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Submitted via www.regulations.gov

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

Re: Docket No. FTC-2023-0007: Non-Compete Clause Rule, Matter No. P201200

Dear Ms. Tabor:

The Retail Industry Leaders Association (RILA) appreciates the opportunity to submit comments on the Federal Trade Commission's (FTC's or the Commission's) proposed rule banning non-compete clauses in employment agreements. *See* 88 Fed. Reg. 3,482 (Jan. 19, 2023).

RILA is a trade association of the world's largest, most innovative, and recognizable retail companies and brands. We convene decision-makers, advocate for the retail industry, and promote operational excellence and innovation. Our aim is to elevate a dynamic retail industry by transforming the environment in which retailers operate. RILA members include more than two hundred retailers, product manufacturers, and service suppliers, who together employ over 42 million Americans and account for $2.7 trillion in annual sales and hundreds of thousands of stores, manufacturing facilities, and distribution centers domestically and abroad.

RILA members fully support dynamic labor markets and competition in the American economy. The retail industry itself is hypercompetitive. Retail companies vigorously compete for a share of consumer spending by providing quality innovative products that meet customers' needs and expectations at a price they can afford. Retailers also compete for skilled talent to strengthen organizations, drive innovation and enhance customer experience.

RILA members agree with the FTC that overbroad and anticompetitive non-compete clauses in employment agreements are not appropriate and should be condemned. However, RILA members that use reasonable non-competes and other restrictive clauses are concerned that the FTC's proposal fails to consider various limited uses of these clauses, which provide benefits to employees and employers alike and do not on balance harm competition. RILA members do not use non-compete clauses for front-line hourly workers. Instead, those members that use non-compete clauses do so only for small number and limited categories of employees—namely,

executives, senior business leaders and skilled employees who are exposed to confidential business information and trade secrets. Non-compete clauses allow these retailers to recruit high quality talent for these kinds of positions, helping them improve the quality of the retailers' products and services, while protecting confidential business information and trade secrets. In exchange for agreeing to a non-compete, impacted employees receive additional benefits such as specialized skills training or compensation (*e.g.*, bonuses, equity, long term incentives, etc.).

A blanket ban on all non-compete clauses (and restrictive covenants deemed "*de facto"* non-compete clauses) is unsupported by the evidence and is unwise policy. Such a ban sweeps in all categories of workers, including those that are highly sophisticated and well compensated. Because non-compete clauses and other restrictive covenants can provide significant societal benefits without being overbroad and anticompetitive, they should be reviewed on a case-by-case basis to determine whether any given clause is reasonably tailored to the circumstances and warrants enforcement.

At a more fundamental level, it is vital for the American system of governance that federal agencies act only within the confines of the authority Congress grants them. To date, Congress has not provided the FTC with the legislative power to issue rules banning non-compete clauses as "unfair methods of competition" (UMC), but rather has only granted the FTC the power to proceed through case-by-case adjudication to prevent unfair methods of competition in commerce. Accordingly, any broad federal policy concerning non-compete clauses should be left to Congress and those agencies they deem to have the expertise and appropriate authority to develop employment policy.

The FTC should reconsider the proposed rule in light of the experiences of the RILA members that use non-compete clauses and given the serious constitutional and other legal concerns associated with this proposed rulemaking.

Executive Summary

I. When non-compete clauses are properly tailored, they can serve as important tools that provide incentives to employers to invest in employees without unfairly restricting employment mobility. Retailers typically use non-compete clauses only for executive, senior business leaders or highly skilled employees who are exposed to confidential business information and trade secrets. Non-compete clauses allow retailers to operate their businesses effectively and efficiently by ensuring that confidential information and trade secrets they share with certain employees will be protected. Retailers also use non-compete clauses in certain circumstances when they provide skills training for employees. A non-compete prevents such an employee from using that training in competing stores (usually subject to geographic and time limits), protecting the retailer's investment. These limited uses of non-compete clauses are reasonable and overall beneficial to employees, employers, and consumers.

II. The FTC's proposed rule banning nearly all non-compete clauses used by employers under its jurisdiction is unsound public policy that will cause unintended harmful consequences. It

prevents the traditional case-by-case evaluation and enforcement of pro-competitive non-compete clauses, eliminating their benefits to commerce. By including ill-defined "*de facto*" non-compete clauses in the ban, the FTC's proposed rule creates significant uncertainty regarding the legality of other restrictive covenants, without which employers will be further hampered in their ability to protect confidential business information. And by proposing that the ban apply retroactively to existing contracts, the FTC would hugely disrupt the operation of businesses that rely on non-compete clauses and prevent employers from receiving the benefits of contractual provisions that they bargained for.

III. The proposed rule is beyond the FTC's legal authority. The FTC bases the proposed rule on its asserted authority to issue binding rules preventing "unfair methods of competition" in commerce, but Congress has never delegated what would be immense power to regulate the national economy through rulemaking to the FTC. Rather, Congress originally designed the FTC so that the Commission would evaluate conduct on a case-by-case basis. While Congress later provided the FTC with the power to issue binding rules with regard to "unfair or deceptive acts or practices" using specific procedures, it declined to provide the FTC with competition rulemaking authority.

IV. The proposed rule does not withstand constitutional scrutiny. The FTC's reliance on rulemaking grant language, which provides the FTC with authority to issue internal rules, does not pass the major-questions doctrine test. This language is at most ambiguous in scope and does not clearly provide the FTC with the power to decide a major national policy question regarding regulation of non-compete clauses in employment agreements. The FTC Act also does not provide the agency with an intelligible principle to issue rules on "unfair methods of competition," so if the statute were read to grant the agency power to issue the proposed rule, the statute would constitute an unconstitutional delegation of legislative authority. To avoid concluding that the FTC Act is unconstitutional, courts would likely decide that the Act does not grant the FTC the power to issue the proposed rule. Finally, the proposed rule also threatens principles of federalism because the FTC is seeking to regulate an area of contract law that is ordinarily left to the states.

V. The proposed rule Is arbitrary and capricious, in violation of the Administrative Procedure Act. The FTC's conclusion that non-compete clauses are categorically "unfair methods of competition" is based on cherry-picked studies that are inconclusive or methodologically flawed, and the FTC cannot rely on its own experience to support the rule because its experience with non-compete clauses is virtually nonexistent. The same goes for the FTC's proposal to ban "*de facto*" non-compete clauses, which is based on even slimmer support. The proposed rule is also arbitrary and capricious because the FTC failed to consider reliance interests, including those of retailers that have structured their businesses relying on the availability of non-compete clauses that states have deemed legal and those of employees who have benefited financially and professionally from these clauses. Furthermore, the FTC failed to conduct an adequate cost-benefit analysis of the proposed rule.

VI. The FTC should withdraw the proposed rule. It should continue evaluating non-compete clauses on a case-by-case basis so that it can prevent deceptive, unfair, or anticompetitive non-compete clauses without banning reasonable ones that provide benefits to commerce.

All of these issues are discussed in more detail below.

Comments

I. Reasonably Tailored Non-Compete Clauses Are Important Tools for Creating Employment Opportunities

The FTC's proposed rule casts aside the significant benefits provided by reasonable non-compete clauses to employees, employers, consumers, and commerce as a whole. As detailed below, the limited use of appropriately tailored non-compete clauses is a reasonable and helpful tool that can allow employers to provide financial benefits and opportunities to individual employees, including higher wages, additional training, and access to confidential information. RILA members that use non-competes do so in a way that is specifically tailored to the circumstances of their individual businesses.

A. Tailored non-compete clauses are beneficial to both employees and employers.

Appropriately tailored non-compete clauses such as those used by a number of RILA members benefit both employees and employers. They provide strong incentives for companies to invest in and financially reward employees, as they ensure to a reasonable degree that employers benefit from training employees and that confidential business information—including business strategies—and company trade secrets will not be taken to competitors immediately upon the departure of an employee.[1]

Employees benefit from non-compete clauses because they can lead to more money in their pockets. As the FTC acknowledges, non-compete clauses are often associated with higher

[1] *See* John M. McAdams, Federal Trade Commission, Non-Compete Agreements: A Review of the Literature 13 (2019) ("The bulk of the empirical literature finds that workers signing non-compete agreements, or workers who reside in areas with a higher incidence of NCAs, receive more training [and] more access to information."); Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R. Rev. 783, 808 (2019) ("Noncompete enforceability is associated with more training."); Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L., Econ., & Org. 376, 379 (2011) (Non-competes "encourage firms to make investments in their managers' human capital."); Johnson, Matthew S., and Michael Lipsitz, *Why are Low-Wage Workers Signing Noncompete Agreements*, 57 J. of Human Resources 689 (2017) (finding that non-competes result in increased training of salon workers).

wages.[2] Prospective and current employees can, and do, bargain for higher pay or other compensation in exchange for a non-compete clause.[3]

A recent survey of RILA members confirms that reasonably tailored non-compete clauses provide mutual benefits. Retailers indicated that retail employees subject to non-compete clauses receive a variety of financial benefits in exchange for agreeing to post-employment restrictions. An overwhelming majority of these companies provide employees receive equity grants or some other long-term incentive as consideration for non-compete clauses. Other financial benefits commonly provided by retailers as consideration include retention payments, bonuses, and severance payments.

