

4-18-2023

## Comment Re: Non-Compete Clause Rulemaking, Matter No. P201200

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### Recommended Citation

Samantha J. Prince, Benjamin Edwards, Matthew T. Bodie, Chaz D. Brooks, Doron Dorfman, Joshua P. Fershee, Christine Hurt, Juliet Moringiello, Francis J. Mootz III, Griffin Toronjo Pivateau, Daiquiri Steele, Tim Azizkhan, Sarah Donley, Cassidy Eckrote, Taylor Haberle, Kathryn L. James, Julia Martinez, Tamia M. Perez, Serena T. Ruedas, and Austin A. Thummel, *Comment Re: Non-Compete Clause Rulemaking, Matter No. P201200* (2023).

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April 18, 2023

Via Electronic Mail

April J. Tabor, Secretary  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite 1 CC-5610 (Annex C)  
Washington, DC 20580

**Re: Non-Compete Clause Rulemaking, Matter No. P201200**

Dear Secretary Tabor,

Professor Samantha J. Prince and the additional undersigned law professors and law students write in their individual capacities, not as agents of their affiliated institutions, in support of the Federal Trade Commission's (the "Commission") proposed rule to ban most non-compete clauses (the "Proposal") as an unfair method of competition.<sup>1</sup> We thank the Commission for the opportunity to comment on the Proposal and for its thoughtful efforts to address a systemic problem affecting a vast number of American workers.

This letter offers comments in response to areas where the Commission has requested public comment. To make our views clear, this letter contains the following sections:

- I. Summary of the Proposal;
- II. The Commission Should Consider Expanding Its Definition of Non-Compete Clauses to Prevent Employers from Requiring Workers to Quit Before Seeking Alternative Employment;
- III. Non-Compete Clauses Are Unfair Methods of Competition;
- IV. Non-Compete Clauses Negatively Impact Workers and Their Families;
- V. The Proposed Rule Protects Small Businesses and Entrepreneurs; and
- VI. The Commission Should Consider a Factor Test for Its Unfairness Analysis for Senior Executives

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<sup>1</sup> This letter was prepared in collaboration with the Thomas & Mack Legal Clinic at the William S. Boyd School of Law, University of Nevada, Las Vegas. Legal research and drafting assistance were provided by the following Clinic students: Kathryn L. James, Tamia M. Perez, Serena T. Ruedas, and Austin A. Thummel.

## **I. Summary of the Proposal**

The Proposal seeks comment on all aspects of the Proposal.<sup>2</sup> The Proposal declares non-compete clauses to be unfair methods of competition.<sup>3</sup> As such, they are subject to the Commission’s rulemaking authority pursuant to Congressional authority delegated under Section 5 and 6(g) of the Federal Trade Commission Act.<sup>4</sup>

The Proposal may be quickly summarized. The Commission presents a near total ban on non-compete clauses across the board—whether identified as such or not. The Proposal defines non-compete clauses in a flexible manner as including any contractual term between an employer and a “worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer.”<sup>5</sup> The Proposal specifies a functional test for non-compete clauses and calls for its definition to include a contractual term that “has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker’s employment with the employer.”<sup>6</sup> The Proposal’s definition of non-compete clauses does not include other employment contract restrictions such as non-disclosure agreements.<sup>7</sup>

The Proposal’s ban is retroactive—requiring employers with existing non-compete clauses to rescind those clauses by the Proposal’s compliance date.<sup>8</sup> The Proposal requires these employers to provide notice to current and former workers of the ban.<sup>9</sup> The Proposal also contains an exception allowing a non-compete clause entered into by persons selling their interest in a business entity.<sup>10</sup>

## **II. The Commission Should Consider Expanding Its Definition of Non-Compete Clauses to Prevent Employers from Requiring Workers to Quit Before Seeking Alternative Employment**

### **A. The Functional Test Prevents Employers from Disguising Non-Compete Clauses**

The Commission seeks comment on the functional test set forth in § 910.1(b)(2).<sup>11</sup> As currently drafted, the functional test determines whether contractual terms function as *de facto* non-compete clauses.<sup>12</sup> This aims to prevent companies from side-stepping the proposed ban by forcing workers to enter into oppressive agreements operating as non-compete clauses under different names.<sup>13</sup> The

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<sup>2</sup> Non-Compete Clause Rule: Notice of Proposed Rulemaking, Federal Trade Commission (F.T.C.), 16 CFR Part 910 at 6 (proposed Jan. 8, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-7313> [hereinafter Proposal].

