES S349 (2022).

[92] *See supra* notes 72-77 and accompanying text.

[93] NPRM at 3490 (citing Naomi Hausman & Kurt Lavetti, Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes, 13 AM. ECON. J. APPLIED ECON. 258 (2021)).

[94] Or with other cognizable downstream effects, such as the impact of qualitative aspects of goods or services, output, etc.

and federal policy changes pertaining to health care reimbursement, background changes in physician practice organization, and a dearth of major state law NCA policy changes in the period in question, 1996-2007.[95] Changes in physician organization have been ongoing for several decades, and include not just a general trend towards consolidation, but increasing vertical integration, as primary and ambulatory care practices are acquired by hospitals, hospital systems, and networks.[96]

The issue of measuring changes in NCA enforceability seems especially salient, given the difficulty of quantifying changes in enforceability associated with legal changes, especially common law ones,[97] soft or subjective elements of the metric used to attempt quantification, and the fact that neither Bishara's approach to measurement nor its implementation in the study seems ever to have been tested against any objective measures of litigation impact. The nature, sensitivity, and specificity of the metric also seem critical given the study's findings, which indicate that the *sign* of the putative effect changes as one shifts one's focus from establishment-level changes to firm-level changes in provider organization.[98]

The NPRM's treatment of the Hausman & Lavetti study seems especially puzzling given the Commission's considerable experience with health care competition matters and, specifically, economic research on health care competition issues conducted by FTC staff in BE. The paper is, in many ways, a careful and thoughtful attempt to investigate the relationship between NCAs and the organization of physician practices. And, indeed, the authors acknowledge various challenges posed by data limitations, among others.[99]

At the same time, the study employs market definitions and analytic methods eschewed in the Bureau's investigations of health care provider mergers. The NPRM also is unclear on the confidence the Commission attaches to the study's striking findings:

> we find that a 100 point increase in the *establishment*-based HHI causes a reduction in negotiated prices of about 1.4 percent to 1.9 percent on average. In contrast, the same increase in

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[95] *See, e.g.,* Hausman & Lavetti, *supra* note 93, at 259, 269, 271, fig. 1 & table 1.

[96] *See, e.g.,* Martin Gaynor & Deborah Haas-Wilson, *Change, Consolidation, and Competition in Health Care Markets*, 13 J. ECON. PERSP. 141 (1999); DEBORAH HAAS-WILSON, MANAGED CARE AND MONOPOLY POWER: THE ANTITRUST CHALLENGE (2003); Martin Gaynor, et al., *The Industrial Organization of Health-care Markets*, 53 J. ECON. LIT. 235 (2015); DEP'T JUSTICE, FED. TRADE COMM'N. IMPROVING HEALTH CARE: A DOSE OF COMPETITION [Internet]. Washington (DC): FTC; 2004 Jul [cited 2017 Jul 31]. Available from: https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf; Brent D. Fulton, *Health Care Market Concentration Trends in The United States: Evidence and Policy Responses*, 35 HEALTH AFFS. 1520 (2017).

[97] *See* Barnett & Sichelman, *supra* note 52.

[98] *See* Hausman & Lavetti, *supra* note 93, at 260 ("100 point increase in the *establishment*-based HHI causes a reduction in negotiated prices of about 1.4 percent to 1.9 percent on average. In contrast, the same increase in concentration caused by firm-level consolidation holding fixed establishment concentration causes prices to increase by 1.7 percent to 2.1 percent.").

[99] *See id.* at 277-8.

> concentration caused by firm-level consolidation holding fixed establishment concentration causes prices to increase by 1.7 percent to 2.1 percent. OLS specifications imply very small (but statistically significant) positive price effects of 0.02 percent or less, consistent with within-state evidence from Baker et al. (2014).[100]

While we should not dismiss surprising results out of hand, these findings seem more a red flag than a credible interval estimate. 100-point changes in HHI are not at all likely to signal competitively significant events. Small changes in concentration are not *necessarily* infra-marginal in their price effects, but this is supposed to be a general result across geographic and service markets, and a decade, not surprising observations in specific geographic and service market. As such, it seems highly unlikely, and at odds with both the FTC's considerable experience with provider mergers and the larger body of health care competition research.[101]

As the Commission is well aware, calculating HHI based on market share is elementary, given a measure of market share: for a given market, one sums the squares of each firm's percentage market share. That's it. And, as the Department of Justice Antitrust Division reports:

> The agencies generally consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated, and consider markets in which the HHI is in excess of 2,500 points to be highly concentrated.[102]

Consider, for example, a geographic market in which 10 firms (10 group practices) provide general pediatric services. For the sake of simplicity, assume that each firm has an identical 10% market share. In that case, the HHI is 1,000 (that is, $10(10^2)$). Suppose, further, that two of the ten firms merge, such that eight non-merging firms each retains its 10% market share, leaving the merged entity with a 20% share. In that case, the HHI would be $8(10^2) + 20^2 = 1{,}200$. That single acquisition would yield a 200-point change in HHI: double the change that is supposed to be robustly associated with significant price increases. The estimate does not seem credible.

The study employs a commercial database that includes the "medical claims for all active employees and their dependents from a sample of large firms," from 1996-2007.[103] That is a substantial longitudinal (and nationwide) sample, although it is worth noting that this study, like many, lacked access

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[100] *Id.* at 260.

[101] *See generally, e.g.*, Christopher Garmon, *The Accuracy of Hospital Screening Methods*, 48 RAND J. ECON. 1068 (2017) (reviewing post-merger price changes for 28 hospital mergers, initially published as BE Working Paper).

[102] *See* Herfindahl-Hirschman Index, DEPARTMENT OF JUSTICE (Jul. 31, 2018), https://www.justice.gov/atr/herfindahl-hirschman-index; *see also* Competitive Effects, FEDERAL TRADE COMMISSION (last visited Apr. 12, 2023), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/competitive-effects.

[103] Hausman & Lavetti, *supra* note 93, at 269.

to All-Payer Claims databases,[104] and one might wonder whether the sample from large firms skews the data. Moreover, the data include prices for ambulatory care services only. Hence, the extent to which hospitals as organizations, and even group and individual practices, cross-cut the delivery of ambulatory and hospital-based services may be a confounding factor of interest, as their longitudinal business database permits firm-level observations, but does not identify the specialties of the physicians at each firm—and, as we noted above, there is evidence of ongoing vertical integration in health care provider markets.[105] Identification may be especially important here, as the findings are *directionally inverse* depending on the choice of firm-level or establishment-level analysis.

Also noted above, the study depends on "a new database quantifying the variation in state-level NCA laws systematically over time, following the measurement system developed by Bishara (2011)."[106] Note that while a number of the "enforceability" studies cited in the NPRM also follow Bishara's framework, they do not all employ the same scale. Moreover, although the notion of "enforceability"—like the relative stringency of regulations—carries a rough intuitive connotation, there is no objective measure of "enforceability" and, as we discuss below, it is not clear what the study's ordering system measures, or how well.

Hausman and Lavetti acknowledge that their "modeling approach follows the general structure-conduct-performance (SCP) frame- work for estimating effects of market structure on prices, which has several well-known limitations."[107] Indeed, while HHIs may still be used for rough and preliminary screening purposes, merger analysis has, by and large, and for decades, left the SCP framework behind, as both theoretical and empirical work has undermined the approach.[108] We would not expect merger screening or analysis to rely upon regressions of HHIs. Does the Commission's Bureau of Economics contend that they should?

Work from the Bureau of Economics has reinforced the background methodological trend away from the SCP paradigm in provider markets. Both staff and management in the Bureau of Economics have made substantial contributions to the study of competition in health care markets, with a

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[104] *See* All-Player Claims Databases, AGENCY FOR HEALTHCARE RESEARCH AND QUALITY (February 2018), https://www.ahrq.gov/data/apcd/index.html.

[105] *See supra* note 95.

[106] Hausman & Lavetti, *supra* note 93, at 270.

[107] Hausman & Lavetti, *id.*, at 276.

[108] *See*, e.g., Richard Schmalensee, *Inter-Industry Studies of Structure and Performance, in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951–1009 (Richard Schmalensee & Robert Willig eds., 1989); William N. Evans, Luke M. Froeb & Gregory J. Werden, *Endogeneity in the Concentration–Price Relationship: Causes, Consequences, and Cures*, 41 J. INDUS. ECON. 431 (1993); Steven Berry, *Market Structure and Competition, Redux*, FTC Micro Conference (Nov. 2017), https://www.ftc.gov/system/files/documents/public_events/1208143/22_-_steven_berry_keynote.pdf. *See also* Nathan Miller, et al., *On the Misuse of Regressions of Price on the HHI in Merger Review*, 10 J. ANTITRUST ENFORCEMENT 248 (2022).

focus on the study of provider consolidation.[109] That research seems to have had a significant impact on the courts' treatment of provider mergers. Between 1993 and 2000, the federal antitrust agencies (FTC and DOJ) challenged eight hospital mergers, losing all eight challenges.[110] Hospital merger challenges were nearly abandoned, but the losing streak spurred renewed research efforts, both within the Bureau and across the academy. Critically, BE staff undertook a series of merger retrospective studies, ranging from individual case studies to reviews of dozens of consummated provider mergers.[111] These are, in essence, forensic investigations, aiming "to determine ex post how, if at all, a particular merger affected equilibrium behavior in one or more markets."[112] Such studies complement diverse cross-sectional and theoretical work on hospital mergers, and on provider consolidation more generally.[113] The retrospectives have helped refine merger screening methods employed within the FTC; and they have been widely credited with reversing the way provider mergers are viewed in the courts.[114]

Research on health care competition from BE and elsewhere, coupled with enforcement by the FTC's Bureau of Competition, represents a signal model of the application of applied industrial organization research to policy development and law enforcement. Notably, this research program militates against SCP assumptions in provider mergers, and against the market definition

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[109] *See, e.g.*, Thomas Koch & Shawn W. Ulrick, *Price Effects of a Merger: Evidence from a Physicians' Market*, 59 ECON. INQUIRY 790 (2021); Keith Brand & Ted Rosenbaum, *A Review of the Economic Literature on Cross-Market Healthcare Mergers*, 82 ANTITRUST L.J. 533 (2019); Thomas Koch, et al., *Physician Market Structure, Patient Outcomes, and Spending: An Examination of Medicare Beneficiaries*, 53 HEALTH SERVS. RES. 3549 (2018); Julie A. Carlson, et al., *Economics at the FTC: Physician Acquisitions, Standard Essential Patents, and Accuracy of Credit Reporting*, 43 REV. INDUS. ORG. 303 (2013); Devesh Raval, et al., *Using Disaster Induced Closures to Evaluate Discrete Choice Models of Hospital Demand*, 53 RAND J. ECON. 561 (2022). *See also, e.g.*, Martin Gaynor & Robert J. Town, *The Impact of Hospital Consolidation–Update*, Robert Wood Johnson Foundation, The Synthesis Project (2012) (Gaynor is a former Director of the FTC's Bureau of Economics); Martin Gaynor & William B. Vogt, *Competition Among Hospitals*, 34 RAND J. ECON. 764 (2003); Leemore S. Dafny, et al., *Regulating Hospital Prices Based on Market Concentration Is Likely to Leave High-Price Hospitals Unaffected*, 40 HEALTH AFF. 1386 (September 2021) (Dafny was Deputy Director for Health Care Antitrust in the FTC's Bureau of Economics from 2012-13); Leemore S. Dafny, *Hospital Industry Consolidation–Still More to Come?*, 370 NEW ENG. J. MED. 198 (2014).

[110] See, e.g., Christopher Garmon, Hospital Mergers—Retrospective Studies to Improve Prediction, CPI Antitrust Chronicle (July 2017).

[111] *See, e.g.*, Garmon, *supra* note 101 (reviewing post-merger price changes for 28 hospital mergers, initially published as BE Working Paper); Deborah Haas-Wilson & Christopher Garmon, *Hospital Mergers and Competitive Effects: Two Retrospective Analyses*, 18 INT. J. ECON. BUS. 17 (2011); Orly Ashenfelter, et al., *Retrospective Analysis of Hospital Mergers*, 18 INT. J. ECON. BUS. 5 (2011); Patrick S. Romano & David J. Balan, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare*, 18 INT. J. ECON. BUS. 45 (2010); John Simpson, *Geographic Markets in Hospital Mergers: A Case Study*, 10 INT. J. ECON. BUS. 291 (2003); Michael G Vita & Seth Sacher, *The Competitive Effects of Not-For-Profit Hospital Mergers: A Case Study*, 49 J. INDUS. ECON. 63 (2001).

[112] Joseph Farrell, Paul Pautler, & Michael Vita, *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals*, 35 REV. INDUS. ORG. 369 (2009).

[113] *See* citations referenced *supra*, note 108.

[114] *See Overview of the Merger Retrospective Program in the Bureau of Economics*, FEDERAL TRADE COMMISSION (last visited Apr. 12, 2023), https://www.ftc.gov/policy/studies/merger-retrospective-program/overview.

alternatives employed by Hausman and Lavetti's study. Results suggest, for example, that various "the new screening tools (in particular, WTP and UPP) are more accurate than traditional concentration measures at flagging potentially anticompetitive hospital mergers for further."[115] Results also suggest "no statistically significant relationship between post-merger price change and the HHI screens, regardless of the geographic market or share metric employed."[116] Hausman and Lavetti are aware of the health care competition literature and attempt to address some of its challenges.[117] Still, given BE's research, and given the unlikely numerical findings, the NPRM's discussion of potential limitations to this single study of the downstream effects is curiously oblique:

> Generally, greater concentration may or may not lead to greater prices in all situations and may arise for reasons which simultaneously cause higher prices (indicating, therefore, a noncausal relationship between concentration and prices). In this case, the authors claim that researching the direct link between changes in law governing non-compete clauses and changes in concentration allows them to identify a causal chain starting with greater enforceability of non-compete clauses, which leads to greater concentration, and higher consumer prices.[118]

Both points seem correct as far as they go, but the NPRM is entirely unclear on the question what they imply for the significance of the study's findings. The NPRM states that "[t]here is evidence that non-compete clauses increase consumer prices and concentration in the health care sector."[119] In the NPRM's introduction, the suggestion is broader: "research has also shown that, by suppressing labor mobility, non- compete clauses have negatively affected competition in product and service markets in several ways."[120] Perhaps, but the Commission has identified only one study indicating downstream price effects. Does the Commission find the evidence credible? Or generalizable? The NPRM continues to expound on the study's dubious findings, and on conjectures about the mechanisms at play, at some length.[121] It also extrapolates on the reported findings, suggesting that they are reinforced by "another study, by Michael Lipsitz and Mark Tremblay, [that] shows increased enforceability of non-compete clauses at the state level increases concentration, as measured by employment-based HHI."[122] Does the Commission deem that finding important?

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[115] Garmon, *Accuracy of Hospital Screening Methods*, *supra* note 101, at 1070.

[116] *Id.*

[117] *See* Hausman & Lavetti, *supra* note 94, at 275-7.

[118] NPRM at 3490.

[119] *Id.*

[120] NPRM at 3482.

[121] *Id.*

[122] *Id.* (*citing* Michael Lipsitz & Mark Tremblay, *Noncompete Agreements and the Welfare of Consumers,* Working Paper (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975864).

None of this is to say that NCAs cannot have an anticompetitive effect in health care markets, and it's certainly not meant to suggest that provider consolidation cannot be anticompetitive. BE research and FTC enforcement have demonstrated that health care provider mergers and acquisitions *can* be anticompetitive, under certain facts and circumstances. Many hospital markets are highly concentrated—on any measure—and providers of health care services who have market power might employ NCAs to create (or exacerbate) barriers to entry in both those services markets and input markets, such as professional labor markets. Many provider markets are subject to regulatory barriers to entry as well, such as state law Certificate of Need or Certificate of Public Advantage regimes,[123] which might interact with restraints on labor mobility. Rule of reason inquiry into physician NCAs in specific labor (and service) markets might well find harm to competition and consumers. And further economic research, such as that commenced by Hausman and Lavetti, might well foster successful and pro-consumer antitrust enforcement. But there are serious reasons to doubt the specific interval estimates produced by the one price study available, and there remain questions about the importance of context in assessing the effects of NCAs, and of the distribution of average NCA effects (of whatever accuracy), across distinct labor markets.

In any case, the substantial literature on health care competition, and the distinctive characteristics of health care product, service, and labor markets—highly regulated at the state and federal levels, and subject to a complex mix of public and private payment—strongly suggest that one cannot reliably generalize the results of a single study on NCAs and ambulatory care prices across the entire national work force, much less to the downstream price effects of NCAs across industries, products, and services markets.

3. *The weight of the evidence does not support the claim that NCAs decrease innovation*

The Commission argues that the "weight of the evidence indicates non-compete clauses decrease innovation."[124] The "weight of the evidence" is unclear. There are, indeed, some studies suggesting that greater NCA "*enforceability*" is associated with some innovation-relevant harm. The main paper that seems to fit the Commission's model of reliable studies on the topic examines seven legal changes from 1992-2008, which were reported to increase or decrease the level of a state's NCA

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[123] *See*, *e.g.*, Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission on Certificate-of-Need Laws and Alaska Senate Bill 62 (2017), https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-us-department-justice-regarding/v170006_ftc-doj_comment_on_alaska_senate_bill_re_state_con_law.pdf; FTC Policy Perspectives on Certificates of Public Advantage, Staff Policy Paper (2022); Statement of the Federal Trade Commission *In The Matter of Phoebe Putney Health Services, Inc., et al.*, FTC Docket No. 9348 (Sep. 4, 2014), https://www.ftc.gov/system/files/documents/public_statements/581041/140905phoebeputneystatement.pdf. The P*hoebe Putney* matter illustrates, among other things, how certificate of need programs can impede effective remedies to demonstrably anticompetitive provider mergers. *Cf. FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013).

[124] NPRM at 3492.

enforceability.[125] That paper finds, according to the NPRM, "that the value of patents, relative to the assets of the firm, increase by about 31% when non-compete clause enforceability decreases."[126] But overall, findings are mixed, the literature is hardly settled or comprehensive, and there remains the question of the confidence one should attach to existing studies, separately or in aggregate.

For the papers that the Commission cites, two find that the enforceability of NCA increases in innovation, one finds a decrease, and one is ambiguous.[127] On the one hand, citing reasonable limitations, the Commission suggests that it puts relatively less weight on those studies. On the other hand, the Commission seems sufficiently confident to conclude that "enforceability broadly diminishes the rate of innovation,"[128] based on one paper that looks at value of patents, which is but one of several commonly used, and oft-debated, measures of innovation.[129] Later, the Commission admits it "is unable to extrapolate from the relevant studies to quantify or monetize this benefit."[130]

As a background matter—and conspicuous in the economic literature on innovation—innovation (and rates of change in innovation) can be hard to quantify, in part because there are diverse indicators of innovation, but no definitive one.[131] Patents have value and some connection with innovation, but patents vary wildly in their value.[132] Value-adjusted patents are better indicators, but patent value, and the time frame in which it's best evaluated, may be hard to assess, as evidenced by, e.g.,

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[125] Zhaozhao He, *Motivating Inventors: Non-Competes, Innovation Value and Efficiency*, Working Paper (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846964.

[126] NPRM at 3492.