Employees can also receive employer-paid specialized skills training as consideration for signing a non-compete agreement. In many instances, this type of training is offered to current company employees who may be in hourly or lowered paid positions within retail stores or distribution centers. Employees benefit from gaining new skills and career-enhancing professional development. The specialized training offered by many retailers can provide individuals not only with a new job opportunity but also with an upward career trajectory and future financial opportunities.

Non-compete clauses are beneficial to employers and commerce as a whole, too. In addition to protecting companies' trade secrets, confidential business information, and investments in employees, non-compete clauses can facilitate information-sharing within organizations to make them more connected, innovative, and effective—bolstering the competitiveness of firms and the economy. Non-competes can also enhance business collaborations among firms by providing guardrails for joint ventures. Without the availability of non-compete clauses, a firm might hesitate to engage in joint-venturing activities or to contribute its best talent to the joint venture for fear that an employee could be stolen by the co-venturer company. Thus, non-compete clauses facilitate the creation and effectiveness of new joint business ventures and help instill new ideas and innovation into the marketplace.

Because properly tailored non-compete clauses provide benefits to both employees and employers and are not unduly restrictive to employee mobility, the vast majority of states allow courts to enforce reasonable non-compete clauses. States have and continue to experiment to determine what limits on non-competes best preserve the balance of interests between businesses, workers, and the economy as a whole.[4] Indeed, courts routinely find that non-compete clauses that are limited in scope, noncoercive and tied to specific business interests—similar to those used by RILA members—are reasonable and even procompetitive.[5] Courts have

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[2] *See* 88 Fed. Reg. at 3487/2–3 (citing Kurt Lavetti, Carol Simon, & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers Evidence from Physicians*, 55 J. Hum. Res. 1025, 1042 (2020)).

[3] *See* Evan P. Starr, James J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & Econ. 53, 80 (2021) (explaining that the evidence of higher earnings is consistent with the notion that "noncompetes [are] a solution to a holdup problem").

[4] *See infra* at IV.C.

[5] *See, e.g.*, *Eichorn v. AT&T Corp.*, 248 F.3d 131, 148 (3d Cir. 2001); *Behrend v. Comcast Corp.*, 2012 WL 1231794, at *27–28 (E.D. Pa. Apr. 12, 2012); *KW Plastics v. U.S. Can. Co.*, 2001 WL 135722, at *22 (M.D. Ala. Feb. 2, 2001); *see also infra* at IV.C.

found that non-compete clauses lead to myriad competitive benefits, including: (1) increasing incentives for employers to train their employees; (2) ensuring that operations remain fully staffed; and (3) protecting trade secrets or other sensitive information.[6] As one court summed it up, "[t]he recognized benefits of reasonably enforced noncompetition covenants are by now beyond question."[7]

B. Retailers use non-compete clauses that are reasonably tailored and reflect unique, fact-specific circumstances.

Competition is a core trait of the retail industry. Retailers are in constant competition with each other for customers and talent. RILA members do not seek to limit frontline or lower-paid worker mobility by requiring that such workers sign non-compete clauses in unreasonable situations—particularly because doing so would make it more difficult to attract workers in the competitive entry-level job market. Rather, RILA members that use non-compete clauses reasonably tailor the scope of employee positions subject to those clauses, using non-compete clauses for only a small percentage of their workforce. A recent survey of RILA members indicated that the majority of retailers that use non-compete clauses do so with less than 1% of their workforce and an additional quarter use non-competes with less than 10% of their workforce.

Retailers primarily use non-competes with a limited number of executive-level, senior business leaders, or other skilled employees—that is, those who work closely with confidential information and trade secrets. These are positions where it would be difficult for an employee not to use the confidential information, even unintentionally, if the employee were to work in a similar position for a competitor. As the employees involved are ordinarily sophisticated and well-informed, any concerns about information asymmetries and bargaining power in these negotiations are limited. Additionally, the employees involved are typically highly paid and/or receive additional financial compensation in exchange for agreeing to abide by non-compete restrictions.[8]

A few examples modeled off the responses to the recent RILA survey may provide the Commission with insight into how retailers use reasonably tailored non-competes. Retailer A negotiates an employment package with a prospective CEO who will direct the strategic direction of the company. Given the potential for harm to the business should the future CEO with knowledge of Retailer A's business strategies leave the company, the employment package

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[6] *See Eichorn*, 248 F.3d at 144 (non-compete clauses reasonable to ensure workforce continuity during sale of subsidiary); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (non-compete clauses encourage employers to "train the employee, giving him skills, knowledge, and trade secrets that make the firm more productive"); *Aydin Corp. v. Loral Corp.* 718 F.2d 897, 901 (9th Cir. 1983) ("[Non-compete] covenants often serve legitimate business concerns such as preserving trade secrets and protecting investments in personnel.").

[7] *Innovation Ventures, LLC v. Custom Nutritions Labs., LLC*, 451 F. Supp. 3d 769, 791 (E.D. Mich. 2020) (quoting *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981)).

[8] *E.g., Capital One Fin. Corp. v. Kanas*, 871 F. Supp. 2d 520, 530-31 (E.D. Va. 2012) (enforcing non-compete agreements against "executives of a publically traded company" because they were "at the pinnacle of sophistication," received significant "consideration . . . in return for their covenant not to compete," and "stood 'on equal footing at the bargaining table' with their employer" (citation omitted)).

includes a time-limited non-compete clause and other restrictive covenants in exchange for severance pay. Similarly, Retailer B uses time-limited non-compete clauses with employees at the director (or higher) level (who comprise less than .05% of its workforce), as these employees have a direct line of sight into the company's strategic plans and direction, as well as in-depth knowledge of talent pools. The rationale for non-compete clauses in each instance is reasonable. As one retail executive stated in response to the RILA survey, "Since we use noncompete clauses only for VPs and above, we're talking about people who have vast knowledge of the business well beyond their particular job area. It would be impossible for them to work for a competitor without utilizing some of that knowledge and skills they acquired working here even unintentionally. We don't want to invest in people only [for them] to turn around and use it against us."

In another example, Retailer C negotiates a retention agreement with a non-compete clause for a highly skilled employee in charge of the development of a new product that is scheduled to launch shortly. Similarly, Retailer D seeks a non-compete as part of an employment agreement with an employee before he moves to a new position leading a project involving an innovative use of artificial intelligence to make Retailer D's inventory and merchandising operations more efficient. Without the protection of non-competes, Retailers C and D could lose a significant portion of their investments and face competitive disadvantages should the employees take their knowledge of the upcoming product or the new project (and related information regarding the business's operations) to competitors.

Additionally, some RILA members use non-compete clauses justifiably in circumstances where they invest significant resources in specialized skill training for employees. It is fair to use non-compete clauses in these circumstances because both the employee and the employer deserve to receive the benefit of their bargain. Employees gain new career-enhancing skills that provide future financial opportunities, and in exchange retailers should be able to receive the benefit of their investment in the employee for a reasonable time period.

In addition to limiting the use of non-compete clauses to select employee positions, RILA members reasonably tailor their non-compete clauses in other ways. More than 40% of respondents stated that the standard length of time for their non-competes is between 6 months to 1 year. And almost half of RILA member survey respondents indicated that they tailor the length of time of their non-competes depending upon the specific nature and volume of confidential information that the employee has been exposed to, rather than using a standard time period on all non-competes. Accordingly, the length of time that restrictions remain in place are appropriately limited in retailers' non-compete clauses.

Retailers also limit the scope of companies that fall under the definition of "competitor" for purposes of non-compete clauses and frequently list specific companies that offer the same product lines or operate in the same retail pillar (*e.g.*, auto, grocery, general consumables, home improvement, fashion, department store, footwear, pharmacy, sports supply, specialty, or discount). So, for example, to protect its trade secrets and confidential business information, in a retention agreement with its chief financial officer Retailer E, a fashion retailer, tailored a non-compete clause to include a list of direct competitor fashion retailers—for which it provided additional compensation. Under the terms of the agreement, the CFO may seek employment with

any other retailer that is not a direct competitor to Retailer E. The CFO is only limited from moving to a direct competitor fashion retailer for a limited time.

The non-compete clauses used by these RILA members are also limited in geographic scope. Typically, the non-compete restriction in these clauses is directly tied to the geographic scope of the retailer's operations and the justification for the restriction.[9] For example, a regional retailer might limit the scope of its non-competes to the scope of its regional operations, while the geographical scope of the non-compete for a national retailer could justifiably be nationwide. When a non-compete clause is required for client service positions where an employer provides specialized skills training, the non-compete is often limited to locations near the retailer's local stores. This is a reasonable means to encourage employers like certain RILA members to pay for specialized skills training, as otherwise, following their training, former employees could use that training against them by immediately going to work for a competitor or setting up a competing business nearby.

The overall impact of these retailers' narrowly tailored non-compete clauses is not anticompetitive or unfair. Retailers who use non-competes and other restrictive covenants go to great lengths to craft them in such a way as to give companies reasonable protections while providing financial or training benefits to employees and not unreasonably limiting their employment opportunities or mobility. Under a typical retailer's non-compete clause, an employee is prevented only from moving to a "direct" competitor within a defined geographic area for a limited time period. Even in the event that an employee is looking to move to a direct competitor, retailers frequently demonstrate flexibility and will negotiate an accommodation for the employee. Take for example, the situation of Retailer F's former head merchant of women's accessories seeking an employment opportunity with a direct competitor, Retailer G. Retailer F further narrowed its non-compete clause—designed to protect Retailer F's confidential and strategic business information—to allow this former employee to work for Retailer G as a merchant in another product category. After expiration of the reasonable period of time required under the revised clause, its former employee could work as Retailer G's head merchant of women's accessories.