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 1, 3.

<sup>5</sup> Proposal at 211.

<sup>6</sup> *Id.* at 212.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 126 (“provided that the employer has the worker’s contact information readily available”).

<sup>10</sup> *Id.* at 5.

<sup>11</sup> Proposal at 110.

<sup>12</sup> *See id.* at 108.

<sup>13</sup> *Id.*

Commission cites two cases as further support for its concerns, both of which show employers' ability to control workers long after they have left their former place of work.<sup>14</sup>

The Commission's concerns have merit. The functional test, as proposed, is necessary to prevent employers from neutralizing the Rule after its enactment by simply avoiding the term non-compete in employment contracts. For these reasons, we strongly support this functional approach to identify non-compete clauses as set forth in §910.1(b)(2).

### **B. The Proposal Should Also Clearly Protect Worker's Ability to Interview for Future Employment While Employed**

Relatedly, the Commission seeks comment on the definition of a "non-compete clause" in § 910.1(b)(1) of the Proposal.<sup>15</sup> We believe that modifying the language of the definition would clarify that the ban also applies to current workers who are actively seeking employment elsewhere. As written, the Proposal defines non-compete clause as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment ... *after* the conclusion of the worker's employment with the employer."<sup>16</sup> The current proposed definition might be read to apply *only* to an individual worker's *post-employment* ability to pursue better job opportunities.

Restrictions imposed on a worker's ability to interview for or seek other positions while employed may act as functional non-compete clauses as well.<sup>17</sup> Indeed, some non-compete clauses explicitly include "on the job" restrictions for workers that prohibit them from pursuing any other work with anyone else.<sup>18</sup> These restrictions raise concerns about workers' ability to seek a new position.

A rule that can be interpreted as applicable only *after* a worker leaves employment may leave workers vulnerable to restrictions preventing them from seeking future opportunities while employed. Without extending the Proposal's definition, many workers will risk termination or be forced to resign from their current position simply to apply for *potential* future employment. This creates worker vulnerability and reduced bargaining power. Many American workers cannot afford that risk. Some 64% of Americans live paycheck to paycheck and may be economically unable to resign their current employment for an uncertain future.<sup>19</sup> If the Proposal implements its current definition, employers may still be able to restrict workers' ability to depart for better economic opportunities.

We believe the Proposal, and more specifically § 910.1(b)(1), could be amended to better encompass this problem and better achieve the Commission's goal of worker mobility. Accordingly, the Commission should consider expanding the scope of the current definition to include "on the job" restrictions.

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<sup>14</sup> *Id.* at 109–110 (Commission cites to *Brown v. TGS Mgmt. Co., LLC*, 57 Cal.App.5th 303 (2020) which concerned an overly broad non-disclosure agreement ("NDA") that prevented a worker from working in the same field post-employment. Commission also referenced *Wegmann v. London*, 648 F.2d 1072 (5th Cir. 1981) where the employer attempted to require the worker to pay back unreasonable training costs if their employment was terminated within a specified time).

<sup>15</sup> *Id.* at 110.

<sup>16</sup> *Id.* at 106–107 (emphasis added).

<sup>17</sup> *See id.* at 107.

<sup>18</sup> Stefania Palma, *US Companies Mount Resistance to Proposed Ban on Non-Compete Clauses*, FINANCIAL TIMES (Feb. 9, 2023), <https://www.ft.com/content/6602eda5-70ac-416f-a78b-f29e44af1768> (last accessed Mar. 1, 2023).

<sup>19</sup> Alexandre Tanzi, *Even on \$100,000-Plus, More Americans Are Living Paycheck to Paycheck*, BLOOMBERG, (Jan. 30, 2023), <https://www.bloomberg.com/news/articles/2023-01-30/even-on-100k-plus-more-americans-live-paycheck-to-paycheck#xj4y7vzkg>.