[127] *See* NPMR at 3492-3. The papers are: Gerald A. Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment*, Fed. Reserve Bank of Phila. Working Paper 21-26 (2021) (finding a correlation that suggests an increase in patenting with enforceability); Fenglong Xiao, *Non-Competes and Innovation: Evidence from Medical Devices*, 51 RSCH. POL'Y 1 (2022) (finding enforceability correlates with an increase in the quantity of innovation as measured by the introduction of new medical devices); Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425 (2011) (finding a correlation that suggests venture capital induces less patenting when non-competes are enforceable); and Raffaele Conti, *Do Non-Competition Agreements Lead Firms to Pursue Riskier R&D Strategies?*, 35 STRATEGIC MGMT. J. 1230 (2014) (finding an ambiguous effect that the Commission summarizes as "riskier research and development strategies lead to more breakthrough innovations, but also lead to more failures, leaving the net impact unclear").

[128] NPRM at 3493.

[129] He, *supra* note 125.

[130] NPRM at 3527.

[131] *See, e.g.*, Thomas M. Jorde & David J. Teece, *Innovation and Cooperation: Implications for Competition and Antitrust*, 4 J. ECON. PERSP. 75 (1990) (regarding the organization requirements (and implications) of innovation, modeling complexities, and common market failures in the "market for know-how").

[132] For a classic review of the literature on the economic significance of patents, and difficulties in determining what aspects of economic activity are, and should be, captured by patent statistics, see Zvi Griliches, *Patent Statistics as Economic Indicators: A Survey*, 28 J. ECON. LIT. 1661, (1990),

FRAND disputes,[133] or the bundles or thickets in which many patents are sold or licensed. Also, patents may be more (or less) relevant given the technology in question, just as trade-secrets and copyrights might have greater or lesser significance depending on the sector and the nature of the tech; for example, trade secrets and copyright might have greater import in areas as diverse as software and biotech. Factors such as venture capital funding, the establishment and growth of startups, etc. also are significant but, again, of varying significance relative to other signals.[134]

Second, the theoretical impact of NCAs on innovation is ambiguous, and empirical findings regarding the complex subject of innovation suggest mixed effects associated with NCAs (or, more commonly, with changes in NCA enforceability).[135] For example, a 2018 study by Starr, et al., examines the impact of greater NCA enforceability on the creation, growth, and survival of spinouts and other new entrants, based on matched employer-employee data on 30 states and 5.5 million new firms. On the one hand, it finds that greater enforceability is associated with fewer within-industry spinouts; on the other hand, the within-industry spinouts created in greater enforceability states "tend to start and stay larger, are founded by higher-earners, and are more likely to survive their initial years."[136] They find no impact on entry by firms that are not within industry spinouts.[137] They suggest that greater enforceability may screen the formation of within-industry spinouts by dissuading founders with lower human capital.

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[133] *See, e.g.*, Eli Greenbaum, *No Forum to Rule Them All: Comity and Conflict in Transnational FRAND Disputes*, 94 WASH. L. REV. 1085 (2019). Because objective valuation of FRAND terms may often be difficult, authorities tend to focus on the conditions under which (and forums in which) good faith negotiation can occur. *Compare* U.S. PTO/U.S. DOJ, *Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Dec. 19, 2019), https://www.justice.gov/atr/page/file/1228016/download (emphasizing conditions of negotiation) *with* U.S. PTO/NIST/U.S. DOJ, *Withdrawal of 2019 Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Jun. 8, 2022), https://www.uspto.gov/sites/default/files/documents/SEP2019-Withdrawal.pdf (emphasizing case-by-case evaluation of conduct).

[134] *Cf.* Bronwyn H. Hall & Dietmar Harhoff, *Recent Research on the Economics of Patents*, 4 ANN. REV. ECON. 541 (2012) (reviewing the literature and noting the importance of patents in certain sectors, while also concluding that "the sheer size and growth of the recent literature might lead one to assume that patents are an extremely important instrument of economic development and growth, which therefore attract a great deal of interest from researchers and policy makers. But this seems at odds with the weak evidence that patents serve as an incentive for innovation and the fact that relatively few firms find them an important means of securing returns to innovation").

[135] *See, e.g.*, Evan Starr, Natarajan Balasubramanian & Mariko Sakakibara, *Screening Spinouts? How Non-compete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MGMT. SCI. 552 (2018); see also FTC 2020 NCA Workshop, Evan Starr, Tr. at 162-163 (observing wage vs. training tradeoffs); *id.*, Lavetti, Tr. at 144-145 (findings indicating wage gains in certain contexts, but not others).

[136] Starr, et al, *supra* note 135 at 552.

[137] *Id.*

A recent working paper by Jeffers suggests that certain labor frictions in knowledge-intensive occupations can play an important role in investment decisions.[138] Using matched employee-employer data from LinkedIn, Jeffers finds that increases in NCA enforceability led to 7-11% declines in worker departures for workers in those occupations where the majority of workers have at least a bachelor's degree. Those declines, in turn, led to increased investment by those firms that rely more on knowledge intensive occupations.[139]

As we discuss below (and as noted in the NPRM), Marx, et al., 2009 exploited a Michigan statutory change—one deemed to increase NCA enforceability—to study worker mobility—specifically, innovator mobility.[140] Their findings suggest the increased enforceability was associated with lower mobility—or job switching rate—of inventors (roughly, employees who are patent holders). However, a 2019 study by Carlino exploited the same legislative event to investigate the effect of NCA enforceability on startups and job creation.[141] Based on a difference-in-differences analysis, he found that an increase in NCA enforceability had a small effect to none-at-all on startups, and a very small, if positive, effect on job creation.[142]

Third, a 2020 paper by Barnett and Sichelman in the University of Chicago Law Review reviews ambiguities and limitations (including plain errors) in the NCA innovation literature in detail.[143] One of its key observations is that almost none of the relevant studies has a causal design; that is, the studies that employ cross-sectional regressions cannot be said to show that changes in NCA enforceability *cause* the observed effects.[144] We do not recapitulate their article here, but we commend it to the Commission as another important commentary on the available literature. We note, specifically, as we discuss in Section I.B.3, *infra*, their observation that several of the event studies

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[138] Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship*, Working Paper (September 7, 2022), *available at* https://ssrn.com/abstract=3040393.

[139] *Id.* at 1. Jeffers also found decreased entry.

[140] Matt Marx, Deborah Strumsky, and Lee Fleming, *Mobility, Skills, and the Michigan Non-compete Experiment*, 55 MGMT SCI 875 (2009) [hereinafter Marx, et al., 2009].

[141] Gerald Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment*, Fed. Res. Bank of Philadelphia Working Paper #17-30 (2017) (comparing Michigan with both an all-states control group and with 10 states with statutory limits on NCA enforcement both before and after the Michigan change).

[142] *Id.* at 16, 20.

[143] *See* Barnett & Sichelman, *supra* note 52.

[144] *Id.* at 1010. ("The simplification of these doctrinal complexities in the Marx et al. study renders that study's key assumption—namely, that nonenforcing states always apply their own law—flawed, and thus confounds its causal identification strategy.")

cited by the NPRM depend on oversimple, and in some regards erroneous, readings of Michigan law.[145]

We do not suggest that any specific mixed or positive findings be considered definitive. Rather, the piecemeal, mixed, and in some regards infirm findings might be considered suggestive as to some of the impact of NCAs on factors associated with innovation, but they cannot be considered adequate grounds for the general conclusion that "non-compete clauses decrease innovation"; certainly, they are inadequate if they are to be considered a significant plank in the justification of a sweeping federal ban on NCA usage.

B. The Existing Event Studies Depend on Eccentric Events and Their Results Are Not Sufficiently Generalizable

The NPRM notes the importance of event studies —"'natural experiments' resulting from changes in state law"—to assess *the effect* of changes in state law on earnings.[146] According to the NPRM, "[t]he use of a natural experiment allows for the inference of causal effects, since the likelihood that other variables are driving the outcomes is minimal."[147] That observation should be subject to significant qualification, but we agree that event studies *can* support causal inferences and that, broadly speaking, they represent an important means of investigating the economic implications of policy changes.

However, as Starr and others have noted, observable variation in NCA law had long been limited, myriad subtle differences across the states notwithstanding. Workshop panelists and others have noted the difficulty of estimating the causal impact of NCA use, due in part to a dearth of exogenous variation.[148] As Bishara and Starr put it in 2016, "very few states have significantly changed their noncompete policies in the last 30 years."[149] More recent changes in state NCA law may be more significant. In the past several years, nine states and the District of Columbia have adopted income- or wage-based limits on NCA enforcement.[150] These may yield data for informative event studies without the artifice of "enforceability" measurement, but the studies cited in the NPRM predate

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[145] *Id.* at 1018 ("Marx et al., however, overlook this complexity and erroneously assume that nonenforcing states always apply their own law so as to void a noncompete agreement that falls under the law of another state.").

[146] NPRM at 3486.

[147] *Id.*

[148] *See, e.g.*, FTC 2020 NCA Workshop, Evan Starr, Tr. at 173.

[149] Bishara & Starr, *supra* note 2, at 537.

[150] Since 2019, five states (Maine, Maryland, New Hampshire, Rhode Island, and Virginia have adopted statutes preventing enforcement of NCAs against low-wage workers; and since 2020, four states (Colorado, Illinois, Oregon, and Washington) and the District of Columbia have adopted similar limits pertaining to middle-income (to mid-plus) workers. For a recent overview of state NCA laws, see, e.g., Beck, *supra* note 18. The NPRM's examples of event studies mostly concern estimates of relative "enforceability" across many, and often subtle or ambiguous, changes in state laws, instead of studies that focus on unique, major changes in NCA law. It's not at all clear that these are properly regarded as event studies, but, in any case, as we discuss in detail below, they rest on a soft and problematic metric for legal change.

these statutory changes. Without such changes, the many, highly varied, and mostly subtler legal changes that had been available constrain the likely generalizability of existing NCA event studies. As McAdams observed, "the more credible empirical studies tend to be narrow in scope, focusing on a limited number of specific occupations (e.g., executives) or potentially idiosyncratic policy changes with uncertain and hard-to-quantify generalizability (e.g., banning non-competes for technology workers in Hawaii)."[151]

1. *Hawaii changed more than NCAs but only for a small number of tech workers*

The Hawaii technology workers study, Balasubramanian, et al., is in many regards well designed and well executed. It exploits a 2015 statutory event in Hawaii to study the effect of NCA enforceability changes on employee wages and mobility.[152] The authors "find that Hawaii's 2015 CNC ban increased new-hire monthly earnings by 4.2 percent, while overall (that is, all worker average) monthly earnings rose 0.7 percent."[153] Supplementing their initial Hawaii analysis with a cross-state analysis, they find that "eight years after starting a job in an average enforceability state, technology workers have about 8 percent fewer jobs and 4.6 percent lower cumulative earnings relative to equivalent workers starting in a nonenforcing state [NCA]."[154] They suggest that their results are consistent with the notion of a significant lock-in effect associated with NCAs. The finding could be especially significant, as the results suggest that the NCA enforcement effects are not confined to low-wage workers.

At the same time, the study seems to illustrate all of McAdams's general concerns about "the more credible empirical studies."[155] Regarding workers' occupations, the authors correctly observe that the relevant statutory change pertained to the tech sector, or "an employee of a technology business."[156] And the statute established that NCAs for tech workers "shall be void and of no force and effect."[157] But there are several wrinkles here.

First, the statute did not so neatly address tech workers. Under the Hawaii statute, tech workers do not include employees of "any trade or business that is considered by standard practice as part of the broadcast industry or any telecommunications carrier."[158] That is, the statute covered tech workers, but not those in the telecom or broadcast industries, or, indeed, any tech workers employed by

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[151] McAdams, *supra* note 4, at 4.

[152] *See* Balasubramanian, et al, *supra* note 91.

[153] *Id.* at S351.

[154] *Id.* at S349.

[155] McAdams, *supra* note 4, at 4.

[156] Haw. Rev. Stat. § 480-4(d) (2021).

[157] *Id.*

[158] *Id.*

any firm "other than a trade or business that derives the majority of its gross income from the sale or license of products or services resulting from its software development or information technology development."[159] Administrative assistants at tech firms were in, but, say, programmers in telecom, government, education, transportation, or health care were out.

Second, as the authors acknowledge, the occupational definition was not the law's only idiosyncrasy. The legislation did not simply apply to NCAs. Rather, it restricted a "noncompete clause or a non-solicit clause in any employment contract."[160] Given sufficient state law variation, that wrinkle could be a feature rather than a bug: post-employment restrictions often are bundled,[161] and one might like to study the effects of changes in the law bearing on the various elements of the bundle, jointly and severally. Given the current levels of variation across state laws, it is a limitation.

In addition, it's unclear how much of a change the law effected, even for tech workers (as defined), and for NCAs and non-solicit clauses. As the authors acknowledge, the statute was not retroactive;[162] that is, it would apply to new employment agreements, going forward from the effective date, but not to those already in effect. Workers already covered by NCAS were still covered. Moreover, prior to the statutory change, Hawaii NCAs already were subject to "a reasonableness analysis."[163] NCAs could easily fail Hawaii's reasonableness test, as Hawaii courts had considered "the benefits to the employer from noncompete or nonsolicit agreements" to duplicate those of trade secret law, and hence "impose undue hardship upon employees of technology business and the Hawaii economy."[164]

Finally, we might wonder whether the Hawaii tech sector (as defined under Hawaii law) is representative of tech sectors in other states. Hawaii is a very small state, with a total population (not just its workforce) numbering approximately 1.4 million (approximately 1.36 million in 2010, and approximately 1.44 million in 2022).[165] And Hawaii does not appear to have a vibrant tech sector, even relative to its small size. One source suggests that there is not a single tech firm among the 100 largest employers in Hawaii.[166]

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[159] *Id.*

[160] *Id.*

[161] FTC 2020 NCA Workshop, Orly Lobel, Tr. at 10; *id.*, Evan Starr, Tr. at 172-73 (regarding NCAs, non-disclosure, non-solicitation of clients, non-solicitation of co-workers, IP-assignment terms, "most firms… are using all of these provisions together.").

[162] Balasubramanian, et al, *supra* note 91, at S353, n. 9.

[163] *Technicolor, Inc v. Traeger*, 551 P.2d 163 (1976).

[164] *Id.*

[165] *Quick Facts, Hawaii*, US CENSUS BUREAU (last visited Apr. 12, 2023), https://www.census.gov/quickfacts/HI.

[166] Chris Kolmar, *100 Largest Employers in Hawaii for 2022*, ZIPPIA (June 2021), https://www.zippia.com/advice/largest-companies-in-hawaii.

In sum, we have a key legislative event that pertains to one industry (not necessarily one occupational category), on an idiosyncratic definition of that industry; the legal change did not apply exclusively to NCAs, it did not apply retroactively to existing NCAs, and it changed the enforceability of NCAs relative to an uncertain, but apparently somewhat stringent, standard of reasonability. It did so in a very small state, where the workforce included some tech workers, but no significant tech industry to speak of. The authors responsibly acknowledge a few of these idiosyncrasies, and their potential to raise "concerns about generalizability."[167] But that seems to put it mildly. It's entirely unclear whether observations that turn on Hawaii's 2015 NCA legislation can be generalized at all, whether to a potential ban on NCA usage, to changes in NCA enforceability that apply beyond the tech industry, or to potential changes in enforceability pertaining to either the tech industry or tech workers anywhere outside Hawaii. To its credit the FTC, likewise, acknowledges the concern about generalizability.[168] At the same time, the Commission seems comfortable making a "preliminary finding" of estimated wage effects across the nation, occupations, and industries based on a "back-of-the-envelope" extrapolation from unpublished findings regarding an idiosyncratic statutory reform in a state with a very small workforce and – even given the state's small size – a relatively small tech industry.[169] Picking the mid-point of this back-of-the-envelope range estimate does not make the Commission's preliminary estimate "conservative," but highly speculative. Respectfully, this does not seem suitable as an estimated effect for a Proposed Rule that would regulate tens of millions of labor agreements.

2. *Oregon banned NCAs for hourly and low-wage workers during the depths of the Great Recession which muddies general applicability*

A 2019 paper by Lipsitz and Starr exploits a 2008 statutory change in Oregon's NCA law that "banned [NCAs] for hourly and low-wage workers."[170] The Oregon statutory change, like the Hawaii legislation discussed above, is of interest in part because relatively little of the considerable state-by-state variation in NCA laws has to do with the simple binary question whether, for some tranche of the workforce, NCAs are or are not enforceable in court. And Oregon seems in several regards less of an outlier than Hawaii. First, it's a substantially larger state;[171] and second, a statutory change focused on hourly and low-wage workers may be more generalizable than one that applies to an eccentric segment of the tech industry in a state lacking a significant tech industry. Looking

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[167] Balasubramanian, et al, *supra* note 91, at S351.

[168] NPRM at 3523 ("Caution is recommended in interpreting this extrapolation, however, since results from one sector within one state may not necessarily inform outcomes that would occur in the rest of the country.").

[169] *Id.* ("Extrapolating from the estimates for Hawaii to the average impact on high-tech workers in each state, a prohibition such as the one in this proposed rule would increase earnings of high-tech workers in the average state by 4.8%.").

[170] *See* Lipsitz & Starr, *supra* note 91, at 162.

[171] *State Population Totals and Components of Change*, US CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html#v2022 (estimating Oregon's population at 4,237,291 as of July 1, 2020).

specifically at hourly workers and comparing observed changes in Oregon against several groups of control states, Lipsitz and Starr find that, "on average, banning... [NCAs] increased the earnings of hourly workers [in Oregon] by 2-3%, with stronger effects for those in jobs most likely to sign... [NCAs], while raising monthly job-to-job mobility by 17%."

Those are significant effects but, as McAdams notes, the study is subject to potentially confounding factors.

First, Oregon's 2008 statutory change coincided with the beginning of "the Great Recession"; that is, with the most significant recession since the Great Depression of 1929-39.[172] McAdams also observes that "[r]esearch on regional recessions finds that the timing of recessions (both the onset and recovery) differs across states," including states in the same census region.[173] Hence, the timing of the statutory change may be regarded as "unfortunate," from a research perspective. Indeed, it

> raises the possibility that the paper's estimated effects are confounded by macroeconomic factors that—similar to [NCAs]—also influence wage growth and worker mobility, as well as by the differential policy responses by states. Indeed, in Lipsitz and Starr (2019), the mobility of workers in Oregon increased (relative to control states) soon after the ban took force in 2008, but average wages did not increase until a full three years post-ban (in 2011). Actual (or threatened) worker mobility is an important channel through which we expect workers to achieve wage growth in Oregon after its ban on non-competes. The fact that Oregon saw an increase in mobility without an increase in average wages raises the possibility that there are confounding factors at play.[174]

Second, as with Hawaii, we might question the extent to which the 2008 statute changed the state's law regarding NCAs and low-wage workers. Lipsitz and Starr state that they examine low-wage workers specifically to "focus our empirical analysis on the subset of workers for whom NCAs [NCAs] were enforceable before 2008, but were clearly voidable after 2008."[175] But Lipsitz and Starr themselves note that the NCA restrictions were not retroactive."[176] Hence, low-wage workers who did not change jobs were not among the subset of workers against whom NCAs were enforceable before 2008 but not after, at least not until a post-2008 change of jobs. And as with Hawaii, there were certain other wrinkles in the state law. Exceptions to the employees covered by Oregon's NCA limits included not just professionals—or persons "engaged in administrative, executive or professional

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[172] McAdams, *supra* note 4 at 17.