In sum, the non-compete clauses used by certain RILA members in limited circumstances are reasonable. The FTC's proposal to unilaterally ban such clauses will eliminate the many benefits they provide to employees, employers, and the overall economy.

II. The FTC's Proposed Blanket Ban On All Non-Compete Clauses Is Bad Public Policy

Plainly put, the FTC's proposed blanket ban on all non-compete clauses is bad public policy. Such a broad ban precludes consideration of the unique facts and circumstances like those detailed here that would make enforcement of a particular non-compete clause appropriate. The proposed rule is also improper because its inclusion of other commonly used restrictive clauses

[9] *See, e.g., Coates v. Bastian Brothers, Inc.*, 276 Mich. App. 498, 507–09 (2007) (holding that "noncompetition clause was reasonable" where it "only applied for one year" and was limited to "within one hundred miles of any business location" of the employer); *St. Clair Med., P.C. v. Borgiel*, 270 Mich. App. 260, 269 (2006) (holding that non-compete clause was enforceable where its geographic scope was reasonably limited to "seven miles" around two of the employer's "offices").

(*e.g.*, non-disclosure clauses, non-solicitation clauses, etc.) as "*de facto*" non-compete clauses would create uncertainty for all stakeholders regarding the legality of such clauses. Further, the proposed retroactive application of the blanket ban would unfairly adversely impact millions of employees and employers and lastly, overall, the proposed rule will have significant unintended consequences.

A. The variety of facts and circumstances that support reasonably tailored non-compete clauses requires consideration on a case-by-case basis.

RILA members agree that overbroad and anticompetitive non-compete clauses are never appropriate and should not be enforced. However, a rule categorically outlawing *all* non-compete clauses for industries subject to the FTC's authority is like taking a bulldozer to a building that needs only tailored repairs. Retailers' business models and operations are as unique and distinctive as their brands. Thus, the operations of one retailer that support a reasonable non-compete for a specific employee would not be identical to those of another retailer, even one that operates within the same product category. The FTC's proposed blanket ban precludes consideration of the unique facts and circumstances underlying a particular non-compete clause, such as the specific situations like those described above that make it reasonable to enforce retailers' non-competes for certain executives, employees in key positions, highly skilled employees, or employees that the retailers have invested in skills training.

The need for case-by-case consideration of the competitive impact of a specific non-compete clause is even more acute when considering the breadth and range of operations and circumstances across all industries. The FTC's broad-brush approach ignores the untold number of situations where use of a non-compete is reasonable, mutually beneficial, and pro-competitive and instead, improperly labels all non-competes as overbroad and anticompetitive. This ill-advised approach would unilaterally override courts' decades-long experience using case-by-case analysis and recognition of the pro-competitive benefits of reasonable non-compete provisions to employees, employers, and consumers.

We urge the FTC not to abandon its long-held approach of analyzing whether a non-compete is anticompetitive on a case-by-case basis. To the extent there is any change to this federal public policy and approach on non-compete clauses, it should be carefully drafted by Congress and targeted to prevent only overbroad and anticompetitive non-compete clauses.[10] This would permit precisely the case-by-case analysis that states and courts have long felt best assesses whether a particular clause is anticompetitive.[11]

B. The FTC's proposed ban on "*de facto*" non-compete clauses is similarly overly broad and creates significant uncertainty.

Aside from pure "non-compete clauses," the proposed rule also would ban innumerable *other* types of commonly used restrictive covenants that may also function as so-called "*de facto* non-

[10] *See infra* at IV.A, VI.

[11] *See infra* at IV.C, VI.

compete clauses."[12] The standard for what qualifies as a "*de facto"* non-compete clause is hopelessly vague and overly broad, and will create significant business uncertainty, including among RILA members, regarding which covenants are unlawful. According to the proposed rule text, covenants that may qualify as "*de facto"* non-competes may include certain non-disclosure agreements and training repayment agreements that the FTC decides "has the effect of prohibiting the worker from seeking or accepting work with a person or operating a business after the conclusion of the worker's employment with the employer."[13] In the preamble, the FTC also pointed to other covenants, such as client or customer non-solicitation agreements, no-business agreements, no-recruit agreements, and liquidated damages provisions as other possible "*de facto*" non-competes.[14]

Retailers, along with other employers, routinely use some of the covenants that could fall under the FTC's proposed definition of a "*de facto*" non-compete clause (*e.g.*, non-disclosure, confidentiality, repayment, forfeiture, non-solicitation, etc.). In RILA's recent survey, the overwhelming majority of respondents indicated that they use one or more of these clauses. The rule's broad language leaves it entirely unclear whether any of these frequently used covenants would remain legal. Many retailers currently use repayment clauses, under which employees who receive signing bonuses or relocation payments agree to repay those costs if they leave the firm within a designated period of time. These clauses generally have a phased repayment schedule where the longer the employee stays before leaving the company, a smaller percentage would need to be repaid. The rationale for these repayment clauses is fairness. Employers are willing to give employees additional financial benefits beyond their standard salary, which can amount to tens of thousands of dollars, in exchange for a reasonable expectation that the employer will benefit from the employee working for the company for a specified limited amount of time. Without the ability to have and enforce repayment clauses, an employee could accept a job offer with a retailer that includes a signing bonus and relocation payment and then leave the retailer shortly after moving his/her family across country and having the moving costs covered and signing bonus paid.

Retailers may also use repayment clauses when the employer pays the upfront costs of specialized skills training. Examples of such training include commercial driver license training, pilot training on a new type of aircraft, HVAC, elevator, escalator, cosmetology, pet groomer and more. Based on feedback from RILA members, the cost of advanced skills training can be significant, depending on the specific training provided, ranging from a low of $5,000 to over $50,000 for training on specialized equipment. Retailers use repayment agreements that are reasonable in scope and impact and which balance burdens on workers with the value of the investment by the retailer. In exchange for receiving career enhancing training paid for by the employer, an employee agrees to pay back the cost of training if he/she leaves the company within a specified time. The total length of time of a repayment clause is largely dependent on the total costs of the training paid for by the retailer. Lower cost trainings will have a shorter repayment period while higher cost training will typically have a longer repayment period. An employee leaving the company immediately after training will repay a higher percentage of the

[12] 88 Fed. Reg. at 3509/3.

[13] *Id.* at 3535/1-2.

[14] *Id.* at 3484/2.

total training costs than an employee who chooses to leave the company toward the end of the repayment period.

Like the other repayment situations described above, the rationale for training repayment agreements is one of fairness. Both the employee and employer deserve to receive the benefit of their bargain. Reasonable repayment clauses do not prevent an employee from leaving the company after receiving the training. Instead, these clauses are intended to help the retailer recover a portion of the costs of the specialized training if the employee leaves the company within a specified time. It should be clear that even with the repayment of training costs, retailers will not be made "whole" as they will still have costs related to employee turnover and will not have the continued benefit of the trained employee's skills.

The rule's standard that such clauses are "*de facto*" non-competes where they are not "reasonably related to the costs the employer incurred for training the worker" is unclear. The proposed rule creates significant doubt as to legality of training-repayment agreements and will certainly have a chilling effect on their use. This raises the possibility that employees may receive contracted-for benefits without having to provide the consideration that they had agreed to. If training-repayment agreements are unlawful, employers would be further disincentivized from covering training and certification costs, as they could ultimately pay for training that would primarily benefit competitors if those employees could immediately leave after receiving the training and work in competition with their former employer.

Forfeiture clauses are another commonly used clause that could get swept up in the FTC's broad net of purported "*de facto*" non-compete clauses. RILA's members often include forfeiture clauses in grants of equity or other long-term investment awards, which are given in recognition of a senior-level employee's contribution to the company and may be paid out over a period of time. These awards typically detail a specific percentage of the total award that is available to the employee immediately and include a vesting schedule listing the future dates of any additional equity or cash awards to be issued. Equity and long-term investment awards are intended to reward and incentivize current company employees. Not surprisingly, these grants include forfeiture clauses, where employees with unvested equity or awards (*i.e.*, those for which the vesting date(s) has not yet passed) forfeit those unvested awards when they leave the company. If forfeiture clauses are deemed to be "*de facto*" non-competes, however, the employer may have to pay for talent that is no longer with the company. To prevent this from occurring, companies would certainly have to revise their current compensation packages and equity and long-term investment award practices to protect their financial resources and investments in talent and minimize financial risks to the company and its shareholders.

Non-solicitation clauses could also get swept under the FTC's proposed ban. These clauses can take two forms: non-solicitation of customers or clients and non-solicitation of employees. As with all the other covenants described here, those retailers that use non-solicitation clauses do so only in those limited situations where the facts and circumstances warrant their use, and the terms of the non-solicitation clause are narrowly tailored to protect an important business interest. For example, retailers do not want employees that provide services to their customers to unfairly gain access to a company's book of customers, then leave to set up a competitor. As another example, in the event of a departure of a senior executive that has been leading an important strategic project for the company, retailers do not want that former senior executive

soliciting former work colleagues who have also been working on the project to leave the company and move to a competitor. Non-solicitation of employee clauses do not prevent any employees from leaving the company to go to work with the former senior executive. The clause merely prohibits the former executive from taking affirmative proactive action to "solicit" the departure of these key employees. While the proposed rule states that it would "generally not include" non-solicitation clauses, the FTC also suggests that such clauses *may* be "*de facto*" non-competes if they are "unusually broad in scope."[15] The Commission does not explain what would make a non-solicitation clause "unusually broad," and will thus also have a chilling effect on businesses—including RILA's members—reasonable use of non-solicitation clauses.

