U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

March 2, 2023

The Honorable Elizabeth Warren
United States Senate
Washington, DC 20510

The Honorable Sheldon Whitehouse
United States Senate
Washington, DC 20510

Dear Senators Warren and Whitehouse:

Thank you for your recent letter, which correctly notes that the U.S. Chamber of Commerce opposes the Federal Trade Commission's assertion of legal authority to issue a competition rule that would ban almost all noncompete clauses around the country.

While we agree with you that unreasonable noncompete clauses can inhibit competition, we must address your fundamental misunderstanding of the Chamber's position. The Chamber opposes this rulemaking not just because it unjustifiably bans the use of noncompetes even when used appropriately, but because the FTC lacks the statutory or constitutional authority to issue a competition rule. The text, structure, and history of the Federal Trade Commission Act and associated statutes all confirm that Congress never granted the FTC the authority to issue a competition rule, particularly one as sweeping as this.

Moreover, numerous constitutional doctrines require that Congress speak clearly, and provide intelligible guidance, if it wishes to assign a decision of such vast significance to a federal agency, particularly when that decision would disrupt an area of traditional state regulation.

A. The Appropriate Role for Noncompetes

We recognize that, improperly used, noncompetes can harm workers and employers alike. Having examined the FTC's rulemaking record ourselves, we agree that some studies show that overly aggressive noncompetes can improperly inhibit the movement of workers without adequate justification. Accordingly, the Chamber supports enforcement actions against anticompetitive or unjustifiable noncompetes. We have not criticized the FTC's recent enforcement actions against particular noncompetes, nor have we defended noncompetes litigated at the state level.

Nevertheless, the rulemaking record also shows, and long-standing experience confirms, that reasonable noncompetes serve pro-competitive interests. Courts, scholars, and economists all have found that noncompetes encourage investment in employees and help to protect intellectual property. In every sector of the economy, employers rely on noncompetes to protect investments in their workforce, to protect trade secrets and other confidential information, and to structure their compensation programs. As the FTC's own economist John McAdams recently explained, noncompetes "allow firms to reduce recruitment and training

costs by lowering turnover," encourage firms to offer higher wages to compensate new employees, and "increase the returns to research and development," thereby promoting innovation.

Consistent with this evidence, businesses strive to use noncompetes in a reasonable, pro-competitive fashion. Our members relate that, in general, they use noncompetes in limited circumstances to safeguard their intellectual property, to protect their investment in training workers, and to structure their compensation agreements.

The Chamber is not alone in our belief that reasonable noncompetes promote growth, innovation, and ultimately competition. More than 100 associations called on FTC to extend its deadline for accepting comments on the proposed rulemaking, given the proposed rule's scope and retroactive effect. This week, more than 260 groups including a wide array of state and local chambers of commerce representing the voices of small businesses from all around the country signed a letter to Congress expressing serious concerns about the rulemaking proposal.

B. The Chamber's Position

Setting aside the merits of noncompetes, the Chamber strongly opposes this rulemaking because the FTC lacks the legal authority to issue competition rules. We believe FTC chose the issue of noncompetes to test the bounds of its rulemaking authority, and FTC has clearly signaled an interest to write other competition rules. Whatever rule the FTC attempts to write in the context of its unfair methods of competition authority, the Chamber is prepared to oppose and challenge. The Chamber's position is grounded in principle, in the Constitution, and in a belief that elected officials should make important policy decisions.

The Chamber's opposition is also consistent and longstanding. In August 2021, as reports began to circulate that the FTC was contemplating competition rules, and long before the FTC issued this proposed rulemaking, the Chamber issued a lengthy analysis explaining why the FTC lacked the authority to issue competition rules.[1] When the FTC first began to explore the idea of rulemakings banning noncompetes and "exclusionary" contracts, the Chamber filed comments pointing out that the Commission lacked the necessary legal authority. In all these documents, we explained that the FTC has had a troubling history of rulemaking overreach dating back decades. Indeed, as if to confirm the Chamber's fears, the Director of the FTC's Bureau of Competition recently gave a speech in which she said that "Section 5 of our law give[s] us the *flexible and open-ended power* to prevent 'unfair methods of competition.'"[2]

As we will explain in more detail in our formal submission to the FTC on this rulemaking, and in court if necessary, the text, structure, and history of the relevant statutes prove otherwise. Section 5 of the FTC Act empowers the Commission to pursue individual

[1] See https://www.uschamber.com/technology/why-the-ftc-powerless-when-it-comes-competition-rulemaking and https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf.
[2] See https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf

enforcement actions against "unfair methods of competition," and Section 6(g) provides narrow authority to develop internal procedural rules. Neither provision, nor any other, authorizes the FTC to adopt generally applicable substantive rules defining unfair methods of competition. In contrast, Congress has repeatedly granted the FTC the authority to promulgate substantive rules on "unfair or deceptive acts and practices" and other discrete topics, but has declined to authorize regulations addressing unfair methods of competition.

FTC's asserted authority to write substantive rules defining "unfair methods of competition" also violates the major questions doctrine. As the Supreme Court recently explained, Congress must speak clearly if it wishes to assign decisions of "vast economic and political significance" to an agency. That doctrine recognizes that "extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices," even when there is a "colorable textual basis" for the agency's position. Nothing in the FTC Act shows a hint of a decision by Congress to allow the Commission to invalidate contracts affecting tens of millions of workers, particularly given that Congress itself has recently considered legislation that would regulate noncompetes.

Similarly, the proposed rule also runs afoul of the nondelegation doctrine. A statutory delegation is constitutional only so "long as Congress lays down by legislative act an intelligible principle" to cabin the agency's discretion. If the term "unfair methods of competition" is divorced from history and precedent, and if the Commission can condemn any business practice as unfair based on nothing more than "nefarious-sounding adjectives," then there is effectively no limit to what the Commission could condemn under Section 5.

Finally, the proposed rule also violates bedrock principles of federalism. Noncompetes are a matter of state law, and today, forty-seven states enforce reasonable noncompete clauses. If Congress "intends to alter the usual constitutional balance between the States and the Federal government," it must be "unmistakably clear," particularly when an agency's regulation would disrupt areas of "traditional state regulation."

C. A Path Forward

The Chamber welcomes the opportunity to work with you and other members of Congress on this topic. Several of your colleagues have introduced federal legislation to regulate noncompetes at the national level, and although we have not taken a position on any particular proposal, we are happy to discuss ideas in a constructive fashion to target inappropriate uses of noncompetes.

Finally, we note that your colleagues appear to agree with us that the FTC currently lacks the legal authority to issue this proposed rule. Specifically, the proposed Workforce Mobility Act would grant the FTC the legal authority to issue a noncompete rule; the fact that the bill's authors felt compelled to grant the FTC this authority strongly suggests that the agency currently lacks it. Moreover, the bill grants the agency this authority in the context of its "unfair and deceptive practices" consumer protection authority, not its "unfair methods of competition" authority –

yet another instance in which Congress is declining to grant the FTC the authority to issue competition rules.

***

We thank you again for your interest in the Chamber and look forward to further dialogue on this and other issues.

Sincerely,

Neil L. Bradley
Executive Vice President, Chief Policy Officer,
and Head of Strategic Advocacy
U.S. Chamber of Commerce

cc: Members of the United States Congress