[173] *Id.* at n. 34 (citing James D. Hamilton & Michael T. Owyang, *The Propagation of Regional Recessions*, 94 REV. ECON. AND STATS. 935 (2012)).

[174] McAdams, *supra* note 4, at 17-18 (internal citations omitted).

[175] Lipsitz & Starr, *supra* note 91, at 148.

[176] *Id.* at 147 (stating that the law brought about "dramatic changes to Oregon's policy on NCAs, effective January 1, 2008 for new contracts" (pre-existing contracts were governed by the old law)).

work who: (a) Performs predominantly intellectual, managerial or creative tasks; (b) Exercises discretion and independent judgment; and (c) Earns a salary and is paid on a salary basis,"[177] and *inter alia*, federal employees at any wage level,[178] various agricultural workers, including those paid on a piece-rate,[179] and a person "principally engaged in the range production of livestock and earns a salary and is paid on a salary basis,"[180] persons "employed in domestic service on a casual basis in or about a family home,"[181] and persons "engaged in the capacity of an outside salesperson or taxicab operator."[182]

In addition, the authors, citing a 2008 law review article by Rassas, note that, pre-2008 Oregon NCAs were subject to a reasonability test, involving "criteria meant to ensure that legitimate business interests were being protected without unduly harming workers."[183] That, of course, raises the question of the extent to which Oregon courts, prior to 2008, found NCAs for low-wage workers to serve legitimate business interest without harm to those workers.

The law review article they cite provides no objective measure, but it plainly suggests that Oregon courts, and indeed Oregon statutory law, were skeptical of NCAs prior to 2008. As Rassas observed,

> The former Oregon statute attempted to balance competing interests of the employee and employer by mostly "codify[ing] the basic common law rules" of reasonableness. Oregon courts imposed additional requirements for enforcement, tipping the balance in favor of the employee's interest in mobility....
>
> Oregon statutory law mandated that non-competes in any industry were void unless "entered into upon the: (a) [i]nitial employment of the employee with the employer; or (b) [s]ubsequent bona fide advancement of the employee with the employer."[184]

Statutory limits on NCAs in Oregon had been in place, undergoing piecemeal changes, since 1977.[185] Reviewing the case law, Rassas emphasizes that "Oregon courts did not take these

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[177] Or. Rev. Stat. § 653.020(3).

[178] *Id.* at 653.020(4).

[179] *Id.* at 653.020(1)(a)-(d).

[180] *Id.* 653.020(1)(e).

[181] *Id.* at 653.020(2).

[182] *Id.* at 653.020(6).

[183] *Id.*

[184] Melissa Ilyse Rassas, *Explaining the Outlier: Oregon's New Non-Compete Agreement Law & the Broadcasting Industry*, 11 U. PA. J. BUS. L. 452-3 (2009) (internal citations omitted).

[185] Elizabeth H. White & Jonathan G. Rue, *Effective Use of Non-solicitation and Confidentiality Agreements in Oregon after S.B. 169*, K & L GATES HUB (Apr. 1, 2022), https://www.klgates.com/Effective-Use-of-Non-Solicitation-and-Confidentiality-Agreements-in-Oregon-After-SB-169-4-1-2022.

requirements lightly."[186] They imposed, among other things, both geographic and temporal limits on NCAs, which they deemed "'covenant[s] in restraint of trade,' the enforcement of which generally runs counter to public policy."[187] In addition, decisions by federal courts in the Ninth Circuit reinforced the substance of Oregon's statutory restrictions on NCAs. For example, in *Nike, Inc. v. McCarthy*, the Ninth Circuit found it…

> apparent that the legislature intended to permit employers to require existing employees to agree to a noncompete agreement, so long as the employee's job content and responsibilities materially increased and the employee's status within the company likewise improved. Otherwise, the employer would merely be imposing a new condition for the "same job." Id. Thus, an advancement would ordinarily include such elements as new, more responsible duties, different reporting relationships, a change in title and higher pay.[188]

And in *Ikon Office Solutions, Inc. v. Am. Office Prods., Inc.*, a federal district court held that, "[u]nder Oregon law, the right not to be subjected to a non-competition agreement, except as authorized… is an 'important employment-related statutory right.'"[189]

We do not argue that Oregon's 2008 legislation was inframarginal in its effects, or that it did not increase the cost of enforcement of NCAs for at least some employers of low-income workers.[190] Rather, given the statutory idiosyncrasies, and the complex pre-2008 restrictions, the magnitude of the change (on any clear measure) is uncertain. Indeed, it is not at all apparent that it represented a major change for hourly and low-income workers. For those reasons, and the confounding timing of the statutory change at issue and the Great Recession, it is not at all clear how the magnitude of Oregon's 2008 change in enforceability compares—or should be compared—with the disparate legal changes observed in control states.

We can ask a further question. When measuring or ordering the relative enforceability of state NCA laws, how should we assess, e.g., restrictions pertaining to a specific occupation (such as, e.g., tech industry employees in Hawaii) relative to those pertaining to, e.g., a certain income level, given that the specifics of the statutes vary? We might consider the percentage of the state's workforce fitting a categorical restriction under state law, the percentage actually or likely covered by NCAs, or various

[186] Rassas, *supra* note 184, at 453.

[187] *Id.* (internal citations omitted).

[188] *Nike, Inc. v. McCarthy*, 379 F.3d 576 (9th Cir. 2004).

[189] *Ikon Office Solutions, Inc. v. Am Office Prods., Inc.*, 178 F. Supp. 2d 1154, 1160 (D. Or. 2001) (quoting *Dymock v. Norwest Safety Protective Equip. for Oregon Indus., Inc.*, 172 Or. App. 399, 405-06 (2001)) (expounding the bounds of Oregon noncompetition law).

[190] *See* M. Scott McDonald and Jacqueline C. Johnson, *Across the Board: Changes Are in the Works for Noncompete Agreements*, LITTLER MENDELSON, PC (Aug. 2007), https://www.littler.com/files/press/pdf/17022.pdf (noting that the 2008 bill took "a hard (and more complex) stance on noncompetes").

other measures, and we might consider the domain of the restriction somehow normalized according to, e.g., the stringency of limitation. There is no objectively correct way to do this, but one or another means might be more or less useful for economic or antitrust analysis; and, in any case, we might want to know how it is being done within any given study and across the "enforceability" literature.[191]

3. *Michigan's statutory changes were not a clear switch from unenforceable to enforceable and back again*

Several papers exploit 2005 statutory changes in Michigan—the Michigan Antitrust Reform Act ("MARA")[192]—with or without a subsequent amendment in 2007, to investigate the impact of NCA enforceability on worker mobility, especially as it relates to innovation. MARA—perhaps inadvertently, increased the enforceability of NCAs. Marx, et al. 2009[193] found that the increased NCA enforceability permitted by MARA reduced the mobility—or job switching rate—of inventors; that is, roughly, employees who were patent holders. In a follow-up study, Marx, et al. 2015[194] found what might be viewed as a "brain drain":

> from Michigan to non-enforcing states following the... policy reversal: during a symmetric window from 1975-1996 surrounding [the change], the rate of emigration to non-enforcing states grew in Michigan (0.24%-0.32%) while dropping in states that did not enforce non-competes. The relative risk of post[change] emigration was 1.35 in Michigan, twice as high as in states that continued not to enforce non-competes.[195]

Barnett and Sichelman demonstrate in detail that these studies evidence significant problems in both data and analysis.[196] A central concern has to do with the legal analysis underlying the assessments of changes in enforceability. Marx, et al. (2009)[197] and Marx, et al. (2015)[198] both suppose that NCAs were generally unenforceable, prior to MARA's enactment in 2005, under a statute providing that "[a]ll agreements and contracts by which any person…agrees not to engage in any avocation or employment…are hereby declared to be against public policy and illegal and void."[199] They also argue—not without evidence—that MARA's repeal of Public Act 329 was inadvertent. They also note a 2007 statutory amendment to the pertinent provision of MARA, which represented its

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[191] *See also* notes 167 & 168, *supra*, and accompanying text.

[192] Michigan Antitrust Reform Act § 18, MCL § 445.788.

[193] Marx, et al., 2009, *supra* note 140.

[194] Matt Marx, Jasmit Singh & Lee Fleming, *Regional Disadvantage? Employee Non-compete Agreements and Brain Drain*, 44 RES. POL'Y 394 (2015) [hereinafter Marx, et al., 2015].

[195] *Id.* at 397.

[196] *See* Barnett & Sichelman, *supra* note 52.

[197] Marx, et al., 2009, *supra* note 140 at 875.

[198] Marx, et al., 2015, *supra* note 194, at 394.

[199] Mich. Public Act No. 329 of 190 (Michigan Antitrust Reform Act § 18, MCL § 445.788.)

retrenchment (not rescission).[200] Specifically, the 2007 amendment added a "reasonableness doctrine" that "did not reinstate the previous ban."[201]

Neither event was quite what the research supposed. As Barnett and Sichelman explain, the assumption that NCAs were unenforceable in Michigan prior to 1985, but generally enforceable from 1985-87,[202] seems to misread the law. Prior to 2005, Michigan courts might uphold NCA terms or approve changes of venue due to, e.g., choice-of-law provisions in the NCAs or the larger employment agreements within which they were situated. Perhaps more important, the authors of the Michigan studies

> appear to overlook that MARA included a "savings clause" that provided that the statute repealed by MARA would "remain in force for the purpose" of enforcing any liability under the repealed act. Consistent with the saving clause, Michigan courts declined to enforce NCAs that were entered into prior to MARA.[203]

That savings clause has implications for both the 2005 and 2007 events. The 2005 adoption of MARA had no bearing on NCAs entered-into prior to the law's enactment and, hence, no bearing on employees actually or putatively subject to NCAs before 2005. Multi-state firms with strong incentives to employ NCA terms would have had a natural incentive to use choice-of-law provisions to impose or maintain those terms in Michigan pre-2005. The studies assume that California's relatively recent decisions disfavoring the application of such choice-of-law clauses to NCAs in California represent the general case, but, as Barnett and Sichelman demonstrate, it does not.[204] Moreover, operative NCAs would have included not just employees subject to extra-Michigan NCAs, but some employees whose employment agreement documents pre-2005 included NCA terms, even if, for those employees, the terms were, at least arguably, unenforceable under Michigan's prior law. As the NPRM notes, and as several authorities have observed, employment agreements commonly contain NCA terms, even in states where such terms are unenforceable; and NCAs are common in engineering and other technical occupations. There are also questions when, to what extent, and on what

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[200] *Id.* at 445.774a(2).

[201] Marx, et al., 2015, *supra* note 194, at 396.

[202] Barnett & Sichelman, *supra* note 52, at 1022. Marx, et al., 2015 *supra* note 194, at 395, cites as the "governing case," *Application Group Inc. v. Hunter Group Inc.*, 72 CAL. RPTR. 2d 73 (1st Distr. 1998).

[203] Barnett & Sichelman, *supra* note 149, at 1022 (citing *Compton v. Joseph Lepak, D.D.S., P.C.*, 397 N.W.2d 311, 316 (Mich. Ct. App. 1986) ("When an agreement or contract is entered into in violation of the statute, repeal of that statute does not make the agreement valid because the Legislature cannot validate a contract which never had a legal existence.").

[204] *See* Barnett & Sichelman, *supra* note 52, at 1018. Bishara cites *Edwards v. Arthur Anderson, LLP*, 189 P.3d 285 (Cal. 2008) for the proposition that California courts have a strong public policy interest in upholding California NCA law). *See* Norman Bishara, *Fifty Ways to Leave Your Employer, supra* note 58, at 757. *But see, e.g., In re Howmedica Osteonics Corp*, 867 F.3d 390 (3d Cir. 2017) (upholding forum selection clauses specifying New Jersey and Michigan jurisdiction for suit to enforce NCAs against two California residents).

terms, the 2005 policy change fostered the negotiation (or imposition) of NCAs on tech professionals whose employment remained unchanged from 2005-07.

The savings clause also has implications for Michigan's 2007 policy reform, beyond whatever retrenchment was accomplished by the savings clause post-2007. Because the 2005 policy change was smaller than the studies suppose, the effect of its 2007 retrenchment was also smaller than the studies suppose. As noted by Barnett and Sichelman, errors and ambiguities in assessing the magnitude of legal changes are especially salient for the Marx et al. [2015] study (as well as a 2009 study by Marx and others), given the relatively small decrease, in absolute terms, in labor mobility observed in Michigan. The 2009 Marx et al. study considers 98,468 inventors and 27,478 inventor moves within Michigan over the period 1963-2006. In absolute terms, labor mobility increased post-MARA over the full time period from 7.18% to 8.98%, although other "non-enforcing" states saw a larger increase, from 7.95% to 10.80%.[205]

> While the Marx, et al. studies never report these differences in absolute numbers, they are easy to calculate. Specifically, the difference of in-state mobility in Michigan versus non-enforcing states in absolute terms was roughly 1%, equating to an absolute difference of about 100-200 moves per year purportedly lost within Michigan due to the enforcement of noncompetes. For inventors moving out of Michigan, the numbers are much lower.[206]

In brief, errors and uncertainty in assessing legal changes in Michigan and in control states takes on an outsize import given the small number of job changes potentially attributable to the Michigan statutory change.[207]

One might suppose that such misinterpretations of the law represent "mere" coding errors, and that such errors are occasional (and sometimes minor or debatable), adding some degree of random error, and hence noise, to signals of the economic impact of policy changes, while leaving findings directionally—and approximately—intact. But the Michigan case should remind us that, with small numbers of observations and/or small effects, recoding might well render previously observed effects statistically insignificant or nil. As we have seen above, such coding issues seem significant across key event studies in the literature, rather than outlier events. And as we discuss in Section III.D below, such issues point to fundamental questions about the meaning and reliability of the "enforceability" metric on which so many studies—and the Commission's conclusions—rely.

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[205] *See* Barnett & Sichelman, *supra* note 52, at 1021.

[206] *Id.*

[207] Needless to say, it is highly unlikely that all tech professional job changes in the pertinent interval were caused by the change in NCA enforceability.

4. *California is not a clean event study due to California's unique attributes*

Policy discussions of NCAs often look to Gilson's 1999 paper,[208] and a few follow-on cross-sectional studies, suggesting that California's hostility to the enforcement of NCAs helps explain the rise of Silicon Valley and what's taken to be the fall to tech innovation in Massachusetts.[209] Barnett and Sichelman dissect these arguments with some care, and we commend their discussion to the Commission, even as aspects of Gilson's comparison now seem dated.[210] Gilson's account is interesting, but in scientific terms, the Silicon Valley/Rt. 128 comparison seems more of a "just-so story," than an empirical vindication of any specific theory about NCAs. At best, it is an existence proof for the claim that relatively stringent limits on the private enforcement of NCAs can, under some facts and circumstances, co-exist with vibrant tech innovation. But that proposition is not much at issue.

California *would* present an especially difficult case for an event study, not least because of timing questions. California's NCA policy is anchored by a provision in the state's Business and Professions Code from 1941, [211] and that provision has both statutory and case law roots dating to the 19th Century.[212] Data problems for a credible event study abound, and not just because key events in the state's growth—as a center of innovation and otherwise—are hard to tie to any specific legal events regarding NCAs.

C. Because There is No Objective Measure of "Enforceability," Many of the Causal Studies Contain a Fatal Methodological Weakness

As we noted above, the Commission is well-positioned to contribute to the further development of economic research regarding NCAs and, specifically, to the further application of Industrial Organization economics to research on NCAs and labor market competition. A critical synthesis of the relevant hearings and FTC workshops could contribute to policy debates involving NCAs in

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[208] Ronald Gilson, *The Legal Infrastructure of High-Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578-9, (1999).

[209] *See, e.g.*, Lina Khan, *Noncompetes Depress Wages and Kill Innovation*, N.Y. TIMES (Jan. 9, 2023), https://www.nytimes.com/2023/01/09/opinion/linakhan-ftc-noncompete.html; FTC 2020 NCA Workshop, Orly Lobel, Tr. at 15, 22; Starr, Tr. at 168.

[210] *See* Barnett & Sichelman, *supra* note 52. *See also*, Russell Beck, *Correlation Does Not Imply Causation: The False Case of Silicon Valley and Boston's Route*, FAIR COMPETITION LAW (Jul. 9, 2019), https://faircompetitionlaw.com/2019/07/09/correlation-does-not-imply-causation-the-false-comparison-of-silicon-valley-and-bostons-route-128.

[211] California law provides that "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600. California statutes also provide an exception for NCAs for a person selling ownership interest in a business, the assets of a business, or the goodwill of a business. Cal. Bus. & Prof. Code § 16600.

[212] *See, e.g.*, *City Carpet Beating Works v. Jones*, 102 Cal. 506 (Cal. 1894) (*citing* Cal. Civil Code §§ 1673, 1674).

Congress and in the states.[213] Additional studies, and the development of better data sources—perhaps in cooperation with the Department of Labor—are well within the staff's competence, and these too could better inform policymaking and state and federal law enforcement. Moreover, the Commission is well-positioned to help develop the antitrust case law where NCAs and related vertical restrictions on labor agreements demonstrably harm competition and consumers. These tasks are potentially important; they are tractable, given the Commission's resources, including its human capital; and they fit well within the Commission's jurisdiction. They should precede, not follow, a proposed federal NCA regulation.

In the NPRM's account of the empirical evidence, the Commission notes that:

> The belief that studies of non-compete clause use do not reflect causal estimates is shared by the authors of at least one of the studies of non-compete clause use. As noted in Starr et al., "Our analysis of the relationships between noncompete use and labor market outcomes... is best taken as descriptive and should not be interpreted causally." As a result, the Commission gives these studies minimal weight.[214]

We agree that it is important to distinguish between correlation and causation. That is not to say that none of the non-causal studies is suggestive, but we note that the studies to which the Commission ascribes "minimal weight" constitute a significant portion of the available literature. Central to much of the literature—including most of the papers the Commission seems to consider causal—examine the putative effects of NCA "enforceability," or of changes in levels of enforceability, under state law.

On the surface, there is some intuitive appeal to this approach for several reasons. For one, there is survey evidence on the incidence of NCA usage within and across states, but little evidence on the individuals bound by (or perceived to be bound by) NCAs, so it is difficult to study the impact of NCA usage directly. Second, one might suppose that evidence on the effect of various policies (and policy changes) bears directly on the question what legal policy, if any, to impose. Third, at a high level of abstraction, we might have an intuitive sense that some regulations are more stringent than others, and that some jurisdictions are more (or less) plaintiff friendly, whether with regard to NCAs specifically or across most civil suits. For example, it seems plain enough that the decisions of California courts, applying California Business and Professions Code Section 16600, recognize a

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[213] For an example of a current legislative proposal, see, e.g., S.379—Freedom to Compete Act of 2023, 118th Cong. (2023-24) (which would amend the Fair Labor Standards Act to prevent the use of NCAs in employment contracts for certain non-exempt employees).