The FTC's vaguely worded proposed ban on "*de facto*" non-competes has the potential to ban standard business clauses (*e.g.*, repayment, forfeiture and non-solicitation) that are commonly used across industries. The threat of a potential FTC enforcement action for these now-uncertain practices will harm employees and chill business activity and innovation.

C. The proposed rule's retroactive application would invalidate millions of contracts, adversely affecting employees and employers alike.

Among its many deficiencies, the proposed rule is perhaps most clearly unfair in its retroactive application, which would invalidate millions of existing non-compete clauses. As discussed further below, the FTC does not have statutory authority to promulgate competition rules.[16] However, assuming for the sake of argument the FTC does has such authority, it certainly does not have the power to ban non-competes retroactively. Agencies such as the Commission generally have statutory authority to impose rules *prospectively*. Indeed, courts have strictly scrutinized agency actions that attempt to retroactively apply regulations.[17] The reasoning behind this heightened scrutiny is simple: under the principles of fairness and due process, individuals and business should have notice of the standards and requirements they will be held to, and thus generally should not be held accountable retroactively for behavior or actions that were previously legal. In those limited circumstances where retroactive application of a rule is allowed, courts have required that the power to do so be explicitly granted by Congress.[18] Such authority is absent here. Nowhere in the FTC's discussion of its purported statutory power to issue competition rules does the Commission point to an express grant of such authority by Congress to regulate *retroactively*.

Moreover, the effects of a retroactive application of the ban would be substantial. Many employers, including those RILA members that use non-competes, have structured their businesses relying on the enforceability of non-compete clauses and other covenants that could be deemed "*de facto*" non-competes. *See infra* at V.B. The FTC's proposed rule would disrupt

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[15] *Id.* at 3482/3.

[16] *See infra* at III, IV.A–B.

[17] *See Mexichem Flour, Inc. v. EPA*, 866 F.3d 451, 462 (D.C. Cir. 2017) ("The Due Process Clause limits the Government's authority to retroactively alter the legal consequences of an entity's or person's past conduct.").

[18] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

these business models and eliminate guarantees that employers bargained for and accounted for in offering compensation and benefits to their employees. Take for example a senior employee who was recently laid off from the company who signed a time limited non-compete clause as part of a severance payment agreement. The retroactive application of a ban on non-competes would unfairly penalize both the employee (who wants the continued severance payment to support his/her family) and the employer (who willingly agreed to make the severance payment in return for a reasonable non-compete). A company would be faced with a difficult choice: continue to make payments to the former employee despite the elimination of key consideration (the non-compete) or, to the extent that they can legally do so, attempt to renegotiate all outstanding severance agreements with formers employees that contain non-compete clauses to adjust the compensation paid to reflect the lesser value of the consideration without an enforceable non-compete. Neither is an option that retailers should be forced to take.

The FTC's proposed action would insert the agency retroactively into negotiations and prevent employees from accessing benefits for which they were willing to exchange for non-compete clauses. This challenging scenario would be played out across a company's business operations. Retention agreements, severance plans, equity and long-term investment awards, and expanded senior executive retirement pay plans all may potentially include retroactively banned non-competes. The FTC can prevent this chaos by eliminating the retroactive application of the proposed ban. We encourage the Commission to do so.

D. The proposed rule will have severe unintended consequences.

Even if the proposed rule is limited to apply *prospectively* only, it will still have a significant negative impact on employees' benefits, compensation, and career advancement opportunities. Wage growth could be impacted if non-compete clauses are prohibited, as employers will no longer pay a premium for them.[19] Without an enforceable non-compete clause to serve as consideration, employers may no longer see the need for severance payments at all, or at least severance payments at current levels. Because the proposed rule would eliminate protections for employers who invest in employees by training them in various specialized career-enhancing skills, employer-paid training will be curtailed, harming employees' professional development and denying them future financial opportunities. Instead of paying the cost of advance skills training for employees, employers could choose to offer those positions only to those applicants that are already certified or have that specific training. This could effectively eliminate a new career path for an employee who may not be able to pay for the specialized skills training she desires without the employer's assistance.

Banning non-competes will significantly heighten the risks of leaked confidential information and trade secrets.[20] The FTC is mistaken that trade-secret law and non-disclosure agreements can adequately protect trade secrets and confidential information.[21] These alternatives are inadequate substitutes for non-compete clauses for several reasons. First, trade-secret litigation is costly and

[19] As discussed, non-compete clauses are associated with higher wages. *See supra* at nn. 2–3.

[20] *See, e.g.*, Aaron Levine & Matt Todd, *FTC Noncompete Ban Could Erode Trade Secret Protections*, Law360 (Feb. 28, 2023), https://www.law360.com/articles/1579186/ftc-noncompete-ban-could-erode-trade-secret-protections.

[21] *See* 88 Fed. Reg. at 3505/2–3507/2.

protracted, and eliminating the availability of non-compete clauses threatens to make it only more so.[22] As noted by multiple retailers in response to the recent RILA survey, eliminating retailers' ability to use reasonable non-competes will mean that companies will incur substantial additional legal costs and expenses for enforcement and litigation related to improper disclosure of confidential business information and trade-secret violations. Increased legal costs mean that retailers will have to tighten their budgets, and might have to allocate fewer resources to business innovation or personnel. In addition, trade-secret litigation is often brought after a former employer suspects misappropriation, but once a trade secret is lost, significant harm ensues and cannot be undone. During the lengthy time it can take to establish harm, the negative impact of the unfair competition from misappropriated trade secrets can continue to grow and compound as the business struggles. Also, to the extent the FTC erroneously believes it can apply the non-compete rule extraterritorially, it is critically important that the agency not do so, because global corporations often have little to no other effective means of legal recourse against misappropriated trade secret and confidential information in certain non-U.S. locations. Thus, in these situations, non-compete clauses offer the only protection for this highly sensitive information.

Banning non-compete clauses also will affect the ability to protect valuable confidential business information that does not necessarily meet the threshold for trade-secret protection.[23] Non-disclosure agreements provide insufficient protection for confidential business information because employees in certain positions cannot reasonably operate in similar positions for competitors without necessarily divulging such information.[24] Moreover, the proposed rule even calls into question the enforceability of non-disclosure agreements by stating that they also could be considered *de facto* non-compete clauses.[25]

To avoid these risks, those RILA members who now rely on non-compete clauses to protect their confidential business information will likely have to adjust their business models. They might do so by limiting how much information is shared with employees to the extent possible and restricting the kinds of positions that have access to strategic confidential business information. As one of RILA's members reported, a ban on non-competes would leave the company unable to share trade secret and confidential, proprietary company information outside a very small group.

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[22] *See, e.g.*, Christina L. Wu, *Noncompete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State's Law?*, 51 UCLA L. Rev. 593, 610 (2003) ("Noncompete agreements can also reduce the cost of trade secret litigation. . . . Instead of claiming misappropriation of trade secrets, an employer can simply bring a contract action for breach of the covenant not to compete, which would be less costly and easier to prove.").

[23] *See e.g.*, *Int'l Bus. Machines Corp. v. De Freitas Lima*, 2020 WL 5261336, at *7 (S.D.N.Y. Sept. 3, 2020) (recognizing that the non-compete agreement at issue "protects a broader range of [confidential] information than the common law New York doctrine of 'trade secrets' might protect" and finding the agreement enforceable), *aff'd*, 833 F. App'x 911 (2d Cir. 2021); *Ak Steel Corp., v. Miskovich*, 2014 WL 11881029, at *11 (S.D. Ohio Apr. 17, 2014) ("'[C]onfidential information need not meet the stringent requirements of a trade secret' to constitute a legitimate business interest protectable by a non-compete agreement." (citation omitted)).

[24] *See, e.g.*, *Nike, Inc. v. McCarthy*, 379 F.3d 576, 586 (9th Cir. 2004) (enforcing non-compete agreement with senior executive who had intimate knowledge of the company's "product allocation, product development and sales strategies" and could thus put that to use for its rival by "developing strategic sales plans, providing overall direction for product allocation and shaping product lines").

[25] 88 Fed. Reg. at 3484/2, 3509/2–3510/1.

This will hamper employees' ability to do their jobs effectively and efficiently and hurt their career development and therefore, future financial opportunities. It will also hamper employers' flexibility to run their companies.

The proposed blanket ban on non-competes and purported "*de facto*" non-competes is bad public policy. It will negatively impact employees' wages, compensation and benefits. Opportunities for employees to get career enhancing positions that have access to strategic confidential business information will be limited and employees also will be deprived of specialized skills training. Companies will not be able to structure compensation, benefits and severance packages to meet employees' expectations and will have challenges retaining key talent including senior executives and skilled employees. Retailers also will be unable to recoup training costs and will incur added legal expenses. These costs will negatively impact companies' profitability and shareholder value, reduce innovation, and increase prices for consumers. For all these reasons, the proposed rule should be withdrawn, and federal public policy on non-compete clauses (if any) should instead come from narrowly targeted legislation.