### **III. Non-Compete Clauses Are Unfair Methods of Competition**

The Commission seeks comment on the finding that non-compete clauses are an unfair method of competition. We agree that the evidence strongly supports this finding and that the Commission has the legal rulemaking authority to enact a ban.<sup>20</sup> Non-compete clauses are an unfair method of competition by design—by closing off a worker’s most natural alternative employment options.<sup>21</sup> Closing off these employment options decrease the possibilities of wage increases and job mobility throughout the labor market.<sup>22</sup>

Substantial evidence supports the Commission’s determination that non-compete clauses operate as unfair methods of competition and negatively affect employment market competition.<sup>23</sup> The Proposal considers comprehensive surveys documenting the widespread nature of non-compete clauses across various industries and throughout income categories.<sup>24</sup> In-demand skilled workers are locked out of the marketplace when handcuffed by non-compete clauses. Non-compete clauses have infiltrated all labor sectors including hairstylists, IT professionals and security guards.<sup>25</sup> Executives are the archetypal group covered by these clauses. But hourly workers, who comprise two-thirds of the work force, are often subject as well.<sup>26</sup> This is because non-compete clauses have trickled down in recent decades from the well-known c-suite employees to hourly workers whose median wage is \$14 an hour.<sup>27</sup>

Non-compete clauses can affect workers’ earnings in different ways. At the least, non-compete clauses bar workers from pursuing better work opportunities that better suit them. Significant wage growth typically comes faster from changing jobs—higher pay or non-cash benefits.<sup>28</sup> Non-compete clauses hamper earnings by giving employers comfort in knowing that a worker would have to turn down lucrative job offers, reducing a worker’s bargaining power to negotiate a raise.<sup>29</sup> The Commission cited a case study of Oregon’s ban on non-compete clauses for low-wage workers showing that wages grew.<sup>30</sup> Wages grew immediately following the ban and even more so over time.<sup>31</sup>

Non-compete clauses may also reduce worker’s ability to exit toxic work environments —both reducing their potential earnings and maintaining dismal office cultures. A worker could be forced to choose between remaining in a work environment that is harmful to them or leaving an industry or career altogether because of a non-compete clause. Voicing one’s concerns as an attempt to affect

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<sup>20</sup> Proposal at 68. *See Nat’l Petroleum Refiners v FTC*, 482 F.2d 672, 678–79 (1973) (opinion emphasized that Section 6(g) of the FTC Act does not identify any limitations on the rulemaking power it confers).

<sup>21</sup> Proposal at 14.

<sup>22</sup> Isaac Chotiner, *What a Ban on Non-Compete Agreements Could Mean for American Workers*, NEW YORKER (Jan. 10, 2023), <https://www.newyorker.com/news/q-and-a/what-a-ban-on-non-compete-agreements-could-mean-for-american-workers>.

<sup>23</sup> Proposal at 73.

<sup>24</sup> Proposal at 15–16 (citing Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & ECON. 53, 53 (2021)).

<sup>25</sup> Adam Westbrook & Emily Holzknecht, *The Great American Labor Trap*, NYT, (Apr. 11, 2023), <https://www.nytimes.com/2023/04/11/opinion/ftc-noncompete-clause-rule.html>.

<sup>26</sup> *See supra* note 22.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.* *See also* Rakesh Kochar, Kim Parker and Ruth Igielnik, *Majority of U.S. Workers Changing Jobs are Seeing Real Wage Gains*, PEW RSCH. (July 28, 2022), <https://www.pewresearch.org/social-trends/2022/07/28/majority-of-u-s-workers-changing-jobs-are-seeing-real-wage-gains/>.

<sup>29</sup> *Supra* note 22.

<sup>30</sup> Proposal at 32–33. *See* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, MGMT SCIENCE 1 (2022) (study gauged wages rose 2-3% initially and by 5% in proceeding years).

<sup>31</sup> *Id.*

change is often the only option left to workers when exiting is not feasible.<sup>32</sup> Of course, an employer may prove unreceptive to a worker’s grievances. Because a worker’s bargaining power in exiting can be neutralized through a non-compete clause, their attempts to effect change for themselves or for the business is minimized.<sup>33</sup>

Non-compete clauses reduce incentives for companies to treat workers, in particular women, well.<sup>34</sup> When women are unable to change jobs because of a non-compete clause, it perpetuates the gender wage gap (which hasn’t budged in decades) and other gender-related harms.<sup>35</sup> A recent report focusing on women in the workplace discussed women in leadership roles.<sup>36</sup> These executives report facing numerous headwinds including microaggressions and having their judgment disproportionately questioned. When able, they move to a new job to achieve better work conditions. The report describes this trend toward increased movement from inhospitable environments as the “Great Breakup.”<sup>37</sup> This Breakup could be leveraged further with a ban on non-compete clauses that would allow more women leaders to have job mobility. Women with more employment options would encourage companies to implement inclusive cultures and end the persistent grip of the gender pay gap.<sup>38</sup>