[214] NPRM at 3487 (*citing* Starr, Prescott & Bishara, *supra* note 54).

stringent restriction on a plaintiff firm's ability to enforce the terms of an NCA against an employee.[215] Hence, we can think of California as a "low enforceability" state.

However, there is no objective measure of "enforceability," and, hence, no established metric with which to detect or approximate such a measure. And if we seek to unpack the notion of enforceability, as prologue to identifying or formulating a useful metric, it seems clear that any number of factors or end points might be relevant to our high-level intuition. For example, we might be interested in the cost (average, median, or modal) of litigating an NCA dispute to its conclusion; we might be interested in the ratio of plaintiff to defendant success in litigating such cases to their conclusion; we might be interested in the frequency with which NCA claims are filed and, if filed, settled or, in the alternative, survive, e.g., motions to dismiss for failure to state a claim or motions for summary judgement. We might also be interested in the way the law—and these various factors—affect not just the incidence of NCAs in a state, but the distribution and terms of those NCAs (or the terms of those NCAs employers seek to enforce). These are all related factors, but they are not equivalent, and, *a priori*, there is no obvious set of them, or weighted sum of them, that is best for all (or any specific) policy purposes.

Given the centrality of "enforceability" to the Commission's empirical brief for regulation, the underlying enforceability metrics and measurements deserve serious scrutiny. Before turning to the specifics of the scoring tools employed in the various NCA studies, we note that the cited studies of enforceability do not use the same metric, even if many of them share some basic assumptions or sources.

The Commission observes that the various studies are based on Malsberger's treatise, *Non-compete Clauses: A State by State Survey*, with some augmented by the 50-state survey conducted by Russell Beck.[216] The Commission also suggests that, while the "studies have defined enforceability of noncompete clauses in slightly different ways, each uses enforceability as a proxy for the chance that a given noncompete clause will be enforced."[217] It is not at all clear that the claim is correct. That is, at least most of the studies appear to lack any express claim about that proxy, and it is not at clear that anyone has ever investigated empirically the link between such measures and such a likelihood. Perhaps it is simply the ratio of suits (perhaps successful) to employees (putatively?) bound by NCAs, or perhaps the likelihood that an NCA will be enforced, conditional on, perhaps an (arguably)

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[215] California law provides that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600. It also provides for an exception for NCAs for a person selling ownership interest in a business, the assets of a business, or the goodwill of a business. Cal. Bus. & Prof. Code § 16600.

[216] NPRM at 3486, n. 62 (*citing* BRIAN M. MALSBERGER, ET AL., *COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY*, BLOOMBERG BNA (2012) and Beck, *supra* note 18. An earlier version of the Malsberger survey was P. JEROME RICHEY, BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE, A STATE-BY-STATE SURVEY (1990 & Cum. Supp. 1991).

[217] *Id.* at 3486.

covered employee's departure to subsequent employment, or perhaps the employee's departure to a competing employer.... What is more, the differences in measurement approaches are not obviously trivial. Some of the key studies take pains to critique the way other (apparently key) studies seek to implement their assessments of enforceability.[218] Differences in the approach employed may be especially important when considering relatively small effects, relatively few observations, or analyses based on correlations that barely meet significance thresholds.

Second, the various approaches to measuring enforceability are all soft measures; that is, they depend on subjective judgments, and, indeed, on series of subjective judgments. Most of the relevant studies are based, to some extent, on a periodic 50-state review of NCA law by Malsberger and others, as well as a set of accompanying questions suggested to guide state-by-state assessments of NCA laws, as published.[219] For example, Bishara's 2011 study examines state statutory and, chiefly, decisional law regarding NCAs and, based on twelve criteria of enforceability identified by Malsberger, applies "seven questions because they directly address the legal issues relevant to measuring a given jurisdiction's intensity of noncompete enforcement."[220]

1. Is there a state statute of general application that governs the enforceability of covenants not to compete?"
2. What is an employer's protectable interest and how is that defined?"
3. What must plaintiff be able to show to prove the existence of an enforceable covenant not to compete?"
4. [numbered 3a by Bishara, but ranked separately] Does the signing of a covenant not to compete at the inception of the employment relationship provide sufficient consideration to support the covenant?"
5. [labeled 3b and 3c, and scored jointly] Will a change in the terms and conditions of employment provide sufficient consideration to support a covenant not to compete entered into after the employment relationship has begun?
6. Will continued employment provide sufficient consideration to support a covenant not to compete entered into after the employment relationship has begun? If the restrictions in the covenant not to compete are unenforceable because they are overbroad, are the courts permitted to modify the covenant to make the restrictions narrower and to make the covenant enforceable? If so, under what circumstances will the courts allow reduction and what form of reduction will the courts permit?"

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[218] *See generally, e.g.*, Bishara & Starr, *supra* note 2.

[219] That is, as published in state codes and, to a lesser extent, in published judicial decisions. *See, e.g.*, Richey & Malsberger, *supra* note 216.

[220] Norman Bishara, *Fifty Ways to Leave Your Employer, supra* note 58, at 771.

7. [labeled 8] If the employer terminates the employment relationship, is the covenant enforceable?"[221]

The seven questions were applied to statutory and decisional provisions for each state, with each state receiving a score of zero, five, or ten in response to each question, and then an aggregate score that was a weighted sum of the individual response scores. For example, in applying Question 1,

> a score of 10 was awarded to a state that has a statute that favors strong enforcement, a 5 was awarded to a state that either did not have a statute or had a statute that was neutral in its approach to enforcement and a 0 was given to a state that has a statute that disfavors enforcement. This question was given an overall weight of ten.[222]

By way of contrast, for question 3,

> a score of 10 was awarded to a state that places a weak burden of proof on the plaintiff employer, a 5 was awarded to a state that has a balanced approach to the burden placed on the employer and a 0 was awarded to a state that places a strong burden of proof on the employer. This question was given an overall weight of 5.[223]

Bishara suggests that:

> Ultimately, this research will present a subtle yet authoritative view of the development of noncompete enforcement and provide evidence of trends in enforcement, as well as give guidance for state policymakers, businesses, and employees when evaluating the pros and cons of negotiating and attempting to enforce a noncompete agreement.[224]

We assume that Malsberger's survey was based on a well-informed review of relevant legal materials. At the same time, the review was not comprehensive, and its identification and characterization of relevant holdings and statutory provisions are matters of subjective—if informed—legal judgment. That is, they are not objective measures. Similarly, the twelve factors of import are matters of subjective—if informed—legal judgment.

Building on that review, Bishara applies his own rubric, which includes the scoring scheme (0, 5, or 10), scoring (or coding) of provisions under that scheme, and weighting of the seven scores to enable a weighted sum for each state, and an ordering of the states according to those sums. Given each sum, the ordering is objective, but the rubric is not: the choice of scoring scheme and—critically—the

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[221] *Id.* at 773-7. It's not clear whether or how answers to individual questions influenced each other. For example, would a given court holding on an employer's protectable interest be scored differently according to the state's statute of general application?

[222] *Id.* at 773.

[223] *Id.* at 775.

[224] *Id.*

scoring and weighting of provisions and holdings under that scheme are all matters of subjective judgement or intuition.

The problem is more than simply that any index is imperfect; the limited inputs and rubric makes it difficult for other scholars to investigate and compare different legal changes. It is worth comparing Bishara's rubric and index to an index like the World Economic Forum's Global Competitiveness Report, for example.[225] The Global Competitiveness Report comprises 12 "pillars," each of which aggregates multiple categories and explicit data points.[226] Any change in the index can be explicitly traced to a change in one of the data points or survey questions. Researchers can adjust weightings (but not the specified data points) as they see fit to test the robustness of the index. From there, researchers using the Global Competitiveness Report can debate whether the index is picking up appropriate policy and legal changes, so that causal estimates are properly identified using changes in the index. We discuss identification further in Section I.D, *infra*.

While Malsberger's identification of pertinent legal decisions and enforceability criteria reflect considered and informed legal judgment, they track a relatively limited amount of the variation observed in state law. Moreover, they are, as we have said, matters of subjective judgment; and we can find no evidence that the criteria (or questions) were ever tested against any specific outcomes. As noted above, it does not appear to be the case that anyone has investigated, empirically, the contention that the enforceability criteria serve as an effective (or accurate) proxy for the likelihood of litigation to enforce an NCA. And to unpack the "theory" of enforceability further, we might consider the varied litigation criteria we listed at the top of this section: there seems never to have been any investigation of the empirical relationship between, e.g., the presence or absence of a state law generally (on some level of generality) and, e.g., the incidence, duration, or cost of NCA enforcement cases litigated to their conclusion. We don't know specifically for what "enforceability" is a proxy, and we don't know how well it serves as a proxy measure for reasonable candidates.

The same can be said of Bishara's rubric and its implementation. Either or both might reflect considered legal judgment. They nonetheless represent subjective assessments; and again, we are unaware of any attempt at empirical assessment of the relationship between any of the individual scores, or the weighted sums of those scores, on any of the enforcement measures we listed at the top of this section. That is not to say that none of the scoring and ranking criteria signals anything of interest. It is, however, intended to underscore that the enforcement measures, (1) constitute a family of related schema, rather than any objective metrics, (2) it's not clear what indicia of relevance that the scores are supposed to function as proxies for, (3) all entail several stages of subjective judgment, and (4) that many other approaches may be available, and perhaps preferrable, for some area

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[225] KLAUS SCHWAB, WORLD ECONOMIC FORUM GLOBAL COMPETITIVENESS REPORT 2019 (2019), *available at* https://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf.

[226] *Id.* at 611-25.

of inquiry or other. We suspect that the combined econometric and legal expertise of the FTC's staff could improve upon these metrics, if tasked to do so.

The various measurement schema employed in the enforceability studies also recall our discussion, above, of the importance of coding to the reported results. The Hawaii, Oregon, and Michigan studies all exploited legal events that were in some regards idiosyncratic and in others simply misread. Hawaii presented an idiosyncratic legal change (bearing on both NCAs and non-solicit terms, for employees of certain tech firms but not others, with no application to existing NCAs), in an idiosyncratic context (a very small state lacking a significant tech sector). The Michigan studies, as discussed, seemed to depend upon readings and coding of a legislative event in Michigan that overstate the regards in which the event effected a change in the law, and perhaps in NCA. Oregon, too, involved a legal change that, while apparently non-trivial, may have affected less legal change than it seemed at first glance; and in any case, the Oregon event coincided with the onset of the Great Recession, which might well have been a confounding factor in assessing observed effects in Oregon against those in control states.

We might also wonder about the enforceability scale employed in the Hausman and Lavetti study of physician organization and health care services prices. That study exploits not a distinct legislative event, but "rich variation in the relevant legal environments" across the states, employing an enforceability rating scheme akin to the one in Bishara.[227] The single example of such changes discussed expressly in the article concerns a judicial decision in Louisiana:

> For example, in *Shreveport Bossier v. Bond* (2001) a Louisiana construction company attempted to enforce an NCA against a carpenter. The state Supreme Court ruled that the NCA could only prevent the carpenter from establishing a new business, but not from joining a pre-existing firm. This decision abruptly changed the law in the state, allowing all workers, including employed physicians, who had previously signed NCAs to escape the restrictions and move to other firms."[228]

This seems to imply that NCAs were generally (or at least typically) enforceable against employees moving to another firm as employees before the decision, but not after. In one regard, that would be simply erroneous. The decision in question, *SWAT 24 Shreveport Bossier v. Bond*,[229] did not change the law of the entire state of Louisiana; it resolved a circuit split.[230]

The extent to which the Louisiana Supreme Court decision changed the law, as read by courts in any of the state's circuits, is unclear. The decision was rendered against a backdrop of Louisiana's

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[227] Hausman & Lavetti, *supra* note 93, at 263.

[228] *Id.*

[229] SWAT 24 Shreveport Bossier v. Bond, 808 So.2d 294 (La. 2001).

[230] *Id.* at 296, 307.

longstanding "public policy disfavoring noncompetition agreements between employers and employees."[231] Specifically, "[p]rior to the enactment of the first statutory prohibition of noncompetition agreements in 1934, Louisiana courts consistently held these agreements to be unenforceable."[232] Subsequent statutory amendments continued to restrict NCAs, but provided for certain exceptions under which NCAs would be enforceable. At issue in *SWAT 24* had been an exception established under a 1989 statutory amendment that did not expressly address NCAs and could be read narrowly or broadly. Under a narrow reading, a Louisiana court would not uphold an NCA if an employee left to work as an employee of another firm, but it might uphold the NCA if the employee left "to pursue his own competing business."[233] Under a broad reading, an NCA might be found valid even if the employee left to work, as an employee, of another firm. Louisiana's second circuit court of appeals had read the exception narrowly in the matter on appeal, and had done so in prior decisions,[234] but the state's fourth circuit read it more broadly in 1998, as did the third circuit in 1999.[235] The state Supreme Court sustained the narrow reading.

The *SWAT 24* decision describes other potentially relevant aspects of Louisiana law, but, plainly, firms suing to enforce NCAs in Louisiana were subject to significant statutory and decisional constraints prior to the circuit split. And while the third and fourth circuit decisions repudiated in *SWAT 24* did provide employers considerable latitude, this much seems clear, and as close to an objective reading of the law as one can get: the *SWAT 24* decision did not change authoritative reading of the law by courts in Louisiana's second circuit.

It is possible that this represents an isolated coding error in the assessments of enforceability employed by Hausman and Lavetti. *But it is an error in the sole legal example they discuss*. In conjunction with the more central errors underlying, e.g., the Michigan and Hawaii event studies, it highlights a more general issue about the measurement of complex changes in statutory and decisional law, as well as their coding.

First, the legal changes being coded do not occur in a vacuum; judicial decisions as well as statutory reforms are set within a larger legal context that tends to comprise preceding statutory law (where relevant provisions may or may not be confined to a specific chapter or section of state law) and a body of jurisprudence that may include unpublished decisions as well as published ones. And given

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[231] *Id.* at 298 (citations omitted).

[232] *Id.* at 303.

[233] *Id.* at 303.

[234] *Id.* at 299 (citing Summit Inst. For Pulmonary Medicine & Rehabilitation, Inc. v. Prouty, 691 So.2d 1384 (La. App. 2 Cir. 1997).

[235] *Id.* at 300-1 (*citing Scariano Bros., Inc. v. Sullivan*, 719 So.2d 131 (La. App. 4 Cir. 1998) and *Moreno & Assocs. v. Black*, 741 So.2d 91 (La. App. 3 Cir. 1999).

that most of the legal changes that have been in evidence are relatively subtle ones, we should worry not just about random errors in coding—about noise—but about systematic errors.

Assessing a legal change by any measure may require familiarity with the body of law in that state. Experienced attorneys in the field—especially those experienced in the state in question—might well be accurate judges of the *directional* impact of a pertinent new statutory provision or authoritative decision on, say, the plaintiff's burden in seeking to enforce the terms of an NCA, likely dependent on specifying the sort of burden at issue and the terms and employment context of the NCA in question. We might assume that all of the systems would consider California's broad statutory limit on NCA enforcement to be a strong one, and that (nearly) all coders would code it as such. There remains the question how much the 1941 enactment of the specific provision of the California Business and Professions Code we see today changed the law in California, and in what respects, given antecedent California statutes and common law restrictions on NCAs dating to the 19th Century.[236]

Quantifying the change is another matter, and for most of the statutory changes that might be observed, one that depends more heavily on identifying both the specifics of the statutory provision and some specific effect, or endpoint—some specific dependent variable—on which the change is supposed to bear, as well as the terms and employment context of the NCAs at issue. Practiced attorneys may or may not have reliable intuitions about how to score such changes. The cruder the scale, the better their chances may be, but the cruder scales may not be much help in scoring or ordering the myriad policy variations one observes in NCA law. What's more, even with relatively crude scales, we have no evidence of the degree to which they may be reliable in one or another regard. Intuitive estimates of the relative effects of diverse changes across numerous states might be arbitrary or otherwise unreliable. And again, they have never been tested against any objective standard. The further we move from the best case—a licensed practicing attorney experienced in the employment law of a given state—the less confidence we might have in the ability of those reading, interpreting, and coding the law to estimate the magnitude of any specific change on any specific variable of interest. As we have seen, there seem to be plain and substantial errors at the level of reading and interpreting statutory and judicial reforms underlying key studies in the literature.

As we observed already, the endpoint (or dependent variable) of interest does not appear to have been specified in any of the "enforceability" studies. And the Commission's suggestion that, while the "studies have defined enforceability of non-compete clauses in slightly different ways, each uses

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[236] California law provides that "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600. It also provides for an exception for NCAs for a person selling ownership interest in a business, the assets of a business, or the goodwill of a business. Cal. Bus. & Prof. Code § 16600. Section 16600, in its present form, appears to date to 1941, but the provision has both statutory and common law roots extending into the 19th Century. *See, e.g.*, *City Carpet Beating Works v. Jones*, 102 Cal. 506 (Cal. 1894) (*citing* Cal. Civil Code §§ 1673, 1674).

enforceability as a proxy for the chance that a given noncompete clause will be enforced,"[237] is itself unclear: the likelihood of what specifically, given what (if any) attributes of an NCA and employment context? In brief, we are left with a search for one or several unspecified dependent variables, without any theory of legal change to identify the quantity of interest, much less to guide how we operationalize its measurement.

None of this proves that the various implementations of the Malsberger-based enforceability rating schema do not signal anything, but we have seen that it's not clear *what* they signal, or that they all signal the same thing. Again, there is no objective metric of "enforceability." At best, we have a family of related subjective approaches to quantifying some related aspects of policy reform. At worst—and arguably—we have the results of running various labor indicators through a black box.

Under the best-case scenario, we have a developing body of economic research, some of it suggestive of reasonable concerns we might have, on average, about some of the effects of NCAs. That is not a solid ground on which to rest a sweeping federal regulation. It is, rather, an invitation for the Commission to continue to gather information on, and experience with, the competitive effects of various NCAs. And it is an invitation to the Commission to commit resources to the further development of this body of research, including improved data sources, as well as refined methods and additional findings. For example, as Starr and others have suggested, we have both an over-reliance on survey data on NCA usage and a dearth of data on who is subject (actually or on paper) to an NCA. The Commission might, for example, help refine available survey instruments—perhaps in cooperation with the Department of Labor—and it might employ its Section 6(b) authority to gather direct evidence of NCA usage, and of what terms are employed in what contexts. Moreover, more recent state-level statutory reform—especially wage-based restrictions on NCA enforcement, as in Virginia, Illinois, Massachusetts—may yield data for a series of event studies that do not require the artifice of the enforceability measure.

We might add a final question: whatever it is that the enforceability studies do or do not signal, and however well, how do the various scoring schema, and the empirical results obtained employing them, array the universe of available policy options? We don't have any results suggesting *regulatory* alternatives, as it does not appear that any of the states have approached NCAs via regulation.[238] Not incidentally, we have no documented evidence of the effects of implementing a ban on use or maintenance of NCAs (as in the Proposed Rule), as opposed to limits on the abilities of plaintiff firms to enforce them, in civil court, against former employees. Beyond that, there remains the more

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[237] NPRM at 3486.