III. The FTC Lacks Statutory Authority to Issue Unfair Methods of Competition Rules.

In addition to being bad public policy, the proposed rule goes well beyond the legal authority of the FTC. First, the FTC does not have the authority to issue substantive rules defining unfair means of competition—the authority cited by the proposed rule permits the FTC only to issue *internal* rules governing its own conduct. Second, the lack of FTC authority is validated both by subsequent congressional action, which confirms that the FTC cannot issue substantive rules, and the consistent practice of states exercising authority in this area. Finally, judicial precedent interpreting Section 5 of the FTC Act hems in the FTC and prohibits it from departing from the requirement to conduct case-by-case analysis using the long-followed rule-of-reason standard.

A. The FTC Act does not grant the FTC authority to issue legislative rules.

The FTC says that Section 5 and Section 6(g) of the FTC Act of 1914 authorize the agency "to issue regulations declaring practices to be unfair methods of competition."[26] As discussed briefly in these comments below and in more detail in numerous other comments, the Commission's interpretation of its statutory authority is incorrect.

Section 5 directs the agency to prevent "[u]nfair methods of competition" in commerce.[27] But Congress envisioned that the FTC would enforce this prohibition through case-by-case adjudications.[28] In 1914, it provided the FTC with investigatory, reporting, and procedural powers in Section 6 of the Act, and nestled among these powers to "classify corporations and . . . *to make rules and regulations* for the purpose of carrying out the provisions of this subchapter," including Section 5. However, that delegation of rulemaking authority is much narrower than FTC now claims it to be.[29] In the early 20th century, Congress did not draft broad legislative

[26] *Id.* at 3499/1–2.

[27] 15 U.S.C. § 45(a)(1)

[28] *See id.* § 45(b)–(l).

[29] *See id.* § 46 (a), (c)–(d), (g)–(h) (emphasis added).

rulemaking grants without pairing them with sanctions for violations of the rules.[30] Because the FTC Act did not (and does not) provide any sanctions for violations of rules promulgated under Section 6(g), Congress did not mean for such rules to regulate the conduct of private actors.[31] Instead, Congress intended that any rules issued under Section 6(g) would cover only the development of internal agency processes and procedures for implementing the provisions of the statute.[32]

Agency action "based upon a determination of law . . . may not stand if the agency has misconceived the law."[33] Here, the Commission has issued the proposed rule relying on its flawed interpretation of its underlying statutory authority, and therefore its action cannot stand.

B. Subsequent congressional action confirms that the FTC lacks authority to issue binding rules on "unfair methods of competition."

For over 50 years, the FTC acted consistently with Congressional intent and did not attempt to issue legislative rules. That changed in the early 1970s when the FTC claimed the power to issue substantive regulations prohibiting certain practices under the authorities in Section 5 and Section 6(g), and in 1973 the D.C. Circuit agreed. That case—*National Petroleum Refiners Association v. FTC*—is the only authority cited by the agency supporting its assertion that it now may issue unfair methods of competition rules.[34] The FTC's reliance on this case for authority to issue a rule banning non-competes is misplaced. *National Petroleum* was wrongly decided. The D.C. Circuit's policy-driven reasoning there was flawed, particularly because it did not consider that in the early 20th century, broad grants of power to issue rules with the force of law were paired with sanctions for violations of those rules—a drafting convention not present in Section 6(g).[35]

Moreover, Congress' subsequent actions in response to *National Petroleum* confirm that it was wrongly decided. In the 1975 Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Congress *expressly authorized* the FTC to issue *consumer-protection* rules—regulations "defining with specificity acts or practices which are unfair or deceptive acts or

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[30] *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 493–94 (2002).

[31] *See id.* at 549–57.

[32] *See id.* at 504–05 ("The failure to provide any sanction for the violation of rules adopted under section 6(g), along with the placement of the rulemaking grant in section 6, which conferred the FTC's investigative powers, clearly suggests that Congress intended the rulemaking grant to serve as an adjunct to the FTC's investigative duties, regarding which Congress had not given the agency the authority to act with the force of law."); *accord* ABA Section of Antitrust Law, Comments in Connection with the Federal Trade Commission Workshop on "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues," at 54 (Apr. 24, 2020).

[33] *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

[34] *See* 88 Fed. Reg. at 3499/1 n.226 (citing *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 697–98 (D.C. Cir. 1973)).

[35] *See supra* at III.A; *see also* Merrill & Watts, *Agency Rules*, *supra* n.31, at 555–57; Richard J. Pierce, *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?*, GW Law Faculty Publications & Other Works. 1561, at 6, 9 (2021); Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking* 10–13, U.S. Chamber of Commerce (2021).

practices"—and laid out detailed procedures for the FTC to engage in those rulemaking that are more onerous than the default rulemaking procedures of the Administrative Procedure Act.[36] If the reasoning in *National Petroleum* were correct, then this express rulemaking grant would have been wholly unnecessary. Meanwhile, Congress did *not* grant the FTC authority to issue *competition* rules (*i.e.*, rules declaring a practice to be an unfair method of competition) in the Magnuson-Moss Act.[37] Five years later, Congress amended the FTC Act again to add even more hurdles for the FTC to issue consumer-protection rules, but again did not authorize competition rulemakings.[38] It is highly doubtful that Congress would require that the agency follow strict and onerous procedures to issue consumer-protection rules, but leave open an easier route to issue competition rules, which have much broader implications for the U.S. economy.[39]

In the decades since the Magnuson-Moss and 1980 amendments to the FTC Act, the FTC has not attempted to issue a binding competition rule again until now. To put it another way, with one limited exception, in the 100-plus years since the initial enactment of the FTC Act, and after multiple Congressional tweaks and amendments to the underlying statute, the FTC has consistently recognized the limitations to its statutory authority to issue rules under Section 6(g). RILA and its members urge the Commission to reverse its current flawed course of action and return to its long-held statutorily consistent interpretation of Section 6(g) as precluding the issuance of binding substantive regulations.

C. The FTC lacks authority to bypass required individualized case-by-case reviews using the rule-of-reason standard.

The proposed rule also mistakenly asserts that the FTC has authority to depart from the rule-of-reason standard and issue a blanket ban on non-compete clauses. But the rule-of-reason standard, with its statutory and common-law foundation, has been the recognized standard governing non-compete clauses for hundreds of years.[40] The Commission and courts have used the rule-of-

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[36] Pub. L. No. 93-637, 88 Stat. 2183, 2193–98 (1975) (creating new Section 18 of the FTC Act); *see* 15 U.S.C. § 57a.

[37] *See* 15 U.S.C. § 57a(a)(2) (stating that the section "shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce").

[38] *See* Pub. L. No. 96-252, 94 Stat. 374 (1980).

[39] *See* ABA Section of Antitrust Law, Report of the Section Concerning Federal Trade Commission Structures, Powers, and Procedures 340 (1980) ("It clearly would be anomalous if the FTC could adopt an antitrust rule based simply on a notice and comment proceeding under the Administrative Procedure Act, while being required to follow the procedural guards Congress mandated for rules in the consumer protection area.").

[40] *See, e.g.*, *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.3 (1988) ("The classic ancillary restraint is an agreement by the seller of a business not to compete within the market." (citing *Mitchel*)); *Eichorn*, 248 F.3d at 144 ("[C]ourts have uniformly found that covenants not to compete should be examined under the rule of reason."); *Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553, 1561 (11th Cir. 1983) ("[T]here has been an unbroken line of cases holding that the validity of covenants not to compete under the Sherman Act must be analyzed under the rule of reason."); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 337 (7th Cir. 1967) ("Agreements not to compete are tested by a standard of reasonableness."); *Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 837 (7th Cir. 1963) ("Restrictive clauses of this kind are legal unless they are unreasonable as to time or geographic scope…."); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.) (noting that agreements "not to compete" are assessed under the rule of reason); *Ulrich v. Moody's Co.*, 2014 WL 12776746,

reason standard to assess the reasonableness of a challenged restraint based on an all-of-the-circumstances analysis.[41] Indeed, courts have repeatedly held that the rule of reason—including its requirement that courts analyze anticompetitive effects based on consumer welfare and consider procompetitive justifications—is applicable to claims brought under Section 5.[42] As then-Commissioner Wilson emphasized in her dissenting statement to the proposed rule, this clear precedent requires the FTC to take a case-by-case, "fact-specific" approach to non-compete clauses, including under Section 5.[43]

Yet the FTC makes almost no effort to account for its radical departure from this long-held legal approach, mentioning the rule of reason only three times in the proposed rule's 65 pages—and two of those are in the same paragraph.[44] The FTC points to no new statutory authority or recent court decisions to justify its actions.[45] Instead, the proposed rule's justification for a blanket ban is based on the FTC's legally erroneous November 2022 Policy Statement purporting to set forth new guidance on "the scope and meaning of unfair methods of competition under Section 5."[46] The 2022 Policy Statement, which did not go through notice-and-comment rulemaking, deviated from the FTC's years-long policy and practice including its most recent formal statement of policy on this issue. The Commission's prior policy statement had been "adopted on a bipartisan basis . . . six years prior because it embodied a sound approach to antitrust law that reflected decades of legal precedent and economic learning."[47] In contrast, the 2022 Policy Statement did not reflect bipartisan support—for good reason—as it, like the proposed rule, abandons the rule of reason and repudiates the consumer welfare statement without a sound legal foundation and, as detailed below, raises significant constitutional issues. The FTC cannot rely on a unilateral, legally flawed policy statement as authority for the proposed rule. The proposed rule should therefore be withdrawn.