#### **IV. Non-Compete Clauses Negatively Impact Workers and Their Families**

##### **A. How Non-compete clauses Tend to Play Out for Workers**

###### **1. At the Time of Contracting**

We offer comment on the Commission’s preliminary finding that non-compete clauses are exploitative and coercive at the time of contracting.<sup>39</sup>

Employers now require 30 million workers—at least 18% of the U.S. workforce—to sign non-compete clauses as an employment condition.<sup>40</sup> According to a Treasury Report, at least 37% of workers are asked to sign non-compete agreements *after* accepting a job offer.<sup>41</sup> In addition, 14% of workers earning less than \$40,000 have signed non-compete clauses, despite these workers possessing trade secrets at less than half the rate of their higher-earning counterparts.<sup>42</sup>

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<sup>32</sup> See ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* 33 (1st ed. 1970).

<sup>33</sup> *Id.* at 30, 41.

<sup>34</sup> See Lydia DePillis, *Noncompete Clauses Get Tighter, and TV Newsrooms Feel the Grip*, *NYT* (Apr. 3, 2023), <https://www.nytimes.com/2023/04/03/business/economy/noncompete-clauses-broadcast-news.html#:~:text=Job%2Dswitching%20barriers%20are%20routine,the%20practice%20across%20all%20fields>.

<sup>35</sup> Carolina Aragao, *Gender Pay Gap in U.S. Hasn’t Changed Much in Two Decades*, *PEW RSCH.* (Mar. 1, 2023), <https://www.pewresearch.org/fact-tank/2023/03/01/gender-pay-gap-facts/>.

<sup>36</sup> Holly Corbett, *The ‘Great Breakup’ and Why Women Leaders are Leaving Companies at Higher Rates*, *FORBES* (Oct. 18, 2022), <https://www.forbes.com/sites/hollycorbett/2022/10/18/the-great-breakup-and-why-women-leaders-are-leaving-companies-at-higher-rates/?sh=5acd12a943d7>.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.*

<sup>39</sup> Proposal at 71.

<sup>40</sup> *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, *WHITE HOUSE* (June 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

<sup>41</sup> U.S. TREAS. DEP’T, *NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS* 4 (Mar. 2016), [https://home.treasury.gov/system/files/226/Non\\_Compete\\_Contracts\\_Economic\\_Effects\\_and\\_Policy\\_Implications\\_MAR2016.pdf](https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf).

<sup>42</sup> *Id.*

Workers may accept a job first and find out about a requisite non-compete clause too late.<sup>43</sup> Workers have less leverage to bargain or decline signing a non-compete clause because they either turned down other job offers or made plans in reliance on the job they accepted.<sup>44</sup> If a worker refuses to sign a non-compete agreement, they risk being fired and losing income, health insurance, and other important company-provided benefits just acquired.

As a matter of contract law, many employers do not provide “consideration” in exchange for a worker signing a non-compete clause other than continued employment. Some states recognized this problem and now require employers to give more equitable consideration such as pay raises and promotions.<sup>45</sup> Banning non-compete clauses nationally would stop these exploitive and coercive practices. It would ensure that workers could navigate the job industry as they see fit for meeting their own personal needs and career goals.

Jimmy John’s provides an example of a company exploiting non-compete clauses for low-wage workers.<sup>46</sup> It targeted low-wage workers by preventing cashiers, sandwich makers, and even janitorial staff from accepting jobs with competitors for up to two years after leaving any of their 2,000 locations.<sup>47</sup> A competitor was defined as any food venue within a two-mile radius of a Jimmy John’s store that made more than 10% of its revenue from sandwiches.<sup>48</sup> Such an arbitrary and vague requirement leads to ridiculous legal quagmires of defining what is a sandwich and what formula to use to calculate revenue.

Despite arbitrary and vague drafting by employers, some states employ a legal doctrine that rewards unenforceable or overly broad non-compete clauses. Under the blue pencil doctrine, courts may strike the unenforceable provision(s) of a non-compete agreement but keep the remainder in effect.<sup>49</sup> Such unenforceable provisions could include overly broad geography, time, or scope of the non-compete clause.<sup>50</sup> This provides an incentive for employers to institute overly broad non-compete clauses knowing that courts will give some effect to them even in instances where the employer overreaches.<sup>51</sup> In other words, no harm—no foul for intentionally drafted unenforceable provisions.<sup>52</sup> Typically, only the most egregious non-compete clauses fail to receive blue pencil protection.<sup>53</sup> Employers coerce workers into signing these, primarily relying on a lack of legal savvy or resources to have them

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<sup>43</sup> Starr, *supra* note 24 at 55.