[238] A few states do provide for suits by the employee. 2020 amendments to the Virginia code restrict NCAs for low-wage employees. Va. Code § 40.1-28.7:8. Such employees can bring an action to have a putative NCA declared void, *and* for other equitable relief including restitution and money damages. While violations of the pertinent provision involve attempts to enforce an NCA against a low-wage worker, not the mere existence of sanctioned terms, such violations are subject to regulatory penalties. But as such, neither the administration of those regulatory penalties nor their effects have been studied.

complicated question how the various systems illustrate the differential effects of the myriad policy options a legislature, court, or regulator might consider, from diverse presumptions against (or for) plaintiff firms seeking to enforce NCAs, to "red-pencil" or "blue pencil" latitude for judges, to restrictions on one or another tranche of the income distribution, or one or another set of occupations are, or should be, rated and ordered.

The Commission has asked for input on various policy alternatives to the sweeping regulatory ban proposed in the NPRM. But it is not at all clear that the empirical evidence allows anyone to sort the optional wheat from the potential chaff. Unfortunately for the Commission, this is also an invitation for courts to strike down any Proposed Rule as insufficiently supported.

D. The Predicted Effects of the Proposed Rule Are Flawed Because Observed State-Level Changes May Not Apply Linearly to the Proposed Rule's National-Level Policy Change

It is not enough to simply lump some studies under the heading of "natural experiment." A natural experiment is just a name given to a situation outside of researchers' control that the user of the term believes allows them to identify a causal estimate. Any causal estimate is identified only with respect to a model. Relative to the model of supply and demand, regressing quantity purchased on price has an identification problem.[239] We cannot say that changes in price cause changes in quantity. But relative to a model of standard consumer theory, there is no identification problem. Variation in price does cause a change in the quantity purchased. Much of the debate surrounding modern empirical economics papers is the extent to which people accept a proposed model or identifying assumptions.

Moreover, the question of causation is not a simple yes or no. For example, the Commission quotes Starr, et al., noting that certain results are "'best taken as descriptive and should not be interpreted causally.'"[240] But in a working paper version of the paper, the authors include an appendix on "Potential Instruments for Noncompetes," which considers policy changes gathered as an instrumental variable for NCAs.[241] An instrumental variable potentially generates a causal estimate under an appropriate model. However, the authors conclude that the regressions "yield implausible estimates."[242] In Section I.B, *supra*, we gave reasons why the identifying assumptions around event studies (such as parallel trends between different states around the Great Recession) may not hold. As the Commission sometimes observes, we should vary the weight we attribute to certain results

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[239] *See, e.g.,* SCOTT CUNNINGHAM, CAUSAL INFERENCE: THE MIXTAPE 21 (2021).

[240] NPRM at 3487 (*quoting* Starr, Prescott & Bishara, *supra* note 54, at 73.

[241] Starr, Prescott & Bishara, *supra* note 54, at 57.

[242] *Id.*

according to the degree to which we believe the identifying assumptions.[243] Instead of lumping all under "natural experiments," it is important to clearly delineate papers on changes of an enforceability index from papers that study an explicit policy change (Hawaii, Oregon, or Michigan). The latter comprise a much smaller body literature. Both sorts of studies may provide valuable insights, but they rely on fundamentally different identifying assumptions—as do the papers with regressions that the Commission considers not to be natural experiments, which would have a causal interpretation if the model were the regression used in each paper.

Once we are confident that what we are picking up is likely to be a true causal effect, then we can ask about external validity and how that estimate can inform a policy change beyond the scope considered in the data, such as the FTC's Proposed Rule. While the Commission uses a "conservative" estimate of the effect on wages, it does not actually provide a robust defense of this estimate; rather, only a "back-of-the-envelope" extrapolation from a single unpublished study.[244] It is difficult to imagine that such a casual approach will satisfy courts assessing whether there is sufficient empirical support for the specific Proposed Rule.

The NPRM assumes a linear relationship between the enforceability index and the log of wages, and that the linear relationship would hold in the context of a national policy change. There are reasons to place little weight on both steps of the extrapolation since it is so far out of sample.

First, the changes picked up in the index used by Johnson, et al. may bear little resemblance to even a state level version of the Proposed Rule.[245] The impact of policy changes at the state level may be linear, supralinear, or sublinear. In other words, there could be linear returns to decreasing enforceability (as assumed), increasing returns, decreasing returns, or even, eventually, negative returns. Taking "the most conservative estimate" does nothing to mitigate this uncertainty, since the estimate technique assumes linearity.[246] Indeed, although a conservative estimate is likely better than the alternative, for any given state (or industry, wage level, type of employee, or any number of other variables) it may still be wildly inaccurate—even *directionally* so.

An alternative would be to use an estimate from a suitable event study, which would allow an explicit comparison between the event study's policy change and the Proposed Rule. If the event study resembled the Proposed Rule, we need to worry about whether the relationship is linear or not, as we have the estimated effect for the relevant treatment, at least at the state level. Unfortunately, no such

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[243] NPRM at 3487.

[244] *See* Johnson, et al., *supra* note 53.

[245] *Id.*

[246] NPRM at 3522.

event study exists because no state has implemented such a stringent policy against NCAs as the Proposed Rule would be.

Second, simply extrapolating from a state policy change—even a comparable one—to a national policy change is not straightforward. It is not obvious that so-called "general equilibrium effects" operate the same at the state level as at the local or national level. For a simple example, state level estimates of the tax elasticity of capital gains are different from what we should predict from a national capital gains tax change.[247] In the context of NCAs, we know that firms set uniform policies across states. This is why workers sign NCAs in states where they are illegal; everyone in the company signs one. Similarly, any estimate of a state policy change will not pick up firm responses that occur only when the policy applies sufficiently broadly. The NPRM suggests that businesses have substitutes for NCAs, such as NDAs.[248] We explain why NDAs do not perfectly replicate NCAs in Section **Error! Reference source not found.**, *infra*. Nevertheless, they may be partial substitutes. In that case, we should expect that businesses will substitute more to NDAs for a national policy change to NCAs than they do for a state policy change. In that case, simply extrapolating from the state estimate will overestimate any effects—good or bad—of the Proposed Rule.

II. The Proposed Rule Fails to Account for NCAs' Procompetitive Benefits and Wrongly Assumes Equivalent Benefit from Alternatives to NCAs

As the Commission observes, courts have long recognized that NCAs may "increase employers' incentive to make productive investments, including in worker training, client attraction, or in creating or sharing trade secrets with workers."[249] The Commission concedes that "there is evidence non-compete clauses increase worker training and capital investment (*e.g.*, investment in physical assets, such as machines),"[250] and cites three studies indicating such effects.[251] Nevertheless, it concludes that these well-established, and empirically supported business justifications "do not alter" its

[247] See, e.g., Ole Agersnap & Owen Zidar, *The Tax Elasticity of Capital Gains and Revenue-Maximizing Rates*, 3 AM. ECON. REV. INSIGHTS 399 (2021).

[248] NPRM at 3505.

[249] *Id.*

[250] *Id.*

[251] *Id.* at 3493 (citing Starr, *Consider This*, *supra* note 87 (finding that moving from mean NCA enforceability to no NCA enforceability would decrease the number of workers receiving training by 14.7% in occupations that use NCAs at a relatively high rate); Jeffers, *supra* note 138 (finding that knowledge-intensive firms invest 32% less in capital equipment following decreases in the enforceability of NCAs); Johnson & Lipsitz, *supra* note 79 (finding that hair salons that use NCAs train their employees at a higher rate and invest in customer attraction through the use of digital coupons at a higher rate, both by 11 percentage points)).

conclusion that all NCAs, save those that come within its narrow exception for the sale of a business, merit condemnation as unfair methods of competition.

The Commission states two reasons for refusing to account for procompetitive uses of NCAs:

> First, employers have alternatives to non-compete clauses that reasonably achieve the same purposes while burdening competition to a less significant degree. Second, the asserted benefits from these commonly cited justifications do not outweigh the considerable harm from non-compete clauses.[252]

Neither of these reasons justifies the Commission's sweeping NCA ban. Indeed, the NPRM provides no account of the degree to which, and cost at which, such alternatives function as either alternatives or complements to NCAs.

The Commission identifies four "alternatives to non-compete clauses for protecting valuable investments": trade secret lawsuits, non-disclosure agreements (NDAs), fixed-duration employment contracts, and enhanced wages and benefits.[253] None of those alternatives is as effective as an NCA in preserving incentives to make output-enhancing investments that could be taken to the investing employer's rivals, however.

Moreover, any effort by employers to try to *make* these alternatives as effective as an NCA would *also* run afoul of the Commission's' Proposed Rule. The Commission in its Proposed Rule makes *de facto* alternatives to non-compete agreements illegal:

> [T]he following types of contractual terms, among others, may be *de facto* noncompete clauses:
>
> (i) A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer.
>
> (ii) A contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker.[254]

While these inclusions may be necessary to achieve the Commission's intended effect – to completely prohibit NCAs, including anything that *functions* like an NCA – they also undermine the

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[252] NPRM at 3505.

[253] *Id.* at 3505, *et seq*.

[254] NPRM at 3535.

Commission's claim that "alternatives" remain available. And it is precisely to the extent that alternatives actually *function* as alternatives that they would run afoul of the Proposed Rule.

Meanwhile, to the extent these alleged alternatives might be found permissible under the "*de facto*" clause of the Proposed Rule only because they remain *less* effective, this highlights how the Proposed Rule deviates from accepted competition principles: Prevailing antitrust doctrine does not credit less restrictive alternatives that are less effective than the restraints they would replace.[255]

A. Trade Secret Law Protects Different Intangible Assets than NCAs and Is More Difficult to Enforce

The Commission maintains that trade secret law provides a substitute means by which an employer may protect valuable information from being transferred to a rival.[256] It states (misleadingly, as explained below) that the Uniform Trade Secrets Act provides legal protection for "information that (1) derives independent economic value from not being generally known to other persons who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts to maintain its secrecy."[257] The ability to sue workers who misappropriate such information, the Commission says, provides an adequate incentive for employers to produce and engage in the intra-firm sharing of competitively valuable information, negating a key business justification for NCAs. But trade secret law is less effective than NCAs at protecting employer interests for at least five reasons.

First, trade secret law provides little to no protection against the appropriation of skills training. Training an employee how to perform the tasks necessary to be a productive worker for an employer is not typically or chiefly a secret to rivals engaged in the same basic business. The benefit those rivals get from hiring the training employer's workers is not secret information but the return on the training employer's sunk training costs. If a firm cannot prevent the loss of such benefits before recouping its investment, it will be less likely to incur such costs in the first place. Trade secret law cannot address that problem.

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[255] *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076 (9th Cir. 2015) (refusing to credit less restrictive alternative that was not "virtually as effective" as challenged restraint); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) (requiring plaintiffs show alternative is "virtually as effective" in serving defendant's objective, concluding proposed LRAs were less effective, and ruling in favor of defendants at final net-effects step). *See also* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 944-5 (2016) ("Equal effectiveness is an explicit limitation in cases, jury instructions, and commentary.").

[256] NPRM at 3506. The Commission points to the Uniform Trade Secrets Act, which provides a state law civil cause of action for trade secret misappropriation; the federal Defend Trade Secrets Act, which establishes a similar cause of action under federal law; and the Economic Espionage Act of 1996, which criminalizes theft of a trade secret for either the benefit of a foreign entity or the economic benefit of anyone other than the owner.

[257] *Id.*, *citing* Uniform Trade Secrets Act § 1(4).

Second, trade secret law fails to protect valuable competitive information besides that implicated in employee training. The NPRM misstates the definition of a trade secret in a manner that obscures key limits on the law's protections. The first element of a trade secret defined by the Uniform Trade Secrets Act is not as stated in the NPRM, but is instead "information… that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use…."[258] The Commission's characterization obscures the requirement that a protectable trade secret must "*not be readily ascertainable by proper means*" by rivals. This requirement has often prevented competitively valuable information like customer lists and information about customers' interests and preferences from qualifying for trade secret protection.[259] An employer who cannot protect such information is less likely to compile it, or to share it with workers who may leave for a rival.

Third, reliance on trade secret law to protect competitively valuable information tends to limit efficient sharing of such information within the firm. Many businesses operate most effectively when numerous employees are aware of competitively valuable information, such as customer preferences, buying patterns, etc. But the second element of a protectable trade secret is that the information be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[260] The more freely a piece of information is shared *within* a firm, the less likely it is to merit trade secret protection.[261] NCAs, by contrast, do not discourage the intra-firm sharing of competitively sensitive information.

Fourth, trade secret law has much higher enforcement costs than NCAs. An employer who believes that its former employee has shared competitively valuable information with a rival must first prove that the information qualifies as a trade secret—i.e., that it (1) has independent economic value, actual or potential; (2) is not generally known to other persons who would benefit from it; (3) is not readily ascertainable by proper means; and (4) is the subject of reasonable efforts to maintain secrecy.[262] It must then show that the departing worker shared the information with a rival. In many cases, the rival could have acquired the competitively valuable information from numerous sources, and it will be difficult for the employer to prove misappropriation. As a practical matter, then, trade

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[258] *Id. See, e.g.,* Florida Uniform Trade Secrets Act, FL. Stat. § 688, *et seq.* (2022) for an example of the USTA, as adopted by the state of Florida.

[259] *See*, *e.g.*, *Hamer Holding Group, Inc. v. Elmore*, 202 Ill. App. 3d 994, 560 N.E.2d 907 (1st Dist. 1990) (determining that the plaintiff's customer list information was not protectable as a trade secret because it could be readily duplicated by anyone with access to the Secretary of State's information, even though it cost the plaintiff $60,000 to condense).

[260] USTA § 1(4)(ii).

[261] *See* Michelle L. Evans, *Trade Secret Misappropriation of Former Employer's Customer List* §8, 139 AM. JUR. TRIALS 293 (orig. published 2015) ("Limiting the number of employees within a company who are aware of the trade secret information tends to protect trade secret status.").

[262] *See* UTSA § 1(4).

secret violations will be relatively difficult to detect, and relatively costly to prosecute—again, diminishing their effectiveness as a substitute for NCAs. NCAs, then, are a complement to trade secret protection, not fully covering the same scope, but enabling firms to ensure some degree of trade-secret protection at comparatively lower cost.[263]

Fifth, even if an employer succeeds in establishing liability under trade secret law, its remedy will often be inadequate, or even worthless. Once a trade secrete has been appropriated, the cat is out of the bag.[264] An aggrieved employer can seek damages, but those can be extremely difficult to prove with adequate certainty (further adding to enforcement costs above). The appropriating employee will often be judgment-proof, and third-party beneficiaries of the trade secrets will be likely unreachable. Rational employers will often forego trade secret actions even in the rare cases in which they could establish trade secret status, misappropriation, and the degree of their damages without undue cost.

B. Non-Disclosure Agreements Are Substantially Less Effective than NCAs at Encouraging Worker Training and the Sharing of Valuable Information with Workers

The Commission observes that:

> Employers that seek to protect valuable investments also have the ability to enter into NDAs [*i.e.*, Non-Disclosure Agreements] with their workers. NDAs, which are also commonly known as confidentiality agreements, are contracts in which a party agrees not to disclose information the contract designates as confidential. NDAs may also prohibit workers from using information that it designated as confidential. If a worker violates an NDA, the worker may be liable for breach of contract.[265]

According to the Commission, the availability of NDAs obviates the need for NCAs. But NDAs—like trade secret actions, and for many of the same reasons—are substantially less effective than NCAs at encouraging worker training, client attraction, and the creation and intra-firm sharing of competitively valuable information.

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[263] *See* Iancu & Kappos, *supra* note 3.

[264] *See id*. ("If a high-level executive at a company that depends on proprietary technology moves to a Chinese competitor, for example, and shares highly confidential information taken from his last employer, that last employer's competitive edge might evaporate forever to China's benefit. By the time the afflicted company sues to enforce trade secret laws, it may be too late; irreparable damage is often done when the information is disclosed to the new employer because that bell can't be unrung."). *See also* Lauren Weber, *FTC Plan to Ban Noncompetes Clauses Shifts Companies' Focus*, WALL ST. J. (Jan. 17, 2023), https://www.wsj.com/articles/ftc-plan-to-ban-noncompete-clauses-shifts-focus-to-deferred-pay-nondisclosure-agreements-11673904728 ("'Once someone goes to another company, you're really on the honor system. You have no way to monitor what information is being disclosed or not.'") (*quoting* Julie Levinson Werner of Lowenstein Sandler LLP).

[265] NPRM at 3507.

Many employer investments, such as skills training, can be transferred to hiring rivals without any disclosure whatsoever. And courts do not enforce NDAs to preclude a trained employee's subsequent *use* of skills funded by a prior employer. Favorable customer relationships created by employer investments also cannot be protected by NDAs. The departing employee who attracts her prior employer's customers engendered by the initial employer's efforts to foster favorable employee/customer interactions does not breach a non-disclosure commitment.

There are also significant practical impediments to using NDAs to protect employer investments in worker training, customer attraction and loyalty, and competitively valuable information. Simply drafting an NDA that could substitute for an NCA poses a challenge because the employer must anticipate and specify ex ante all the categories of information a departing employer might misappropriate and the ways it might do so. To establish liability, the employer must prove that the employee disclosed or illicitly used the information; again, the mere fact that another learned the information does not establish that that the employee disclosed it. If the employer surmounts this hurdle, it must establish its damages with reasonable certainty[266]—challenging when, as is typical, damages comprise lost profits.[267] And, again, departing employees may often be judgment-proof.

Instead of being substitutes, NDAs may be a complement to NCAs, as NCAs may decrease the enforcement costs of NDAs. In that case, we would expect to see NCAs bundled with other trade secret agreements,[268] which we do, especially among higher earning individuals, which we do, as the NPRM points out.[269]

C. Fixed Duration Employment Contracts Are Subject to Remedial Limitations that Render Them Ineffective Substitutes for NCAs

The Commission states that:

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[266] Restatement (Second) of Contracts § 352 (1981) ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.").

[267] *Id.* at § 352, cmt. a ("Courts have traditionally required greater certainty in the proof of damages for breach of contract than in the proof of damages for a tort. ... [This principle] excludes those elements of loss that cannot be proven with reasonable certainty. The main impact of the requirement of certainty comes in connection with recovery for lost profits.").

[268] *See* Natarajan Balasubramanian, Evan Starr, & Shotaro Yamaguchi, B*undling Employment Restrictions and Value Appropriation from Employees* Working Paper (Jan. 2023) at 35, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403. *See also* NPRM at 3485 n. 42 ("This survey also found that non-compete clauses are often used together with other restrictive employment covenants, including non-disclosure, nonrecruitment, and non-solicitation covenants. Id. at 17 (reporting that respondents that had a noncompete clause reported having all three of the other restrictive employment covenants 74.7% of the time).").

[269] NPRM at 3487 ("Balasubramanian et al. [*supra*, note 91] find that while non-compete clause use is associated with 2.1–8.2% greater earnings (compared with individuals with no post-contractual restrictions), this positive association is due to noncompete clauses often being bundled with non-disclosure agreements.").

> [I]f an employer wants to prevent a worker from leaving right after receiving valuable training, the employer can sign the worker to an employment contract with a fixed duration. An employer can establish a term of employment long enough for the employer to recoup its training investment without restricting a worker's ability to compete with the employer after the worker's employment ends.[270]

The problem with relying on fixed duration employment contracts is the law of contract remedies. Given the repugnancy of involuntary servitudes and the practical difficulty an administering court would face in ensuring that any compelled service is of adequate quality, contract law does not permit specific performance as a remedy for breach of personal service contracts.[271] Hence, no court would order an employee subject to a fixed duration employment contract to abide by her commitment. The remedial options would be either a negative injunction barring the employee from engaging in competing employment[272]—effectively a judicially imposed NCA—or money damages. But here too, lost profits would be difficult to ascertain and, often, impossible to collect.