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at *26 (S.D.N.Y. Mar. 31, 2014) (rule of reason applies to non-compete clauses); *see also Addyston Pipe & Steel Co.*, 85 F. at 281–82 (collecting cases spanning 19th century applying rule of reason to non-compete clauses).

[41] *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007) (explaining that the rule of reason "weighs all of the circumstances of a case," allowing courts to determine whether the challenged restraint, in its broader context, imposes "anticompetitive effect[s] that are harmful to the consumer" or "stimulat[es] competition . . . in the consumer's best interest").

[42] *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 578–79 (9th Cir. 1980) (anticompetitive effects); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) (business justifications).

[43] 88 Fed. Reg. at 3541/1 (Wilson, dissenting); *Snap-On Tools Corp.*, 321 F.2d at 837 (stating that non-compete clauses "are legal *unless they are unreasonable as to time or geographic scope*" (emphasis added)).

[44] *See* 88 Fed. Reg. at 3496/3, 3517/1–2.

[45] Indeed, the FTC's failure to account for the rule of reason (an important aspect of the problem) is separately arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[46] Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act, Federal Trade Commission File No. P221202 ("Policy Statement") (Nov. 10, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[47] *See* Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" at 1 (Nov. 10, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

IV. The Proposed Rule Raises Significant Constitutional and Other Legal Issues

A. The major-questions doctrine dictates that the FTC lacks authority to issue the proposed rule.

Courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[48] Under the "major-questions doctrine," even where an agency's assertion of rulemaking authority has a "plausible textual basis," an agency lacks the authority to resolve major policy questions absent "clear congressional authorization."[49] As the Supreme Court has explained, it is incorrect to construe vague or cryptic statutory provisions to include "sweeping and consequential authority" to agencies.[50] For example, in *Alabama Association of Realtors v. Department of Health and Human Services*, the Court rejected the Centers for Disease Control and Prevention's attempt to institute a nationwide eviction moratorium in response to the COVID-19 pandemic under its authority to adopt measures "necessary to prevent the . . . spread of " disease.[51]

Regulation of the national economy is certainly a major policy question that is implicated by any unfair methods of competition rule by the FTC. Hence this doctrine teaches that the ambiguous rulemaking provision in Section 6, tucked away among provisions concerning the FTC's investigative powers, cannot be properly read to be a delegation of broad competition rulemaking power. And application of the major-questions doctrine is *especially* clear *here*, where the agency admits its rule would preempt employment laws in 47 states (at least in part) and invalidate roughly one out of every five employment contracts.[52] Recent congressional action also confirms that the issue of a potential national ban on non-compete clauses is a major policy question. Members of Congress have recently introduced bills that would prohibit a substantial portion of non-compete clauses (and in some instances nearly all).[53] As recently as February, members of Congress reintroduced bills in both the House and the Senate for the Workforce Mobility Act, which would prohibit non-compete clauses in most circumstances (although, for example, permit one-year non-compete periods for senior executive employees).[54] Notably, this proposed legislation would treat certain non-compete clauses as violations of the FTC Act's prohibition on "unfair or deceptive acts or practices," not "unfair methods of competition," and would provide joint enforcement authority to the FTC *and* the Department of Labor.[55]

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[48] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

[49] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quotation marks omitted).

[50] *Id.* at 2608.

[51] 141 S. Ct. 2485, 2487 (2021).

[52] *See* 88 Fed. Reg. at 3485/2, 3494/1

[53] *See, e.g.*, Restoring Workers' Rights Act of 2022, H.R. 8755, 117th Cong. (2022) (bill to amend the Fair Labor Standards Act of 1938 to prevent employers from using non-compete agreements in employment contracts for certain non-exempt employees); Freedom To Compete Act, S.B. 2375, 117th Congress (2021) (similar).

[54] *See* Workforce Mobility Act of 2023, S.B. 220, 118th Cong. (2023); Workforce Mobility Act of 2023, H.R. 731, 118th Cong. (2023).

[55] *See id.* § 6.

Section 6(g) is not a clear grant of legislative power to the FTC in any respect; it certainly is not a clear grant of authority to dictate *employment*-related policy nationwide. Under the major-questions doctrine, the FTC cannot rely on "the previously little-used backwater of" Section 6(g)—the only source of rulemaking authority the FTC relies on—to issue a national ban on non-compete clauses.[56]

B. The non-delegation doctrine and constitutional-avoidance doctrine counsel against interpreting the FTC Act to provide the FTC with the authority to issue the proposed rule.

The major-questions doctrine provides a sufficient basis for the FTC to recognize that the proposed rule is beyond its authority, but that conclusion is bolstered by the constitutional-avoidance canon, which counsels avoiding interpreting the ambiguous Section 6(g) as a possibly unconstitutional delegation of legislative power.[57] Congress must articulate an "intelligible principle" for an agency to follow when exercising legislative rulemaking authority; absent an intelligible principle to guide the agency, the grant of authority is an unconstitutional delegation.[58] Section 5 proscribes "unfair methods of competition," but this term is so broad and vague that it is highly questionable whether it qualifies as an "intelligible principle" that can guide the FTC in crafting legislative rules relating to competition.[59] This concern is highlighted by the series of vague adjectives the FTC recently used in its November 2022 Section 5 Policy Statement to describe conduct that it asserts it could ban as "unfair methods of competition": conduct which "may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature" or is "otherwise restrictive or exclusionary, depending on the circumstances."[60] This Policy Statement dramatically expands the category of conduct covered by Section 5. It also makes it even less clear what conduct could be characterized by the FTC as "unfair."[61]

A reading of the FTC Act to grant of statutory authority to promulgate legislative rules defining "unfair methods of competition" would thus be deemed by the courts to be an unconstitutional delegation, given the vagueness of the phrase "unfair methods of competition"—particularly as articulated by the FTC in its November 2022 Policy Statement. Indeed, the Supreme Court held a similar grant of rulemaking power constitutionally impermissible when it struck down "codes of

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[56] *West Virginia*, 142 S. Ct at 2613.

[57] *See Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980); *FCC v. Fox Television Stations*, 556 U.S. 502, 516 (2009) (explaining that the constitutional-avoidance canon "counsel[s] that ambiguous statutory language be construed to avoid serious constitutional doubts"). .

[58] *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (citation and quotation marks omitted).

[59] *See, e.g.*, *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 454 (1986) (describing the "standard of 'unfairness' under the FTC Act" as "elusive").

[60] Policy Statement, *supra* n.46, at 9.

[61] *See* Wilson, Section 5 Policy Statement Dissent, *supra* n.47, at 2 ("[T]he Policy Statement adopts an 'I know it when I see it' approach premised on a list of nefarious-sounding adjectives, many of which have no antitrust or economic meaning."); *cf. Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (explaining that Congress "has set out an intelligible principle" when it "has made clear to the delegee the general policy [it] must pursue and the boundaries of [its] authority" (quotation marks omitted)).

fair competition" in *A.LA. Schechter Poultry Corp. v. United States.*[62] In doing so, the Supreme Court specifically contrasted Congress's purported grant of authority to issue ex-ante legislative rules called "codes of fair competition" with the FTC's authority to prevent "unfair methods of competition" through case-by-case adjudication.[63] Rules defining conduct as "unfair methods of competition" are very much like "codes of fair competition." Lastly, the constitutional-avoidance canon would instruct a court to reject an interpretation of Section 6(g) that includes a grant of legislative rulemaking authority, since a reading that does not raise constitutional infirmities is just as, if not more, plausible.

C. The proposed rule also threatens principles of federalism.

In addition to raising red flags under the major-questions doctrine and non-delegation doctrine, the proposed rule also fails to respect principles of federalism. As the proposed rule acknowledges, it has long been left the states to regulate non-compete clauses relating to employment.[64] States have experimented with a wide variety of regimes in this context: three states ban non-compete clauses nearly in toto;[65] at least thirty-two other states permit some non-compete clauses but bar others depending on industry or job of the worker;[66] and at least ten others allow non-competes with employees who are paid above an established threshold amount.[67] This experimentation has ramped up in recent years, with many states testing out different types and levels of non-compete restrictions in recent decades.[68]

Despite acknowledging this rich tapestry of state law, the proposed rule does not even mention federalism, much less explain why the FTC thinks it appropriate at this late date to intrude into this realm of "traditional state regulation" without clear congressional authority.[69] As explained above, the authority invoked by the FTC for its promulgation of the proposed rule does not support the rule and is very far from the "clear manifestation of congressional purpose" necessary to disrupt the status quo balance of power between the states and the federal

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[62] *See* 295 U.S. 495, 532–34 (1935).

[63] *Id.* at 532–33 ("What are '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.").

[64] *See* 88 Fed. Reg. at 3494/1–3.

[65] *Id.* at 3494/1 (California, North Dakota, and Oklahoma).

[66] *Id.* at 3494/1–2; *see* Russell Beck, Beck Reed Riden LLP, *Employee Noncompetes: A State-by-State Survey* (August 17, 2022) ("Beck Reed Riden Chart") (listing states with exemptions based on industry).