<sup>44</sup> *See id.*

<sup>45</sup> Ryan Burke, *What You Need to Know About Non-Compete Agreements, and How States are Responding*, WHITE HOUSE (May 5, 2016), <https://obamawhitehouse.archives.gov/blog/2016/05/05/what-you-need-know-about-non-compete-agreements-and-how-states-are-responding>.

<sup>46</sup> *See* Sarah Whitten, *Jimmy John’s Drops Noncompete Clauses Following Settlement*, CNBC (June 22, 2016), <https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Griffin Toronjo Pivateau, *An Argument for Restricting the Blue Pencil Doctrine*, BELMONT L. REV. 1, 22 (2019).

<sup>50</sup> *Id.* at 6.

<sup>51</sup> *See id.* at 2.

<sup>52</sup> *See id.*; Greg Grisham, *Nevada Supreme Court Changes Course on “Blue Penciling” Non-Competition Agreements* A.B.A. (Apr. 21, 2021), <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2021/nevada-supreme-court-blue-pencil-non-competition-agreements/>.

<sup>53</sup> *See Intertek v. Eastman*, 2023 WL 2544236 at \*1 (Del. Ch. Mar. 16, 2023) (the Chancery Court refused to blue pencil and instead strike down a non-compete clause as the geographic scope was “anywhere in the world”).



contested.<sup>54</sup> The blue pencil doctrine encourages overreach and in turn, drives worker harm through non-compete clauses.<sup>55</sup>

## 2. Non-Compete Clauses Facilitate Harassment

Even if a former worker abides by the contractual obligations of a non-compete clause, an employer may still use it as a justification to threaten and harass departing employees. Employer's attorneys sometimes send an intimidating Cease and Desist letter accusing a former worker of violating a non-compete clause and threatening a lawsuit—regardless of the clause's validity. Employers in California, where there is a total ban on non-compete clauses already, take advantage of the lack of national unity by vigorously imposing them.<sup>56</sup> Without knowing if the non-compete is enforceable and without the resources to hire an attorney to investigate further, workers tend to acquiesce.<sup>57</sup> These scare tactics reinforce the belief that the clauses are valid regardless of actual enforceability.

### B. Family Impact of Non-Compete Clauses

We urge the Commission to consider the adverse effects non-compete clauses have on individual workers' families.

In addition to coercive practices, non-compete clauses inflict harm on workers by limiting their ability to pursue better work opportunities and, in turn, reduce the overall stability of family units. Individual workers face several challenges when they are prevented from matching with the jobs that best suit their needs. A worker subject to a non-compete clause's geographic restrictions may be forced to choose between remaining close to immediate family members or seeking employment opportunities elsewhere. Non-compete clauses often force workers into burdensome and protracted commutes or relocation.<sup>58</sup> To the extent that non-competes separate families, it may also isolate elderly Americans—creating additional social costs. Young families may not be able to move away from their relatives because of the need for help with childcare.

Access to reliable childcare at an affordable price is a worsening social and political concern.<sup>59</sup> Paying for childcare ranges from 8 to 19.3% of the median family income (for one child) and a total of \$122 billion in lost earnings, productivity, and revenue last year.<sup>60</sup> Non-compete clauses limit a worker's flexibility in finding work that aligns with their family's needs such as different work hours, shorter commutes, or the ability to live near family that can help with childcare. Non-compete clauses compound and exacerbate these challenges faced by American families.

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<sup>54</sup> See *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*, WHITE HOUSE (May 2016), [https://obamawhitehouse.archives.gov/sites/default/files/non-competes\\_report\\_final2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf) at 5.

<sup>55</sup> Pivateau, *supra* note 49 at 42.

<sup>56</sup> See *supra* note 22.

<sup>57</sup> *Id.*

<sup>58</sup> See *supra* note 25 (workers attest to driving hundreds of miles on their daily commutes because of a non-compete clause).

<sup>59</sup> See Gianna Melillo, *What's Behind the US's Worsening Child Care Crisis?* THE HILL (Feb. 12, 2023), <https://thehill.com/changing-america/enrichment/education/3852987-whats-behind-the-uss-worsening-child-care-crisis/>.

<sup>60</sup> Liana Christin Landivar, Nikki L. Graf & Giorleny Altamirano Rayo, *Childcare Prices in Local Areas: Initial Findings from the National Database of Childcare Prices*, U.S. DEP'T OF LABOR (Jan. 2023), [https://www.dol.gov/sites/dolgov/files/WB/NDCP/WB\\_IssueBrief-NDCP-final.pdf](https://www.dol.gov/sites/dolgov/files/WB/NDCP/WB_IssueBrief-NDCP-final.pdf).