D. The Claim that Higher Wages and Enhanced Benefits Can Substitute for NDAs Reflects a Misunderstanding of the Hold-Up Problem

Finally, the Commission maintains that NCAs are unnecessary because employers could prevent their workers from leaving for a rival by providing them with greater benefits:

> Employers that wish to retain their workers can also pay the worker more, offer them better hours or working conditions, or otherwise improve the conditions of their employment. These are all viable alternatives for protecting training investments, and other investments an employer may make, that do not restrict a worker's ability to work for a competitor of the employer or a rival's ability to compete against the worker's employer to attract the worker.[273]

These observations by the Commission betray a fundamental misunderstanding of the hold-up problem that justifies particular NCAs.

Employers often must undertake costly investments to enable their employees to generate as much value as possible. For example, they may provide them with costly training, share competitively valuable information with them, and grant them opportunities to build personal relationships with

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[270] NPRM at 3507.

[271] Restatement (Second) of Contracts § 367(1) (1981) ("A promise to render personal service will not be specifically enforced."); *id.* at § 367, cmt. a ("A court will refuse to grant specific performance of a contract for service that is personal in nature. The refusal is based in part on the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone and, in some instances, of imposing what might seem like an involuntary servitude.").

[272] *See*, *e.g.*, Lumley v. Wagner, 42 Eng. Rep. 687 (1852).

[273] NPRM at 3507.

firm clients. Such investments are made at risk: if the employee leaves before the investing employer has received an adequate return on its investment, the cost of the investment is lost, and perhaps transferred to a rival. A higher wage may be justified for a subsequent employer, as the employee comes with the added value provided by the former employer (e.g., training, knowledge of competitively valuable information, relationships with potential customers). Employees in which employers have invested are thus well-positioned to press their employers for greater compensation. The risk of such hold-up prompts a tendency of employers to underinvest in training and information sharing. NCAs ameliorate such risks and, hence, their tendency to prompt such underinvestment.

To provide greater compensation before firm investments in employees have generated adequate returns is to compensate an employee for the firm's investment. In effect, it endorses, rather than ameliorates, the risk of hold-up. Thus, simple deal-sweetening is not, as the Commission asserts, a "viable alternative[] for protecting training investments[] and other investments an employer may make."[274]

III. The Commission's Relevant Experience, Expertise, and Capacity to Enforce Proposed Rule Is Limited

The NPRM states that the

> rulemaking represents the culmination of several years of activity by the Commission related to non-compete clauses and their effects on competition. This activity has included extensive public outreach and fact-gathering related to non-compete clauses, other restrictive employment covenants that may harm competition, and competition in labor markets generally.[275]

Specifically, the NPRM cites to the record of several hearings and workshops: two hearings sessions among the Commission's Hearings on Competition and Consumer Protection in the 21st Century "FTC 21st C. Hearings"),[276] the FTC 2020 NCA Workshop,[277] and a 2021 workshop, jointly sponsored by the FTC and the Antitrust Division, regarding the broader topic of labor market

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[274] *Id.*

[275] NPRM at 3498.

[276] The FTC convened fourteen sets of Hearings on Competition and Consumer Protection in the 21st Century, running from September 2018 through June 2019. Two sets of hearings were of special relevance: On October 16, 2018, a full day of hearings was devoted to issues to do with Antitrust in Labor Markets, including NCAs; and on June 12th, 2019, one of the panels in the hearing comprising a Roundtable with State Attorneys General included discussion of NCAs and other labor restrictions. Information regarding the full set of hearings, including links to agendas and transcripts for individual hearings, can be found at Fed. Trade Comm'n, Hearings on Competition and Consumer Protection in the 21st Century [hereinafter FTC 21st C. Hearings], https://www.ftc.gov/enforcement-policy/hearings-competition-consumer-protection.

[277] FTC 2020 NCA Workshop, *supra* note 2.

competition. ("FTC/DOJ 2021 Labor Competition Workshop").[278] The Commission also cites three competition matters involving NCAs that were resolved by consent orders on the eve of the Commission's announcement of the NPRM.[279] In addition, the Commission notes a 2019 petition for a rulemaking from the Open Markets institute and various co-signatories.[280]

While we do not doubt that the staff conducted appropriate investigations in each of the three matters – or in a fourth settled in March – we note that the consents were achieved without either trial or adjudication by the Commission, and without any finding or stipulation of any antitrust violations.[281] Moreover, as noted by Commissioner Wilson in her dissenting statement to two of the three orders, the Consent Orders are exceedingly brief, providing little guidance as to how the conduct at issue violated—in the Commission's view—either the FTC Act or the Sherman Act.[282] A fourth matter has been settled since, but that provides little further guidance. And, like two of the three initial matters, it involves facts and circumstances specific to the glass container industry.[283]

In *Prudential Security, et al.*, security guards allegedly were subject to NCAs that barred the guards from undertaking related employment with any of Prudential's competitors, and from starting a competing business. Those prohibitions were alleged to apply for two years following conclusion of the guards' work for the Respondent, anywhere within a 100-mile radius of their main place of work for the Respondent. The NCAs also were alleged to impose liquidated damages of $100,000 per guard, per violation.[284] Such terms seem extreme, given the occupation: they might well be untethered from, e.g., any of the firm's interests in protecting proprietary information or the firm's employee-specific investments;[285] and they might well be inefficient, "unreasonable" (as found by a Michigan state court, applying Michigan law),[286] or otherwise objectionable.

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[278] Fed. Trade Comm'n and U.S. Dep't Justice, Workshop: Making Competition Work: Promoting Competition in Labor Markets (Dec. 6-7, 2021) [hereinafter FTC/DOJ 2021 Labor Competition Workshop], https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets.

[279] Press Release, *FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers* (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers. Since publishing the NPRM, the Commission has announced a fourth NCA settlement, also in the glass container industry. *In the Matter of Anchor Glass Container, Corp.*, FTC File No. 211 0182 (Mar. 15, 2023) (decision and order)

[280] NPRM at 3497. To the best of our knowledge, the Commission has never reported any evaluation of the 2019 petition.

[281] *See* citations *supra* at note 14.

[282] *See* Dissenting Statement of Commissioner Christine S. Wilson, *supra* note 15.

[283] *See supra* note 279.

[284] *In the Matter of Prudential Security, et al.*, *supra* note 14, at 3.

[285] That is our initial reaction to what are, of course, questions of fact, on which the Commission has not reported.

[286] *Prudential Security, Inc. v. Pack*, No. 18-015809-CB (Mich. Cir. Ct. Dec. 13, 2018).

Based on the available documents, however, it remains unclear whether competition in specific Michigan labor markets was harmed by the conduct at issue. The Commission's complaint alleged harm to "competitive conditions," and to individual security guards in some relevant labor market or markets. [287] The supporting documents also allege that the NCAs were "coercive and exploitative."[288] The Commission opines that such conduct, causing "harm to competitive conditions," constitutes a violation of Section 5's prohibition of unfair methods of competition. It cites, as authority, its recent Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the FTC Act.[289] Indeed, such language is to be found in the policy statement, and terms such as "exploitative" and "coercive" occur in *dicta* in certain Supreme Court decisions. But, as we have noted elsewhere, while those terms are evocative in colloquial usage, they have no established meanings in antitrust jurisprudence; and their meaning, application, and connection to antitrust jurisprudence is not explained in the Commission's policy statement.[290] Critically, novel applications of the Commissions 2022 policy statement have not yet been vindicated in the courts.

It is well established that NCAs can vary along multiple dimensions: duration, geographic scope, occupational scope, application to certain types of firms, and stipulated damages, among others.[291] Even supposing, *arguendo*, that the conduct at issue in *Prudential, et al.*—like the conduct at issue in *Ardagh Group, et al.*, and *O-I Glass*—violated Section 5's prohibition of "unfair methods of competition," the consent orders seem to turn on specific facts and circumstances, such as the duration of the restrictions and the outsize liquidated damages provisions in Prudential, et al. It remains entirely unclear how well information uncovered in the staff's investigations might inform competition analyses of NCAs with different terms, or in other labor markets. As Howard Shelanski—a former Director of the FTC's Bureau of Economics and a former Administrator of the White House Office of Information and Regulatory Affairs during the Obama Administration—noted at the FTC's 2020 workshop, enforcement is a "slow" way to gather the information requisite to the issuance of useful guidance or regulations, in part due to selection bias.[292] That is not to gainsay the importance of developing the case law. Rather, it is to underscore the need to develop a body of case law that reflects the diversity of NCAs, the contexts in which they are employed, and their effects. Three or four settled fact-specific investigations, *in toto*, seem a very slender reed on which to hang a major

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[287] *In the Matter of Prudential Security*, *supra* note 14, at 5.

[288] *Id.*

[289] NPRM at 3499 (*citing* FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10, 2022)).

[290] *See, e.g.*, Daniel Gilman & Gus Hurwitz, *The FTC's UMC Policy Statement: Untethered from Consumer Welfare and the Rule of Reason*, ICLE Issue Brief (Nov. 23, 2022), https://laweconcenter.org/resources/the-ftcs-umc-policy-statement-untethered-from-consumer-welfare-and-the-rule-of-reason.

[291] For a 50-state review, see Beck, *supra* note 18. *See also* FTC 2020 NCA Workshop, Evan Starr, Tr. at 195 (regarding 14 dimensions along which state NCA laws vary, under categorization in Malsberger, et al. treatise).

[292] FTC 2020 NCA Workshop, *supra* note 2, Howard Shelanski, Tr. at 263.

federal regulation on labor agreements generally. That seems all the more significant, given the history of NCA litigation, both in competition matters and at common law, where the specific terms and conditions, and the context in which they are employed, have tended to determine whether or not specific NCAs were found enforceable or lawful.[293]

With respect to the hearings and workshops mentioned in the NPRM,[294] while not focused exclusively on NCAs, these were significant information-gathering efforts on competition issues in labor markets by FTC staff. The Commission's call for comments, issued in conjunction with the 2020 workshop, solicited responses to various questions, both descriptive and normative, including several on the adequacy of existing NCA laws and regulations; the FTC also asked for input on possible legal reforms. They also addressed the Commission's practical ability and legal authority to advance policy reforms by regulation. The NPRM notes that 328 comments were submitted to the record of the 2020 workshop, and that 27 comments were submitted to the record of the FTC/DOJ 2021 Labor Competition Workshop.[295] In addition, 280 comments were submitted in response to a 2021 call for "public comments on contract terms that may harm competition, including 'non-compete clauses that prevent workers from seeking employment with other firms.'"[296] All of these, according to the NPRM, informed the rulemaking process:

As it has developed this Proposed Rule, the Commission has closely considered the views expressed at these forums and the public comments it has received through these engagement efforts. The comments have informed the Commission's understanding of the evidence regarding the effects of non- compete clauses; the law currently governing non-compete clauses; and the options for how the Commission may seek to restrict the unfair use of non- compete clauses through rulemaking, among other topics.[297]

That may be true, but, as we noted in the Introduction and Executive Summary of these comments, the Commission has never issued a report summarizing or synthesizing the information gleaned from these various endeavors. What is more, references to the evidence gathered through those substantial investigations seem extremely limited and highly selective. The diversity of views and evidence presented at the hearings and workshops, and in submissions to the records of those events, is not in evidence in the NPRM or, specifically, the Proposed Rule. Some well-documented complications get slight treatment in the NPRM, while others are simply absent from the discussion. While workshop presentations and submissions cannot settle the complex questions presented by NCAs and the Proposed Rule, they do offer substantial input on matters ranging from stakeholder views

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[293] *See* text accompanying notes 16-21, *supra*.

[294] NPRM at 3497-8.

[295] *Id.* at 3497.

[296] *Id.*

[297] *Id.* at 3498.

to legal challenges, to the developing state of the empirical evidence. A proper analysis of the record, rather than summary reference to it, is wanted.

Even a brief survey of the record indicates the complexity of stakeholder viewpoints, policy issues, and evidence. At the FTC's 2020 workshop, panelists and commenters expressed diverse views on the most basic questions whether the FTC could or should regulate NCAs. Several workshop participants and numerous comments endorsed some measure of federal intervention to restrict the use or enforcement of NCAs, at least in some contexts.[298] Some of those comments endorsed federal intervention as a complement to state NCA law. For example, comments submitted jointly by twenty state Attorneys General advocated for "federal rulemaking that is consistent with [the states] ability to pursue enforcement and legislative priorities to the benefit of workers and consumers," while also noting advantages to "the type of experimentation and variation that our system of government is designed to promote,"[299] with the states serving as Brandeisian "laboratories of democracy."[300] At the same time, they recommended that federal rules should not preempt state law.[301]

Other comments took a dimmer view of federal intervention, while also lauding state law variation: "[s]tate laws are sufficient to address any harms that may be associated with noncompete agreements. Federal intervention (whether at the statutory or regulatory level) is not necessary."[302] And the Global Antitrust Institute commented that they were "concerned… that many proposals to address… [concerns about NCAs] through ex ante antitrust regulatory interventions, such as an FTC rule, are ill-suited and will likely do more harm than good."[303]

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[298] *See generally* Comments submitted to FTC to Hold Workshop on Non-compete Clauses Used in Employment Contracts, Docket No. FTC-2019-0093 [hereinafter NCA Workshop Comments], https://www.regulations.gov/docket/FTC-2019-0093. *See, e.g.*, Comment Submitted by Public Citizen—Alex Harman, Comment #0286; Comment Submitted by Open Markets Inst.—Udit Thakur, Comment #0313; Comment Submitted by United States Senate—9 Signatures, Comment #0017. *See also,* FTC 2020 NCA Workshop *supra* note 2, Eric Posner, Tr. at 71, 74-77.

[299] NCA Workshop Comments, *id.*, Comment Submitted by Office of the Atty. General for the District of Columbia on Behalf of State Attorneys General (20 signatures), Comment #322.

[300] *Id. See also, e.g.*, FTC 2020 NCA Workshop *supra* note 2, Orly Lobel, Tr. at 11.

[301] *Id.*

[302] NCA Workshop Comments, *supra* note 298, Comment Submitted by Russell Beck (and 21 co-signatories), Comment #0319. *See also, e.g.*, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University, Comment #0243 ("We are concerned, however, that many proposals to address … [concerns about NCAs] through *ex ante* antitrust regulatory interventions, such as an FTC rule, are ill-suited and will likely do more harm than good."); Comment Submitted by the U.S. Chamber of Commerce—Sean Heather and Glenn Spencer, Comment #0303 ("the Chamber sees as unnecessary rulemaking by the FTC under either its unfair methods of competition authority (assuming such authority even exists), or its unfair and deceptive practices authority."); Comment Submitted by The Center On Executive Compensation ("Center")—Andrew Maletz, Comment #0264 (association representing chief human resources officers of large firms stating that "We believe an FTC rule regarding non-compete agreements is unnecessary.")

[303] *Id.*, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University, Comment #0243.

Comments from the Antitrust Law Section of the ABA questioned the need for federal intervention.[304] They also questioned whether the available evidence provided an adequate foundation for policy reform:

> The Section does not have the impression that the research and analysis of non-compete clauses are far enough along such that lawmakers and policymakers—whether at the federal, state, or local level—have a clear sense of the nature and extent of the harms, an ability to evaluate the adequacy of existing legislative and regulatory regimes to address those harms, and a blueprint for additional legislation or regulation should current regimes be deemed inadequate.[305]

Howard Shelanski stated plainly that an outright ban would be "deeply problematic."[306]

Commissioner Noah Phillips's noted the Commission's extremely limited experience with competition rulemaking in general: "The FTC has issued a competition rule just once in its history, in the 1960s."[307] And several workshop participants also focused on the demands of rulemaking for the FTC or, more specifically, the demands that would attend any rulemaking likely to survive court challenges. Commissioner Phillips argued that the broad language of Section 5 might raise Constitutional concerns, including those associated with the Nondelegation Doctrine; and, further, that "[n]ondelegation concerns may also be exacerbated by other factors here, including the lack of clarity in the rulemaking authority, the traditional commitment of the issue to the states, the fact that neither the FTC nor any court has found non-competes to violate the FTC Act's prohibition against unfair methods of competition."[308]

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[304] We note that the Section has submitted comments in response to the NPRM Comment from the American Bar Ass'n, Antitrust Law Section, FTC-2023-0007-9980, March 2, 2023, *available at* https://www.regulations.gov/comment/FTC-2023-0007-9980. These more recent comments note that the literature remains limited, but that it tends to support the proposition that NCAs for low-wage workers are "generally harmful and not justified" by procompetitive rationales that may apply with other workers. The comment does not appear to advocate for any specific regulation, and it does not appear to address the question whether the FTC, specifically, should adopt a regulation restricting the use of NCAs for low-wage workers. We agree with the Section's claim that the literature remains limited, and with their suggestion that standard rationales for NCAs can seem strained in the case of low-wage workers. Restrictions on low-wage workers may generate various policy concerns. However, as should be clear from our comments overall, we do not agree that the literature provides adequate grounds for the adoption of any FTÇ competition regulation under Sections 5 and 6(g) the FTC Act.

[305] NCA Workshop Comments, *supra* note 298, Comment Submitted by the Antitrust Law Section of the ABA—Brian R. Henry, Comment #0329.

[306] FTC 2020 NCA Workshop, *supra* note 2, Howard Shelanski, Tr. at 283.

[307] *Id*, Noah Phillips, Tr. at 220.

[308] *Id.* at 221.

Such concerns should be all-the-more salient, given the Supreme Court's recent articulation of the Major Questions Doctrine in *West Virginia v. EPA*.[309] Reviewing certain power plant emissions standards adopted by the Environmental Protection Agency, the Court observed that…

> our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.[310]

Separation of powers principles, in addition to readings of legislative intent, required "something more than a plausible textual basis for the agency action"; for that reason, given the scope and economic impact of the EPA's regulation, the Court held that EPA had exceeded its statutory authority.

In the NPRM, the Commission contemplates a regulation that would, by the Commission's own estimation, alter the terms of employment for approximately 30 million American workers, with an economic impact of "$250 to $296 billion per year," on wages alone. That is, the Commission asserts that its Proposed Rule would be one of significant economic impact, just as public controversy over NCAs and the proposed preemption of state law suggest significant political impact. Independent of proposed rules and advanced notices of proposed rulemaking, the Commission reports that it has some 18 guides and regulations under review.[311] Most of these were adopted under express statutory authority considerably narrower than the charge of Section 5. The FTC Act comprises no such express grant of authority with respect to NCAs or other terms of labor agreements.

We cannot be certain how the courts might evaluate an FTC NCA regulation, but it's clear enough that the federal courts have increasing concerns about agency deference. With that in mind, adoption of NCA regulations as proposed would seem to pose a substantial risk to the Commission; that is, to both the substance of such regulations and the Commission's regulatory authority in competition matters, at least. A thoroughgoing analysis of the scope of the Proposed Rule and the present (and developing) state of agency deference and statutory interpretation in Supreme Court jurisprudence seems sorely needed. Former FTC Chairman William Kovacic took a less settled position on FTC authority, while also observing that the contemporary judiciary is skeptical of agencies' initiatives to extend their own reach.[312] While Kovacic did not suggest that the courts find all regulatory innovation anathema, he did emphasize the importance of building a comprehensive foundation

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[309] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587 (2022).