[67] 88 Fed. Reg. at 3594/1–2; *see* Beck Reed Riden Chart (listing states with exemptions based on salary or wage amounts). Other states have unique rules. For instance, in Massachusetts, non-competes cannot govern for more than 12 months, and there is a strict notice requirement. Mass. Gen. Laws Ann. ch. 149, § 24L. In Rhode Island, employers may include non-competes in their contracts with employees, but the circumstances in which courts will enforce the clauses are limited. R.I. Gen Laws § 28–59–3(a)(1). And in Nevada, non-competes may not be used for hourly wage earners. NRS 613.195(3).

[68] *Id.* at 3494/2–3.

[69] *Pegram v. Herdrich*, 530 U.S. 211, 237 (2002).

government in this area.[70] This lack of clear congressional authority makes the proposed rule susceptible to potential legal challenges. In such a situation, because courts must abide by the "guiding principle" of interpretation that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [their] duty is to adopt the latter," courts would likely interpret the FTC Act narrowly in order to avoid constitutional federalism issues.[71]

Without express congressional authority and in light of the significant constitutional major question, non-delegation and federalism concerns raised by the proposed rule, the best course of action for the FTC to take is to retract the rule and wait to take action until Congress determines if, and when, to give the Commission authority to issue competition rules and the parameters of that authority.

V. The Proposed Rule Is Arbitrary and Capricious and Otherwise Violates the APA.

Even if the FTC did have the statutory authority to issue a rule banning non-compete clauses (which RILA members do not believe it does, for the reasons articulated above), the proposed rule is still fatally flawed under the Administrative Procedure Act (APA). The evidence cited in the rule to support the ban on non-compete clauses is unreliable and conflicting; the FTC barely considers the reliance interests that all stakeholders (employees and businesses) have in using non-compete clauses that are currently legally permitted; and the proposed rule's cost-benefit analysis is deeply flawed. Accordingly, the proposed rule is flawed and should be withdrawn.

A. The FTC's determination that non-compete clauses and other restrictive covenants are "unfair methods of competition" is flawed.

The proposed rule's condemnation of non-compete clauses as "unfair" is misguided and mistaken. In making that determination, the rule largely falls back on conclusory, subjective language like "exploitative and coercive" that is drawn directly from the November 2022 Policy Statement.[72] But that vague language bears no relationship to the governing standard for unfairness under the rule of reason—whether a restraint is "harmful to the consumer."[73] The FTC's resort to these ambiguous standards is no surprise, as the actual evidence cited in the proposed rule regarding the competitive effects—the real standard for evaluating restraints—of non-competes is unreliable and mixed.

The proposed rule cites, in the main, studies that are both inconclusive and methodologically flawed. For instance, many of the studies relied upon by the FTC studied the effect of a few

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[70] *Id.*; *see also Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so 'unmistakably clear in the language of the statute." (internal quotation marks omitted).

[71] *Jones v. United States*, 529 U.S. 848, 857 (2000).

[72] 88 Fed. Reg. at 3502/2–3.

[73] *Leegin Creative Leather Prods., Inc.*, 551 U.S. at 877 (restraints unlawful only where they are "harmful to the consumer"); *see also* 15 U.S.C. § 45(n) (act or practice unfair where it "causes or is likely to cause substantial injury to consumers").

state-level policies targeting non-compete clauses.[74] But an FTC economist elsewhere has explained in describing those studies that no broad principles can be extrapolated from them given the differing industries, types of firms, and makeup of the employee base in each state.[75]

The FTC also inconsistently evaluates the extant studies—giving great credence to studies that support a non-compete ban while downplaying and ignoring other studies that have a more favorable or nuanced view of non-competes. For example, relying solely on a study of the healthcare market—in which pricing is incredibly complex—the FTC concludes that non-compete clauses increase prices.[76] But when confronted with studies demonstrating that non-competes increase job-creation rates, the FTC strains to distinguish them—including by unsupported speculation about *why* the job-creation rate may have increased.[77] More broadly, the FTC ignores evidence that reasonably drawn non-competes have procompetitive effects on labor, product, and service markets.[78] By side-stepping an "important aspect" of the issues at hand, the FTC has acted arbitrarily and capriciously.[79] And where it does engage with the issues, its approach to the evidence is "internally inconsistent," which also is arbitrary and capricious.[80]

This is also true for the FTC's ban on "*de facto*" non-compete clauses. For that decision, the rule cites only two court decisions and one law review article.[81] This bare, evidence-free showing is plainly insufficient to support a finding that these restrictive covenants are "unfair."

Finally, the FTC cannot rely on its own experience as evidence supporting the rule, either, because it wholly lacks meaningful adjudication and enforcement experience in the context of non-compete clauses.[82] As then-Commissioner Wilson pointed out in her dissent, the *only* case the FTC has ever litigated challenging a non-compete clause ended in a finding that the clause did *not* violate Section 5.[83] Yet now, the FTC seeks to ban all non-competes across the nation in

[74] *See* 88 Fed. Reg. at 3487/2.

[75] *See* John M. McAdams, FEDERAL TRADE COMMISSION, NON-COMPETE AGREEMENTS: A REVIEW OF THE LITERATURE 11 (2019).

[76] *See* 88 Fed. Reg. at 3490/1–2.

[77] *See id.* at 3488/3–3489/1.

[78] *See, e.g.*, Starr *et al.*, *supra* n.3, at 80 (explaining that the evidence of higher earnings is consistent with the notion that "noncompetes [are] a solution to a holdup problem").

[79] *See State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

[80] *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018); *see Sierra Club v. EPA*, 884 F.3d 1185, 1194–96 (D.C. Cir. 2018) (action was arbitrary and capricious where the "only support for [the action] was the very data it had just dismissed as inaccurate").

[81] *See* 88 Fed. Reg. at 3484 nn.35 & 36, 3507 n.328.

[82] *See Nat'l Tour Brokers Ass'n v. ICC*, 671 F.2d 528, 533 (D.C. Cir. 1982) (agency can "rely[] on its own experience as factual support for its decision to promulgate a rule" *only if* the agency "adequately record[s] and explain[s] that experience on the record").

[83] *See* 88 Fed. Reg. at 3542/1 (citing *Snap-On Tools Corp.*, 321 F.2d at 837).

one fell swoop. The FTC's overreaching behavior is improper, and its reliance on non-existent experience in an attempt to support a rule is arbitrary and capricious.[84]

B. The proposed rule gives inadequate consideration to reliance interests.

Under governing Supreme Court precedent, agencies must fully consider any "legitimate reliance" interests of those affected by agency action.[85] The proposed rule does not expressly acknowledge any of the reliance interests that employees and businesses have in employing reasonable non-compete clauses, which are lawful under current laws subject to the rule-of-reason framework used by the FTC, and federal and state courts. By failing to account for significant reliance-interests costs, the proposed rule's cost-benefit analysis is flawed.[86]

For instance, in a recent informal survey of RILA's members, almost all of those who responded currently use non-compete clauses or other restrictive covenants (non-disclosure, non-solicitation, forfeiture, repayment, etc.) for a small number of their employees (*e.g.*, executives, key senior employees, and employees with specialized skills). These retailers have structured their operations around their ability to use non-compete clauses to retain workers in whom they have invested substantial money, and to prevent trade secrets or other confidential financial and planning information from leaking to competitors.[87] Similarly, other restrictive covenants protect companies' book of customers, and investments made in employee training, long-term incentive benefits and signing and relocation bonuses. These companies likely would not have structured their operations in this way if they had known that the FTC would propose an outright ban on their reasonable non-compete clauses. They had no reason to suspect such a ban was forthcoming: after all, as explained above, the clear and consistent approach from all available judicial precedent, which they relied upon, is to analyze non-compete clauses and other restrictive clauses under the rule of reason. *See supra* at II.C.

In addition, employees nationwide have come to rely on the added compensation and benefits associated with reasonable non-competes and other restrictive clauses, including higher wages, generous severance plans and packages, equity awards, and other long-term incentives as well as the opportunity for career-enhancing specialized skill training. All the positive effects of these clauses for employees and employers would be undermined by the proposed rule's ban. *See supra* at II.A. By discounting many costs—such as the forced re-negotiation of thousands of employment contracts—that will ensue because of the proposed ban, the Commission's cost-benefit analysis is faulty and cannot support the rule.

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[84] *Cf. District of Columbia v. Dep't of Ag.*, 444 F. Supp. 3d 1, 27–28 (D.D.C. 2009) (agency likely acted arbitrarily and capriciously where it relied on "unsupported" assertions of "operational experience").

[85] *Dep't of Homeland Sec. v. Regents*, 140 S. Ct. 1891, 1913 (2020); *see id.* ("When an agency changes course, . . . it must be 'cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016))).

[86] *See* 88 Fed. Reg. at 3528/1–3530/1.

[87] *Cf. Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102 (9th Cir. 2021) (non-compete clauses in franchise context prohibit franchisees from "proactively raiding" each other's workers and thus allows them to "collaborate for the benefit of [their customers] without cutting their own throat" (cleaned up)).

The proposed rule does not establish a new policy on a "blank slate."[88] Instead, it attempts bulldoze over the longstanding approach that businesses have been reasonably relying upon in employing non-compete clauses and other commonly used clauses that could be deemed "*de facto*" nom-competes, arbitrarily ignoring the reliance interests employees and businesses have in that approach. In failing to consider these significant reliance interests, the proposed rule fails to meet a key requirement of the APA.