Additionally, commuting is costly and not all Americans have cars to be able to commute outside of a city's limits. According to the National Equity Atlas, in 2019 18% of Black households did not own a car, as compared to 6% for White households.<sup>61</sup> And immigrant households across all racial and ethnic groups, except Black households, are more likely to lack access to a vehicle compared to their US-born counterparts.<sup>62</sup> Simply put, not all American have or can afford a car. They cannot afford the additional time to commute further and pay for additional hours for child and elder care. The Proposal's ban will allow people to pursue their career goals in alignment with familial responsibilities and do so more affordably.

### C. Non-Compete Clauses Drive Reverberating Harms Across Many Markets

Relatedly, the harms associated with non-compete agreements, which subsequently impact the family unit, are closely tied with two markets—housing and asset management.

#### 1. Housing Market

Non-compete clauses impact individual worker and their families in the housing and rental markets where they now face tightening market conditions.<sup>63</sup> Housing supply shortages coupled with steep inflation rates now cause decreased mobility amongst American homeowners and renters.<sup>64</sup> As of 2021, only 1 in 12 Americans reported moving annually.<sup>65</sup> Non-compete clauses contribute to this lack of housing and geographic mobility. A non-compete is often limited in scope to a geographical area. This often has the effect of either forcing a worker to stay with that employer or facing an unfavorable housing market elsewhere. Workers who are restricted from pursuing optimal employment opportunities are less likely to have reason for buying or selling their home than workers who enjoy such freedoms within a housing market. Further, any individuals forced to relocate may face limited availability and increased prices within a different housing market.

#### 2. Asset Management Markets

The Commission seeks comment on its preliminary finding that the asserted benefits from non-compete agreements do not outweigh the harms.<sup>66</sup>

Non-compete agreements also drive underinvestment in retirement savings by significantly reducing worker income and savings capabilities. This generates a host of problems such as wealth disparity, racial wealth inequities and a growing retirement crisis.

Because of nearly unprecedented wealth inequity, the current era resembles a Second Gilded Age.<sup>67</sup> Wealth disparities persist and are growing within the United States. Income growth has been most

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<sup>61</sup> *Car Access: Everyone Needs Reliable Transportation Access and in Most American Communities That Means a Car*, NATIONAL EQUITY ATLAS [https://nationalequityatlas.org/indicators/Car\\_access](https://nationalequityatlas.org/indicators/Car_access) (last visited Apr. 14, 2023).

<sup>62</sup> *Id.*

<sup>63</sup> Kevin P. Kane, *State of the Nation's Housing Markets: 3Q 2022*, U.S. DEP'T OF HOUS. & URBAN DEV. <https://www.huduser.gov/portal/sites/default/files/pdf/State-of-Housing-Markets-3Q2022.pdf>.

<sup>64</sup> Emily Badger, *When the Best Available Home Is the One You Already Have*, NYT, (May 2022), <https://www.nytimes.com/2022/05/27/upshot/housing-market-slow-moving.html>.

<sup>65</sup> *Id.*

<sup>66</sup> Proposal at 105.

<sup>67</sup> Jill Lepore, *Richer and Poorer*, NEW YORKER, (Mar. 9, 2015), <https://www.newyorker.com/magazine/2015/03/16/richer-and-poorer>.

rapid for the top 5% and even outpaces similarly situated countries.<sup>68</sup> Other households' wealth has not returned to pre-recession levels and household income trends have remained tepid for the last 20 years.<sup>69</sup> The middle class's ability to save for retirement is shrinking.<sup>70</sup> In a 2021 Forbes study, only 27% of workers reported they felt on track for retirement.<sup>71</sup> Even more alarmingly, only 18% of 60–67-year-olds reported the same.

Major inequality continues to pervade in minority racial groups. The average Black and Hispanic households earn about half as much as the average White household and own only about 15 to 20% as much net wealth.<sup>72</sup> In terms of numbers, non-Hispanic White (\$187,300) and Asian (\$206,400) households have higher median household wealth compared to Black (\$14,100) and Hispanic (\$31,700) communities.<sup>73</sup>

Saving for retirement is proving an impossible challenge for many, but the problem becomes more dire as traditional pensions—defined benefit plans—vanish. By the end of 2013, traditional pensions accounted for only 35% of retirement assets while defined contribution plans and IRAs accounted for more than half of all retirement assets.<sup>74</sup> More investment risks are now left to the individual and not the employer.<sup>75</sup> Pensions provided a guaranteed lifetime income stream, while the latter is at the mercy of market volatility and the ability for employees to contribute to their retirement plan.