[310] *Id.* at 17.

[311] *See* FTC, *Rules and Guides Currently Under Review*, FTC.GOV (last visited Apr. 12, 2023), https://www.ftc.gov/enforcement/rulemaking/retrospective-review-ftc-rules-guides/rules-guides-currently-under-review.

[312] *See* FTC 2020 NCA Workshop, *supra* note 2, William Kovacic, Tr. at 36. *Cf.* Aaron Nielson, Tr. at 234-44 (stating that it is an "open question" whether courts would sustain a challenge to the FTC's authority.)

for any forays into competition rulemaking likely to survive judicial scrutiny.[313] Howard Shelanski similarly advocated for the further development of the empirical evidence before entertaining rule-making;[314] he also suggested that there was much work—such as the issuance of guidance and the development of research—that the Commission might undertake on NCAs besides, or prior to, regulation.[315]

As discussed in more detail in Section I of these comments, *supra*, various panelists at the FTC 2020 NCA Workshop—including leading contributors to the empirical literature cited in the NPRM—noted significant limitations to the state of the literature, as did comments submitted to the record. For example, Evan Starr noted the difficulty of estimating the causal effects of using NCAs,[316] and the need for more research on those causal effects.[317] Challenges to such research include, *inter alia*, the fact that NCAs are commonly bundled with other restrictions, such as non-solicitation and non-disclosure terms (and attendant selection issues),[318] an over-reliance on survey data,[319] a dearth of longitudinal data,[320] a relative dearth of exogenous variation,[321] and a dearth of findings regarding total welfare implications of NCAs and, specifically, of research on the downstream effects of NCAs on product and service markets, and thereby on consumers.[322] Panelists also suggested mixed results, rather than uniform findings on, e.g., pay, and on potential tradeoffs in labor markets, such as tradeoffs between wages and firms' investments in employee training.[323]

Panelists at the FTC 2020 NCA Workshop also noted mixed results, rather than uniform findings on, e.g., pay, as well as potential tradeoffs in labor markets, such as tradeoffs between wages and firms' investments in employee training.[324] And several panelists noted both observed and potential benefits to NCAs.

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[313] *See id.*, William Kovacic, Tr. at 37.

[314] *See id.*, Howard Shelanski, Tr. at 264-5.

[315] *See id.*

[316] *See id.*, Evan Starr, Tr. at 158, 173.

[317] *See id.* at 173.

[318] *See id.* at 166.

[319] *See id.* at 174.

[320] *See id.*, at 173.

[321] *See id.*.

[322] *See id.*, Kurt Lavetti, Tr. at 151-2.

[323] *See id.*, Evan Starr, Tr. at 162, 166, 174; Ryan Williams, Tr. at 179, et seq. (negotiation and compensation for CEOs); *id.*, Kurt Lavetti, Tr. at 144-46 (regarding physician compensation); *id.*, Howard Shelanski, Tr at 263 (noting "ambiguity" in the research) and 284 (describing training investments what would not occur under a ban).

[324] *Id.*, Evan Starr, Tr. at 162, 166, 174; Ryan Williams, Tr. at 179, *et seq.* (negotiation and compensation for CEOs); Kurt Lavetti, Tr. at 144-6 (regarding physician compensation); Howard Shelanski, Tr. at 263 (noting "ambiguity" in the research).

For example, Ryan Williams presented research on the effects of NCAs for CEOs suggesting that NCAs provide compensation benefits for the CEOs themselves, and that firms are more likely to fire a CEO for poor performance when there is a NCA in force, which potentially benefits both shareholders and employees.[325] Overall, he said that the findings imply a positive story for CEO NCAs. Similarly, Kurt Lavetti reviewed research suggesting both physician benefits and efficiencies associated physician NCAs.[326] And Commissioner Noah Phillips noted the potential of NCAs to ameliorate hold-up problems in labor agreements by, for example, encouraging investment in worker training and the sharing of proprietary information with employees.[327] In sum, as Kurt Lavetti concluded, "we're still far from reaching a scientific standard of concluding that non-compete agreements are bad for overall welfare."[328]

One more issue seems notable. The NPRM omits any reference to a 2019 literature review conducted by staff in the FTC's Bureau of Economics.[329] That literature review was much discussed in comments submitted to the 2020 workshop and in the workshop itself.[330] Not incidentally, the named staff author of the review, John McAdams, moderated a session at the 2020 workshop. Yet the McAdams paper is not even mentioned in the NPRM. McAdams observes that economic research regarding NCAs "has made important strides."[331] At the same time, however, he observes mixed results, and he describes numerous data and methodological limitations running throughout the body of literature. Overall, he finds that the "more credible empirical studies tend to be narrow in scope, focusing on a limited number of specific occupations… or potentially idiosyncratic policy changes with uncertain and hard-to-quantify generalizability."[332] Of direct relevance to the Proposed Rule, "[t]there is little evidence on the likely effects of broad prohibitions of non-compete agreements."[333]

That, too, is part of the Commission's expertise and experience regarding NCAs. But it is a part that suggests caution, and grounds for research development, rather than a rush to adopt a sweeping uniform regulation like the Proposed Rule. The NPRM's review of the literature is substantial but skewed; and, as we discuss below, the NPRM fails to adequately address many of the well-known

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325 *Id.*, Ryan Williams, Tr. at 178.

326 *Id.*, Kurt Lavetti, Tr. at 144-6.

327 *Id.*, Noah Phillips, Tr. at 218.

328 *Id.*, Kurt Lavetti, Tr. at 139.

329 *See* John McAdams, *Non-Compete Agreements: A Review of the Literature*, *supra* note 4.

330 *See, e.g.*, FTC 2020 NCA Workshop, *supra* note 2, Kurt Lavetti, Tr. at 140 (referring to John McAdams, the workshop panel moderator: "There's also a new working paper by John that provides a great overview of this literature.").

331 *See id.*, at 4.

332 *See id.*

333 *See id.*

limitations to available studies. The Proposed Rule carries real risk to the Commission's authority, as well as its resources. As Kovacic said at the 2020 workshop, "the bolder the measure, the stronger the evidentiary armor is going to have to be and the more thoughtful the analyses," if an intervention, and the Commission's authority, are to be sustained.[334] As a general matter of policy, we cannot recommend adoption of so sweeping a rule as the one that the Commission has proposed. That fundamental policy issue aside, it should be conspicuous that a more fulsome development of the record, and a more critical review of the literature, is needed before the FTC proposes any regulation of NCAs.

The imposition of a sweeping federal regulation and the preemption of state law suppose general and durable market failure causing substantial consumer harm. Observation of certain market imperfections, or frictions, falls well short of that mark.[335] Recent empirical findings suggesting potential harms and benefits associated with NCAs in different, and specific, contexts also fall short. The case for regulation also supposes that regulatory intervention can be effective and efficient, yet there is no model in state law for the ban proposed by the FTC, and the NPRM provides no analysis of the likely effects of the difference between the Commission's proposal and state law alternatives. No state has adopted the general prohibition on NCA usage that the FTC has proposed. No state chiefly restricts NCAs via a regulatory ban; and no state has adopted the seemingly arbitrary 25% share restriction that the Commission has proposed for permitting certain NCAs in conjunction with the sale of a business.[336] And while the NPRM includes a casual attempt at a cost-benefit analysis, it lacks even a cursory analysis of the resources that would be required for effective implementation and enforcement of the Proposed Rule. These would not be trivial. As noted in the NPRM, there is survey evidence suggesting that NCAs now apply to roughly one fifth of all employed persons in the

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[334] *Id.*, William Kovacic, Tr. at 37.

[335] Regarding competition in labor markets generally, see, e.g., Diana Furchtgott-Roth, *Antitrust and Modern U.S. Labor Markets: An Economics Perspective*, HARV. J. L. & PUB. POL'Y PER CURIAM 1 (Summer 2022) ("data from the Bureau of Labor Statistics of the U.S. Department of Labor show that exercise of monopsony power is generally not occurring in today's 21st century economy, nor has it been characteristic of labor markets over the past half century."); Richard A. Epstein, *The Application of Antitrust Law to Labor Markets: Then and Now*, 15 N.Y.U. J. LAW & LIBERTY 709 (2021).

[336] The only express exception in the Proposed Rule regards NCAs executed in conjunction with the sale of a business, where the NCA applies to a seller who "is a substantial owner of, or substantial member or substantial partner in, the business at the time the person enters into the non-compete clause. Proposed § 910.1(e) would define substantial owner, substantial member, or substantial partner as an owner, member, or partner holding at least a 25% ownership interest in a business entity." NPRM at 3515. While an exception providing for NCAs in conjunction with the sale of a business is common in states with some general hostility to NCAs, as under Cal. Bus. & Prof. Code § 16601, the identification of a 25% ownership requirement appears arbitrary and excessive. For example, California law permits certain NCAs for, *inter alia*, "[a]ny person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interesting in the business entity." Cal. Bus. & Prof. Code § 16601. We have not found any authority restricting such ownership to anything like a 25% share. That proposed restriction may prove far too narrow, not just when natural persons owning a startup or small business number more than four, but when, e.g., venture capital investment reduces the founders' shares of a startup.

U.S. labor force; that is, nearly 30 million workers.[337] Regulations are not self-enforcing: and while regulation may be, in certain regards, more streamlined than case-by-case law enforcement, it still requires investigation of alleged infractions, administration, and, in addition to regulatory challenge mechanisms, compliance monitoring, guidance to industry and workers, periodic rule review, and the resources to defend at least some challenges to agency determinations of violations, and assessments of penalties, in federal court. Detection alone may often be a challenge to the extent that many "workers are totally uninformed about the law."[338]

Effective enforcement need not entail detecting, much less penalizing, every violation, but it does require sufficient enforcement activity to establish a credible threat that violations will be penalized, and that enforcement is not selective. Yet the NPRM contains no assessment of the resources required for adequate enforcement of the Proposed Rule or any alternative NCA regulation. Enforcement staff in the Commission's Bureau of Competition ("BC") have substantial antitrust expertise in mergers and diverse conduct matters, but little experience in labor matters and none in the enforcement of competition regulations. Moreover, the Commission has recently reported that BC staff are barely able to meet the Commission's already established and important workload.[339] Adding an obligation to monitor restrictions in labor agreements across all industries and occupations in the U.S. would be both futile and an unnecessary drain on the staff's ability to scrutinize mergers and conduct under settled antitrust law.

Enforcement burdens would be greater still, given the Commission's proposal "that whether a contractual term is a non-compete clause for purposes of the Rule would depend on a functional test,"[340] rather than a nominal one. Currently, NCAs may be confined to distinct and readily parsed provisions among terms of employment, or they may be drafted in more complex terms, and perhaps distributed across multiple provisions or documents. A general bar on NCA use, subject to substantial regulatory penalties, would encourage firms that value NCAs to seek marginally permissible alternatives and various workarounds; these might tax staff resources further still, from detection and investigation through challenges in either administrative process or federal court.

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[337] NPRM at 3485. The latest survey from the BLS survey suggests approximately 18%, but survey findings vary somewhat, and, at least roughly, cluster in the neighborhood of 20%. And BLS estimates a workforce of approximately 150 million employed persons. U.S. Bur. Labor Stats., Monthly Labor Review (Jun. 2022) (reporting 149,785 total employed), https://www.bls.gov/opub/mlr/2022/article/us-labor-market-shows-improvement-in-2021-but-the-covid-19-pandemic-continues-to-weigh-on-the-economy.htm.

[338] FTC 2020 NCA Workshop, *supra* note 2, Evan Starr, Tr. at 171.

[339] *See, e.g.*, Oversight and Enforcement of the Antitrust Laws, Prepared Statement of the Federal Trade Commission, *supra* note 28 ("While we constantly strive to enforce the law to the best of our capabilities, there is no doubt that—despite the increased appropriations Congress has provided in recent years—we continue to lack sufficient funding.").

[340] NPRM at 3509.

The Commission's experience with enforcing its own Contact Lens Rule (CLR),[341] which implements a specific statutory charge in the Fairness to Contact Lens Consumers Act (FCLA),[342] may be instructive. The CLR was adopted following "decades of regulatory and research experience regarding the optical goods industry."[343] That experience included adoption and enforcement of the Eyeglass Rule[344] (adopted in its initial form in 1978), and two substantial studies of competition and consumer protection issues regarding regulation and retail sales of contact lenses specifically, with the latter report conducted pursuant to an express statutory charge in the FCLA.[345]

The key provision in both the FCLA and the CLR was a simple "prescription release" requirement: "[w]hen a prescriber completes a contact lens fitting, the prescriber . . . shall provide to the patient a copy of the contact lens prescription."[346] Periodic rule review led the Commission to solicit comments on the CLR in September 2015;[347] review of those comments, and other input, led to an NPRM proposing amendments to the CLR in 2016,[348] a supplemental NPRM in 2019,[349] and publication of amendments to the CLR in 2020.[350] As the Commission explained in amending the rule, there was a "need to improve compliance with the Rule's automatic prescription-release requirement, as well as a need to create a mechanism for monitoring and enforcing the Rule."[351] In plain language, the Commission found that its own rule was difficult to enforce, and that non-compliance was widespread. To quantify the enforcement challenge might be difficult, but one number seems salient: we are aware of precisely zero matters in which the Commission enforced the CLR's prescription release requirement between its initial 2004 effective date and its 2020 amendment.

We do not mean to gainsay the challenge of enforcing the CLR. To the contrary, we believe that the Commission's experience with the CLR illustrates the challenges of drafting, and enforcing, effective

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[341] 16 C.F.R. § 315.

[342] 15 U.S.C. §§ 7601-7610.

[343] FTC Staff Comment on Proposed Additional Regulations Issued by the North Carolina State Board of Opticians (Jan. 13, 2011), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-north-carolina-state-board-opticians-concerning-proposed-regulations-optical-goods/1101ncopticiansletter.pdf.

[344] 15 U.S.C. § 7608.

[345] *See* FTC, *Possible Barriers to E-Commerce: Contact Lenses: A Report From the Staff of the Federal Trade Commission* (Mar. 29, 2004), http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf; FTC, *The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study* (Feb. 2005), https://www.ftc.gov/reports/strength-competition-sale-rx-contact-lenses-ftc-study.

[346] 16 C.F.R. § 315.3(a)(1).

[347] Contact Lens Rule Request for Comment, 80 FR 53272 (Sept. 3, 2015).

[348] CLR Notice of Proposed Rulemaking, 81 FR 88526 (Dec. 7, 2016).

[349] CLR Supplemental Notice of Proposed Rulemaking, 84 FR 24664 (May 28, 2019)

[350] CLR Final Rule, 85 Fed. Reg. 50668 (2020).

[351] *Id.* at 50671 (*citing* the 2016 CLR NPRM, *supra* note 348).

regulations, even when an agency has decades of experience with the issues those regulations are meant to address.

IV. The Commission's Legal Authority to Issue the Proposed Rule is Contentious—and Dubious

The NPRM implicates a range of questions regarding the Commission's legal authority. These questions relate both to the scope of the Commission's substantive legal authority to regulate NCAs and to its authority to undertake such regulation through the adoption of a substantive rule, rather than through adjudication.[352] These issues are made all the more complicated given the infrequency with which the Commission has attempted to undertake competition rulemaking in implementation of its Unfair Methods of Competition ("UMC") authority under Section 5 of the FTC Act—arguably, just once in over 100 years of FTC UMC authority. Meanwhile, there is very little judicial authority discussing the Commission's competition rulemaking authority, and none of it is recent.[353] And recent judicial trends exacerbate the issue, as the courts have been increasingly skeptical of claims of regulatory authority such as the Commission makes in the NPRM.

This is a contentious area of law and policy. Several of the key issues are discussed below; other comments submitted to this proceeding develop these arguments in more detail.[354] Our primary purpose here is to emphasize that the Commission's Proposed Rule, if adopted, would regulate into market uncertainty and legal controversy.

The Commission is the nation's chief inter-sectoral regulator of domestic trade and commercial activity. With its statutory mandate to prevent unfair methods of competition comes a corollary mission to promote a robust and competitive marketplace. Uncertainty is anathema to such a marketplace. The Commission's Proposed Rule would upset dozens of state laws. Not incidentally, NCAs already are a topic of extensive legislative discussion at the federal level.[355] If adopted, these rules will be subject to years of litigation. One of the few things that can be said with certainty is that media and other coverage would lead to substantial confusion and disruption for employees and employers alike.

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[352] *See generally, e.g.*, Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit,* ADMIN. L. REV. (forthcoming 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4344807.

[353] The most recent case to opine on the Commission's substantive competition rulemaking authority dates to 1973. *See Nat'l Petroleum Refiners Ass'n* v. *Fed. Trade Comm'n,* 482 F.2d 672, 697-8 (D.C. Cir. 1973).

[354] *See, e.g.*, comments submitted to this Docket by TechFreedom, the United States Chamber of Commerce, and the Washington Legal Foundation.

[355] *See* Workforce Mobility Act of 2023, H.R. 731, 118th Cong. (2023-2024) and Workforce Mobility Act of 2023, S. 220, 118th Cong. (2023-2024).

In the comments below, we discuss the following issues: whether the Commission has statutory authority to adopt substantive Unfair Methods of Competition rules (under current D.C. Circuit precedent, yes; but that precedent is unlikely to withstand judicial review today); whether the Proposed Rule presents major questions for the purposes of the Major Questions Doctrine (it does); whether it would withstand judicial scrutiny under the Major Questions Doctrine (it likely would not); and whether the Proposed Rule, if adopted, would be based upon an unconstitutional delegation of authority to the Commission (they likely would be).

A. The Commission's Claimed Authority to Adopt Competition Rules Is Unlikely to Withstand Judicial Scrutiny

The Commission's claim of general competition rulemaking authority under Section 6(g) of the FTC Act rests on an ambiguous statutory clause and a 1973 opinion of the D.C. Court of Appeals in National Petroleum Refiners Association v. FTC.[356] That opinion has not been affirmatively repudiated by the Court of Appeals or reversed by the Supreme Court, but there has been little occasion to revisit it: The Commission has not proposed or enforced competition rules since the 1970s. As the Commission is well aware, the *National Petroleum Refiners* Court considered an octane labeling rule that operates chiefly as a consumer protection regulation, although one deemed at the time to have both competition and consumer protection elements. And the case was decided before Congress enacted the Magnuson-Moss Warranty Act,[357] which amended the FTC Act to include substantial procedural constraints on the consumer protection rulemaking that had constituted nearly the whole of the FTC's regulatory activity.[358] What is more, the 1973 opinion reflects a degree of agency deference that is increasingly out of favor with the federal courts.[359]

Other comments will argue the best reading of Section 6(g) in more detail than we undertake here. Our purpose here is more limited. We remind the Commission that its reading of its own authority is contentious.[360] Administrative law scholars have argued that a far more limited reading of 6(g) is likely to prevail in the courts.[361] And, in any case, the Commission must recognize that the promulgation of a broad regulatory prohibition of NCAs under the Commission's UMC authority, first, is

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[356] *Nat'l Petroleum Refiners*, 482 F.2d at 697-8.