C. The FTC's cost-benefit analysis is flawed.

The proposed rule's cost-benefit analysis is also deeply flawed. It both *under*states the costs of the rule (in addition to ignoring many other costs altogether) and *over*states the benefits.

First, as to costs, the few costs the FTC actually acknowledges are significantly understated. For instance, the rule dramatically underestimates the amount companies will have to spend reviewing and revising contracts for incoming, current, and former employees. The rule estimates that process will take only one or four to eight hours of lawyer time, respectively, *per firm*.[89] But companies, including some of RILA's members, use many different types of agreements (*e.g.*, employment agreements, retention agreements, severance plans, severance agreements, equity and long term investment award grants, specialized training programs, signing bonuses, and relocation payment agreements, to name a few) that may contain various forms of non-competes or other clauses. Given the broad range of clauses (*e.g.*, non-disclosure, non-solicitation, repayment clauses, etc.) that potentially could be caught in the "*de facto*" non-compete clause net, this could involve reviewing and analyzing many different agreements and programs involving hundreds of thousands of current and former retail employees. If any revisions to contracts and programs are required, additional time will be needed. In all, this process will likely take hundreds of hours of lawyer time per employer. And those hours would cost, in all likelihood, at least *ten times* more per hour than the FTC estimates.[90]

Likewise, the FTC's estimate that it will take only 20 minutes of a "human resources specialist's" time to engage with each affected employee and notify him or her of the revised contract ignores the upfront costs of determining which of many potential explicit and "*de facto*" non-compete clauses actually apply to which employees.[91] Employers will also need to spend time renegotiating each of these contracts—a cost that will uniquely burden small businesses who do not have substantial internal legal teams or outside counsel relationships. A few RILA members estimated that implementing the proposed rule would initially cost them at least $100,000 to $200,000 each; the combined cost of implementing the proposed rule for all RILA members will be in the tens of millions of dollars. Given that these are only the costs that would

[88] *Fox Television Stations, Inc.*, 556 U.S. at 515.

[89] 88 Fed. Reg. at 3528/2.

[90] The FTC's cited figure of $61.54 per hour is the median hourly income of lawyers nationwide. *See* 88 Fed. Reg. at 3528/2–3. The more relevant statistic is the average hourly billing rate of a private-practice lawyer, whether a partner ($749/hour) or an associate ($546/hour). Wolters Kluwer, 2022 *Real Rate Report*, available online at https://www.wolterskluwer.com/en/news/wolters-kluwer-elm-solutions-2022-real-rate-report-indicates-that-timekeeper-rates-continue-to-rise.

[91] 88 Fed. Reg. at 3528/2.

be incurred by RILA's 100-plus members, it is clear that the total costs of implementation across *all* industries throughout the United States would be astronomical.

The FTC's woeful underestimation of implementation cost is indicative of how the Commission treats other costs, too. As discussed in more detail above,[92] the rule gives short shrift to the negative effects a ban will have on business investment, conceding only that it might lead firms to reduce employee training or investment in capital assets that enhance the effectiveness of human capital[93]—which the FTC nowhere attempts to enumerate. Those costs will likely be enormous. The proposed rule also barely addresses the potential that banning non-compete clauses will *reduce* wages, despite citing some studies that support that notion.[94]

Nor does the rule consider the inefficiencies and downsides of alternative practices firms may have to employ to protect their trade secrets in lieu of non-competes, such as limiting workers' access to information, which are likely to both be disruptive and lead to a loss of opportunities for the workers. As explained above, in many cases it will be virtually impossible to wall off confidential business information (including trade secrets) from general business knowledge, forcing companies to minimize the number of employees who can see confidential company information, which will have negative impact on business efficiencies and overall competitiveness of the company.[95] Nor does the proposed rule consider the significant inefficiencies caused by forcing businesses to implement more substantial guardrails *within* their organizations to protect confidential information, without the availability of non-compete clauses. The FTC also minimizes the increased litigation costs to protect trade secrets and confidential business information that are likely to result from barring clear and easy-to-enforce non-competes.[96] Moreover, companies who do not currently employ such alternative provisions would have to *add* them to their contracts and implement related policies and procedures, at substantial expense.

Further, many other obvious costs are ignored entirely by the proposed rule. The rule does not consider, for example, the costs that firms will incur from former employees soliciting the firm's clients or customers. One reason that some firms employ non-compete clauses in worker contracts is to prevent workers from leaving for a competitor and soliciting their clients to come with them.[97] This can be especially damaging to small businesses who cannot withstand the loss of a major client. Lastly, the rule's analysis under the Regulatory Flexibility Act also downplays

[92] *See supra* at II.C–D.

[93] 88 Fed. Reg. at 3529/2.

[94] Omesh Kini, Ryan Williams & Sirui Yin, *CEO Noncompete Agreements, Job Risk, and Compensation*, 34 Rev. Fin. Stud. 4701, 4707 (2021).

[95] *See supra* II.D.

[96] 88 Fed. Reg. at 3530/1.

[97] *See, e.g.*, Kurt Lavetti, Carol Simon, William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. of Human Resources at 2 (2020).

the costs to small businesses arising from higher worker turnover and worker poaching by other firms.[98]

Second, as to benefits, the rule dramatically overstates the purported social goods that would flow from a ban on non-compete clauses. The rule's benefits calculation is premised on the notion that 30 million workers—or roughly 18% of the workforce—are currently bound by such clauses. But that number is supported by only a single study that relies on a decade-old survey of a nonrepresentative sample of workers.[99] This outdated data fails to account for the fact that many states have limited the use of non-competes in recent years.[100] Companies have responded by reevaluation their use of non-compete clauses, meaning that there are very likely many fewer workers presently bound by non-compete clauses than the FTC's estimate—and thus fewer benefits (if any) could follow from banning non-compete clauses. The results of a recent RILA member survey supports the argument that the number of impacted workers is overstated. The majority of responding members that use non-compete clauses indicate that they do so with less than 1% of their workforce and an additional 26% of respondents use these clauses with 10% or less of their total workforce.

A foundational requirement of the APA is that before imposing a new regulation, an agency must accurately and thoroughly weigh the costs and benefits of doing so. Here, the FTC's flawed cost-benefit analysis, with its overstatement of benefits and understatement of costs, does not satisfy a core requirement of the APA, and therefore the proposed rule should be withdrawn.

VI. The FTC Should Abandon the Proposed Rule and Continue Adjudicating Non-Compete Clauses on a Case-By-Case Basis.

RILA members do not support overbroad and anticompetitive non-competes that limit worker mobility. Targeting overbroad and anticompetitive non-compete clauses, however, does not require a blanket ban like the FTC proposes. Moreover, a broad public policy on non-compete clauses is a matter for federal and state elected officials to address. RILA is currently engaged, and looks forward to continuing to engage, with Congress to find a solution that tackles anticompetitive non-competes while still providing employees and businesses flexibility to negotiate mutually beneficial contract provisions.

For all the reasons stated above, the FTC's proposed rule is unlawful and ill-conceived. The FTC lacks the requisite statutory authority for the proposed rule, and it is bad policy in any event. To the extent the FTC seeks to address non-compete clauses going forward, it should not act through rulemaking, but instead remain within the bounds of its statutory authority and evaluate particular non-compete clauses on a case-by-case basis using the rule-of-reason standard.[101] This adjudicatory process established by the FTC's authorizing statute enables the agency to weigh

[98] 88 Fed. Reg. at 3531/2–3.

[99] *See id.* at 3485/2–3 (citing Starr *et al.*, *supra* n.3, at 53, 63).

[100] *See id.* at 3494/2–3.

[101] *See, e.g.*, ABA Section of Antitrust Law, Comments, *supra* n.32, at 60 (Apr. 24, 2020) ("As the Commission's historical experience with rulemaking suggests, adjudication may be a superior way to address the potential problem of non-compete clauses.")

any anticompetitive harms that such clauses may cause against their procompetitive benefits.[102] There is no reason that the FTC cannot eliminate truly unfair non-compete clauses using its existing statutory authority and processes.

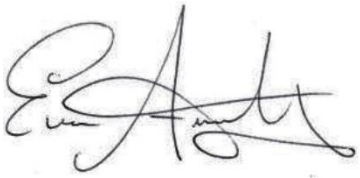
Lastly, in the proposed rule the FTC implies that it is willing to consider limiting or modifying the rule in some manner. As noted above, RILA and its members do not believe that the FTC's current statutory authority authorizes the Commission to issue any competition rule, including a potentially limited rule on non-competes. However, assuming for the sake of argument that the FTC does have such authority, in the event that the Commission decides to modify or limit the proposed rule in any fashion, under the requirements of the APA, the FTC must repropose any new modified rule and take stakeholder feedback on the new proposal.

Conclusion

RILA appreciates the opportunity to provide these comments on the FTC's proposed non-compete clause rule. We would welcome an opportunity to discuss our feedback with the commission.

If you have any questions or need any additional information, please contact Kathleen McGuigan, EVP and Deputy General Counsel, at kathleen.mcguigan@rila.org / (202) 869-0106 or Evan Armstrong, VP Workforce, at evan.armstrong@rila.org / (202) 869-0263.

Sincerely,



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[102] *See Leegin Creative Leather Prods., Inc.*, 551 U.S. at 885–86.