Employer sponsored defined contribution plans, such as 401(k)s vary widely, but a majority make employer contributions contingent upon employee contributions. Therefore, retirement savings start with how much an employee can save. And how much an employee can save starts with their income and life expenses. Employees who are handcuffed by non-compete clauses can be stuck in lower paying jobs and unable to contribute, or contribute as much, to their retirement savings.

In addition, employer contributions to 401(k) type plans are often based on a percentage of what the employee contributes, or a percentage of one's compensation. And employer plans are so varied that some impose vesting schedules on employer contributions, while others do not.<sup>76</sup>

For workers to be locked into a non-compete clause and unable to move to a higher paying job that may include more generous retirement benefits such as ones that have immediate vesting rather than a

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<sup>68</sup> Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Trends in Income and Wealth Inequality*, PEW RSCH CENTER (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* See Neil Bennett, Donald Hays & Briana Sullivan, *2019 Data Show Baby Boomer Nearly 9 Times Wealthier than Millennials*, CENSUS BUREAU (2022), <https://www.census.gov/library/stories/2022/08/wealth-inequality-by-household-type.html>.

<sup>71</sup> Kristin McKenna, *Only 27% Of Workers Say They're On Track For Retirement. Where Do You Stand?*, FORBES Apr. 5, 2021), <https://www.forbes.com/sites/kristinmckenna/2021/04/05/only-27-of-workers-say-theyre-on-track-for-retirement-where-do-you-stand/?sh=a927a742c091>.

<sup>72</sup> Aditya Aladangady & Akila Forde, *Wealth Inequality and the Racial Wealth Gap*, FED. RSRV. (Oct. 22, 2021), <https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.html>.

<sup>73</sup> *Supra* note 70.

<sup>74</sup> *The Effects of Conflicted Investment Advice on Retirement Savings*, WHITE HOUSE (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/cea\\_coi\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf), at 5.

<sup>75</sup> Mark Miller, *The Vanishing Defined-Benefit Pension and Its Discontents*, REUTERS (May 6, 2014), <https://www.reuters.com/article/us-column-miller-pensions/the-vanishing-defined-benefit-pension-and-its-discontents-idUSBREA450PP20140506>.

<sup>76</sup> Samantha J. Prince, *Megacompany Employee Churn Meets 401(k) Vesting Schedules: A Sabotage on Workers' Retirement Wealth*, 41 YALE L. & POL'Y REV. 1, 1 (2023).

schedule can delay retirement and exacerbate the retirement crisis.<sup>77</sup> It also creates risk and stress for the individual and their families.

It is undeniable that non-compete clauses affect an individual's mobility and earning income and anything that affects ability to earn and save will exacerbate wealth gaps. Closing wealth disparities between economic class and across racial lines will require removing market constraints such as non-compete clauses that limit workers from earning income and preparing for retirement.

## **V. The Proposed Rule Protects Small Businesses and Entrepreneurs**

Though the Commission proposes a general ban on non-compete agreements, the Commission considers unique situations where some may be appropriate. Specifically, the Commission proposed a business sale exception and permits businesses to employ alternative measures to protect their proprietary information.

### **A. The “Business Sale Exception” Strikes the Right Balance**

The Commission, while being mindful of the individual worker, must also strike a delicate balance to ensure small businesses and entrepreneurs are not adversely affected by the Proposal. In response to the Commission's request for comment on proposed § 910.3 (often referred to as “the business sale exception” or “sale exemption”), we echo our support for the section as proposed.

Business owners and potential purchasers have a vested interest in non-compete agreements and many see the clauses as “necessary to protect the value” of the business.<sup>78</sup> Often, purchasers are not merely interested in the physical assets of a for-sale business. More often than not, the business's goodwill including its reputation, proprietary information (e.g., customer lists and other trade secrets), and the founders' unique ideas are a significant consideration in valuing the business.<sup>79</sup> Non-compete clauses are a frequently used method to ensure a purchaser has adequate time to establish its footing without fear of unfair competition by the seller.<sup>80</sup> The few state legislatures which broadly void non-compete clauses recognize similar exceptions for the sales of businesses.<sup>81</sup>

The need to protect the purchase of a business is adequately addressed by proposed § 910.3. Proposed § 910.3 exempts non-compete clauses from the Rule's coverage which are entered into by and between purchasers of a business entity and its substantial owners, members, and partners.<sup>82</sup> The Commission defines the term “substantial” in § 910.3(e) as those holding at least a 25% ownership interest in the business.<sup>83</sup> This distinction ensures that those owning minor equity stakes would still be protected by the Rule and its general ban on non-compete clauses. This exemption is not without limit, however.