[357] P.L. 93-637 (1975) (codified at 15 U.S.C. § 2301, *et seq.*).

[358] *See, e.g.*, Maureen K. Ohlhausen & Ben Rossen, *Dead End Road: National Petroleum Refiners Association and FTC "Unfair Methods of Competition Rulemaking*, Truth on the Market (Jul. 13, 2022), https://truthonthemarket.com/2022/07/13/dead-end-road-national-petroleum-refiners-association-and-ftc-unfair-methods-of-competition-rulemaking.

[359] *Id*.

[360] *See, e.g.*, Noah Joshua Phillips, *Against Antitrust Regulation*, AM. ENTERPRISE INST. REPORT (Oct. 13, 2022), https://www.aei.org/research-products/report/against-antitrust-regulation.

[361] *See, e.g.*, Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, COLUM. PUB. L. RES. PAPER, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4344807; Thomas W. Merrill, *Re-Reading Chevron*, 70 DUKE L.J. 1153 (2021).

nearly certain to be challenged in the courts and, second, risks both the substantive provisions of such a rule and a Supreme Court repudiation of the Commission's authority to issue substantive or "legislative" competition rules more generally.

Section 6(g) states: that "the Commission shall also have power… from time to time to classify corporations and… to make rules and regulations for the purpose of carrying out the provisions of this Act."[362] For the proponents of a broad rulemaking power, this is taken to be a catch-all provision providing a general power to issue "rules and regulations," subject only to the relatively light-touch procedural requirements for "informal rulemaking" in Section 553 of the Administrative Procedure Act.[363]

As prominent commentators have noted, there is no "plain meaning" of "rules" within the meaning of section 6(g).[364] In *National Petroleum Refiners*, the D.C. Circuit opted to "favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain meaning of the statute."[365]

A contemporary court, reading the same statutory language, would not likely agree that the meaning of "rules" in section 6(g) is "plain," based on suppositions about the general policy behind the initial enactment of the FTC Act.

Most importantly, we note that the remainder of Section 6 empowers the Commission to investigate and report on the business practices of corporations. More recent amendments have to do with investigating, reporting, consulting, and advising by the Commission.[366] No part of Section 6 expressly authorizes the Commission to undertake any enforcement action or impose any penalties, and the authority it does explicitly grant is limited to information gathering and analysis by the Commission.

Recent judicial trends are far less deferential to administrative agencies, and far more likely to curtail agency discretion in the face of statutory ambiguity. For example, in *AMG Capital Management*, the Supreme Court narrowly interpreted the Commission's power to obtain equitable remedies, repudiating established Commission practice.[367] And, as explained below, in cases like *West Virginia v.*

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[362] 15 U.S.C. § 6(g) (reference to s.57a(a)(2) omitted).

[363] 5 USC §553.

[364] *See* Merrell, *Antitrust Rulemaking*, *supra* note 352, at 28.

[365] *National Petroleum Refiners*, 482 F.2d, at 689.

[366] *See* Merrell, *Antitrust Rulemaking*, *supra* note 352, at 28.

[367] *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021). The FTC had argued that monetary damages were impliedly available under the power in section 13(b) of the FTC Act to seek injunctive relief, but the Supreme Court disagreed and restricted the Agency to injunctive relief only, without the implicit grant of damage.

EPA, the Supreme Court has demonstrated concern with the general breadth of the administrative state and, specifically, has rejected the proposition that courts defer to agency interpretations of vague grants of statutory authority where such interpretations are of major economic and political import.[368]

B. The Proposed Rule Presents Major Questions that Can Be Addressed Only by Congress

Adoption of a broad NCA rule such as proposed in the NPRM will likely also face scrutiny under the major questions doctrine. The Supreme Court's recent opinion in *West Virginia v. EPA*[369] has brough substantial attention to the Major Questions Doctrine. While the contours of this doctrine are still being defined by the courts, it stands roughly for the proposition that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[370] The Proposed Rule is broad—on the Commission's own account it would affect around 30 million employees and hundreds of billions of dollars in commerce annually. It would also insert the Commission into an area that is already heavily regulated by the states and the federal government: Numerous federal statutes and rules regulate employer/employee relations, and a vast—and active—body of state statutory and judge-made law addresses NCAs specifically. If adopted, the Proposed Rule would clearly be one of vast economic and political significance. Indeed, one could well call the Proposed Rule the very model of a modern major question.

If deemed to be a major question, it beggars belief to think that the courts would find that Congress, through the FTC Act's capacious but general language, has spoken clearly enough to grant the Commission the authority to regulate labor in this way. Both the substance of the Proposed Rule and the mechanism of issuing such rules are likely to be found infirm. The Commission's relevant authority is to proscribe unfair methods of competition. The scope of that authority has long been understood as largely coextensive with, but slightly broader than, the scope of the antitrust laws. Historically, the Commission's UMC authority has been exercised through case-by-case enforcement actions.

The Commission's Proposed Rule would go far beyond the established scope of the FTC's UMC authority, and it would abandon case-by-case enforcement entirely. Indeed, there is no question that traditional *indicia* of anticompetitive conduct are of no relevance to the Proposed Rule. For example, the proposed prohibition is not limited to firms with market power. What's more, there is no legitimate argument that NCAs are *categorically* anticompetitive (or otherwise unfair methods of competition). Many rules are somewhat overinclusive—that goes hand in hand with the legislative prerogative—but the Commission's claim to rulemaking authority is strained at best, and its substantive legal

[368] *West Virginia v. Envtl. Prot. Agency*, 142 S. Ct. 2587 (2021).

[369] *Id.*

[370] *Util. Air Regul. Grp. v. Envtl. Prot. Agency*, 573 U.S. 302, 324 (2014).

authority is limited on its face to enforcing the prohibition of unfair methods of competition, not to regulating competition to ensure that broad categories of commercial practices are *on net* competitive.

Moreover, there is no paucity of legislative interest or ability to regulate in this area. Both Congress and the states are very active in the areas that the Commission's rules would regulate.[371]

Other comments in this proceeding take up the arguments that the Proposed Rule presents major questions and would likely be rejected under the Major Questions Doctrine. We add to those comments, both to join in those concerns and to add a broader institutional perspective. The Commission's recent moves towards aggressive use of its Unfair Methods of Competition authority run in the opposite direction of contemporary administrative law. The Commission's recent policy statement on its use of its UMC authority, for instance, cites to myriad cases that are four or more decades old, antedating the modern era of antitrust law, and often rely on *dicta* in doing so.[372] At the same time, in cases like *West Virginia v. EPA*, the Supreme Court has shown concern with the general breadth of the administrative state, and in cases like *AMG Capital*,[373] the Court has taken action to limit, or has shown concern about, the scope of the Commission's authority specifically. And just last week, in Axon Enterprise,[374] the Supreme Court held that defendants in FTC and SEC administrative proceedings need not exhaust agency process on the merits before raising constitutional challenges to the agencies' actions in federal district court.

The cost of risky and resource-draining litigation cannot be gainsaid. Importantly, this observation is endogenous to the question of the Commission's authority: The Commission is the nation's chief inter-sectoral commercial regulator. The Proposed Rule promises to be exceptionally disruptive to the entire American economy—a destabilizing force that runs counter to the Commission's purpose and that should, in any case, be an important consideration, even when the Commission exercises a clear statutory mandate. But here, the only certainty is uncertainty. The Commission is considering regulations that would subject vast swaths of the United States' economy, employees, and employers to confusion and uncertainty. The Commission ought to be more circumspect about the potential to disrupt the process it is charged to protect.

None of this is to reject the Commission's authority to challenge a specific firm's specific use of NCAs under Section 5 of the FTC Act. Through case-by-case basis adjudication, the Commission

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[371] *See, e.g.*, Workforce Mobility Act of 2023, *supra* note 355.

[372] *See* FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), available at https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission. *See also* Gilman & Hurwitz, *supra* note 290.

[373] *AMG Capital Mgmt.*, 141 S. Ct. 1341.

[374] *Axon Enterprise, Inc. v. F.T.C.*, 598 U.S. __ (2023).

might determine that a specific course of conduct, in a specific factual setting, makes out either a UMC or UDAP claim; that is wholly consistent with the purposes and language of the FTC Act.

C. A Grant of Substantive Statutory Authority Sufficient to Support the Proposed Rule Would Amount to an Impermissible Delegation of Authority

While the Court's application of the Major Question Doctrine in *West Virginia v. EPA* is grounded in several established strands of constitutional jurisprudence, the precise meaning of the doctrine remains uncertain. One line of inquiry suggests the doctrine is a new instantiation of the Non-Delegation Doctrine. There is some sense to that. The Major Questions Doctrine requires that Congress must clearly—and with some specificity—indicate an agency's authority to engage in significant rulemaking. The non-delegation doctrine, meanwhile, requires that Congress provide an intelligible principle that limits the scope of congressional authority delegated to an agency.[375] But the Non-Delegation Doctrine stands on its own: it could be the case that major questions present delegation issues, but there remain potential non-delegation issues separate from major questions. And the Court has also noted, e.g., separation of powers concerns at play in major questions.

The Non-Delegation Doctrine was famously articulated in *Schechter Poultry*, a 1935 Supreme Court opinion striking down the National Industrial Recovery Act (NIRA).[376] This is a seminal case in the administrative-law canon: decided on the same day as *Humphrey's Executor*, it dealt with the permissibility of Congressional delegations of authority to federal agencies. The central issue is that the United States Constitution vests "all legislative powers" in Congress.[377] Federal agencies are empowered to act on Congress's behalf, which seemingly could violate the Constitution's legislative vesting clause, which would render all agencies unconstitutional.

To resolve this issue, the Court found that Congress can empower agencies to exercise specific powers on Congress's behalf, but that there must be limits to these delegations of authority. The constitutional limit is that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[378]

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[375] Regarding nondelegation generally, see, e.g., Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004). *Compare Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (reaffirming the traditional test permitting the delegation of discretionary authority if constrained by an "intelligible principle") *with id.* at 2135-7 (Gorsuch, J. dissenting) (insisting that delegations should be limited to filling the details in statutes with major questions resolved by Congress). *See also* Noah Joshua Phillips, *Against Antitrust Regulation*, supra note 360.

[376] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[377] U.S. Const., Art. I.

[378] *Schechter Poultry*, 295 U.S. at 529.

Schechter Poultry is all-the-more relevant to the Proposed Rule because it discusses that doctrine in direct comparison to the Commission's statutory authority.[379] Both NIRA, which required the National Recovery Agency (NRA) to enforce codes of "fair competition," and the Federal Trade Commission Act, which prohibits "unfair methods of competition," have similar and similarly broad grants of statutory authority. In striking down NIRA, the Court explained its flaws in direct comparison to the FTC's statutory authority to deem certain methods of competition unfair. It explained that…

> "unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest.… To make this possible, Congress set up a special procedure. A Commission, a quasi-judicial body, was created. Provision was made [for] formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority.[380]

While the Court does not *expressly* say that it is the case-by-case, adjudicatory nature of the Commission's UMC authority that renders the FTC Act a constitutional delegation of authority, the Court did point to the lack of these specific quasi-judicial procedures in holding NIRA's delegation of authority to the NRA to be unconstitutional.

In other words, if the FTC were successfully to assert that the FTC Act authorizes it to enact broad competition rulemakings like the Proposed Rule, that holding may contain the seeds of its own demise, if the Court determines that such a broad grant of authority without the constraints of adjudicatory process or special Mag-Moss-like procedural rules is contrary to the Non-Delegation Doctrine.

V. Conclusion

As we said in the introduction to these comments, we cannot recommend that the Commission adopt the Proposed Rule. It is not supported by the evidence, empirical or otherwise; neither is it supported the Commission's experience, authority, or resources.

Our comments have, like the Commission's own NPRM, reviewed the empirical literature regarding NCAs in some detail. In doing so, we can conclude only that the Commission's conclusions about "the weight of the evidence" are untenable.

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[379] This discussion draws from the analysis in William C. MacLeod, *Regulating Beyond the Rule of Reason*, __ GEO. MASON. L. REV. __ (*forthcoming*).

[380] *Shechter Poultry*, 295 U.S. at 533-4.

First, as made amply clear at the FTC 2020 NCA Workshop, evidence about the effects of NCAs themselves is both limited and mixed. And like the more substantial body of evidence on the putative effects of NCA "enforceability," it is hardly comprehensive. Moreover, as made clear in the literature, and at the FTC's various workshops and hearings regarding NCAs and other labor competition issues, significant data and methodological limitations are observed throughout the relevant empirical literature. These are endemic and far from trivial. While the NPRM's review of the literature responsibly notes many of these limitations in discussing individual studies, the Commission seems wholly to ignore such limitations in making its general observations about the available empirical findings.

Second, most of the studies that have employed causal designs depend heavily on a dubious set of "enforceability" metrics. These lack any clearly specified subject; they are variable in their implementation; they depend upon several layers of subjective assessments; and they are highly coding dependent. Each implementation might best be considered a "black box." There is no such thing as an objective measure of enforceability.

Finally, most of the studies cited by the Commission have limited relevance to antitrust enforcement. The Commission seems to be in no position to offer even a partial equilibrium analysis of NCA effects. To ignore the question of downstream effects on consumers (and the paucity of evidence in this area) would be irresponsible. What is more, findings on, e.g., average wage effects observed in a particular state tell us little about the question of substitution effects, or about the basic question of the extent to which such average effects—even if taken at face value—may be driven by specific local labor markets in which specific employers exploit a significant degree of monopsony power. As Howard Shelanski observed, "[i]t's very possible that a small employer that ties up six employees in a noncompete has zero effect on the market."[381] At the same time, imposition of an NCA without notice could be a material omission, and potentially actionable under the Commission's UDAP authority.[382]

None of this is to say that the literature is without merit, or that none of the cited studies are suggestive of legitimate policy concerns. It is to say that the existing body of literature is developing and substantially incomplete. Available findings are mixed, there are far too many unanswered questions, and most empirical observations are far too uncertain in their findings and in their generalizability to ground a sweeping federal rule.

But beyond the Proposed Rule's evidentiary infirmities lie still more problems. The Commission plainly lacks both the experience required to ground such a rule and the resources that would be necessary to enforce it. Moreover, as the Commission is aware, adoption of the Proposed Rule would

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[381] FTC 2020 NCA Workshop, *supra* note 2, Shelanski, Tr. at 293.

[382] *Id.*, Shelanski, Tr. at 191.

be nearly certain to prompt legal challenges to both the substance of the NCA regulations and, more broadly, to the Commission's authority to issue substantive or "legislative" competition rules under Section 6(g) of the FTC Act. While the Commission may be persuaded it has been granted such authority, and might cite a fifty-year-old D.C. Circuit case in support of that proposition, the Commission cannot gainsay changes in judicial construction that have occurred since *National Petroleum Refiners*. More specifically, the Commission cannot ignore the Supreme Court's more recent holdings on non-delegation and major questions that are wholly at odds with the sort of agency deference that obtained in 1973. That is, the Commission cannot ignore either the litigation burden or the risk to its own authority—nor the legal and economic uncertainty—that the adoption of the Proposed Rule would entail.

All is not lost. As we have also discussed, the Commission is in a position to develop better data sources, and the staff are capable of making substantial contributions to the literature. These could include, among other things, development of directly observed data on NCA terms and usage that would reduce, if not obviate, an excessive reliance on survey data. In addition, recent developments in state law—specifically, income-based restrictions on NCA enforcement—should enable data collection and event studies that do not depend upon soft and untested enforceability metrics.

The Commission, Congress, and state policy makers could all benefit from a more extensive development of the Commission's experience with NCAs. We note that the Commission has not issued any report of the findings of its 21st C. Competition Hearings, and that it has not issued any report on its 2020 workshop. We recommend that the Commission undertake a careful review of the records of pertinent FTC hearings and workshops, and that it issue a substantial report of its findings as prologue to any consideration of federal NCA regulations. Importantly, such reports could inform policy reforms that do not rest on antitrust. Recent state-level statutes, such as income-based limits on NCA enforcement, are not merely opportunities for event studies. Rather, they highlight the various policy concerns that might motivate state or federal reforms in labor policy, whether in conjunction with, or apart from, any observations of conduct that exploits market power in violation of the FTC Act or the federal antitrust laws, to the detriment of competition and consumers.

Competition policy can make an important contribution to such potential policy reforms, without necessarily coopting them. For example, it may be that NCAs for low-income workers serve no procompetitive goal, even if there are many labor markets in which NCAs do not harm competition but prove otherwise politically unobjectionable. That might provide a foundation for further state or federal policy reform, wholly apart from the question whether there are UMC violations that could support FTC competition rulemaking.

Finally, the Commission has asked about alternatives to the Proposed Rule, and "whether the rule should apply uniformly to all workers or whether there should be exemptions or different standards for different categories of workers."[383] We believe that the existing literature simply does not permit the making of viable inferences regarding the different effects of potential alternative policies, and thus that the issuance of the Proposed Rule or any alternative NCA rule by the Commission would be premature. Further research could confirm the Starr, Prescott, and Bishara finding that the timing of an NCA disclosure bears critically on the wage impact of an NCA, for example.[384] If so, that might ground a general finding that the failure to disclose NCA terms at some point before the commencement of employment is a material omission, perhaps with sufficient frequency and effect to support a Mag-Moss UDAP rulemaking. At present, that too would be premature, however.

Indeed, if the existing evidence is to be taken at face value, arguably the wage-effect evidence, especially that adduced by Starr, Prescott, & Bishara, counsels *against* a broad prohibition on NCAs:

> To be sure, regulatory regimes must sometimes rely on clear rules that ban (or allow) particular conduct, and such rules will be overinclusive or underinclusive. As then-Judge Breyer once explained, the cost of assessing the exact impact of each type of conduct would be prohibitive. The benefits of additional investigation do not always warrant the costs. However, if the anticipated impact on wages should drive the treatment of employee noncompete agreements, the cost of discriminating between contracts likely to reduce such wages and those likely to increase them is extremely low. Agencies and courts need simply ask whether the employer disclosed the agreement before acceptance. If the answer is "yes," any presumption that such an agreement will reduce wages must evaporate. If anything, the presumption should shift in favor of a conclusion that the agreement will produce net benefits.[385]

That is not to say that no enforcement is ever warranted. The Commission has brought and settled four Section 5 cases in which they alleged that specific NCAs, under specific facts and circumstances, violated the prohibition of unfair methods of competition. Although the antitrust analysis in the public documents is not entirely clear, we do not maintain that there have been no NCAs that constitute UMC violations; and there might well be uninvestigated matters in which the Commission might demonstrate actual or likely harm to competition and consumers. In the alternative, as noted above, an FTC investigation might find a UDAP violation under some specific set of facts and circumstances.

But the Proposed Rule at issue here is not tied to credible evidence and is not nearly so restrained. The extensive concerns discussed in this comment militate against the Commission's adoption of the Proposed Rule and, indeed, based on the available record, against any general competition rulemaking restricting the use of NCAs by the Commission.

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[383] NPRM at 3516.

[384] *See* Starr, Prescott & Bishara, *supra* note 54.

[385] Meese, *supra* note 56, at 702-3.

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