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<sup>77</sup> See generally *id.*

<sup>78</sup> Kelsey O' Gorman, *Don't Panic—The FTC's Proposed Non-Compete Ban May Not Apply to the Sale of Your Business*, TKO MILLER, <https://www.tkomiller.com/blog/dont-panic-the-ftcs-proposed-non-compete-ban-may-not-apply-to-the-sale-of-your-business> (last accessed Feb. 28, 2023).

<sup>79</sup> Steve Milano, *What Is the Reason a Buyer of a Business Would Want a Non-Compete Clause in the Contract?*, CHRON: SMALL BUSINESS, <https://smallbusiness.chron.com/reason-buyer-business-would-want-noncompete-clause-contract-58463.html> (last accessed Mar. 1, 2023).

<sup>80</sup> *Id.*

<sup>81</sup> Proposal at 129 (citing Cal. Bus. & Prof. Code sec. 16601; N.D. Cent. Code sec. 9-08-06(1); Okla. Stat. Ann. tit. 15, secs. 218 (sale of a business) and 219 (dissolution of a partnership)).

<sup>82</sup> *Id.* at 128.

<sup>83</sup> *Id.* at 131.

Businesses must still ensure non-compete clauses drafted pursuant to this exemption are reasonable in both scope and duration.<sup>84</sup>

For the above reasons, we endorse § 910.3 in its entirety.

### **B. The Commission Was Correct to Leave Businesses with Alternative Contractual Tools to Protect Their Legitimate Interests**

The Commission, despite proposing a general ban on non-compete clauses, leaves businesses with considerable tools to protect their legitimate interests. This includes the continued use of non-disclosure agreements, non-solicitation clauses, and statutory trade secret protections.<sup>85</sup> These tools, though sometimes drafted so broadly that they operate as *de facto* non-compete clauses, “generally do not prevent a worker from seeking or accepting employment” elsewhere.<sup>86</sup> For this reason, the Commission reasons that these tools are permissible, so long as they pass the functional test discussed earlier.<sup>87</sup>

We concur with this view. As mentioned in the business sale context, protecting intellectual property and other proprietary information is a frequent concern for businesses of many kinds. Statutory trade secret legislation at the state and federal level ensures these concerns are adequately addressed.<sup>88</sup>

The Proposal leaves trade secret and other protections like customer lists and non-solicitation clauses undisturbed.<sup>89</sup> Trade secrets have federal statutory protections with or without express agreements.<sup>90</sup> Nondisclosure agreements protects “any information the employer imparted to the employee in confidence.”<sup>91</sup> Damages clauses remain.<sup>92</sup> Term employment contracts can also protect employer investment in a worker just as well or better than a non-compete clauses. The oldest major professional sports league in the world, Major League Baseball, thrives with these contracts, while maintaining player mobility.<sup>93</sup> Given these alternatives, the argument that non-compete clauses are a necessary evil to accomplish business goals is unwarranted. Businesses have—and will continue to have—leverage to protect their legitimate interests.

## **VI. The Commission Should Consider a Factor Test for Its Unfairness Analysis for Senior Executives**

The Commission specifically seeks comment on “whether it should adopt different standards for non-compete clauses with senior executives.”<sup>94</sup> In its Proposal, the Commission preliminarily finds that,

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<sup>84</sup> See *Intertek v. Eastman*, 2023 WL 2544236 at \*1 (Del. Ch. Mar. 16, 2023).

<sup>85</sup> Proposal at 108.

<sup>86</sup> *Id.* at 4.

<sup>87</sup> *Id.*; See Proposal at 108–109.

<sup>88</sup> Proposal at 92.

<sup>89</sup> *Id.* at 104.

<sup>90</sup> Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836 §§ 376-386 (2016).

<sup>91</sup> Camilla Alexandra Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements That Act Like Noncompetes*, 133 YALE L.J. 1 (2023).

<sup>92</sup> See generally Gerd Muelheusser, *Regulating Damage Clauses in (Labor) Contracts* 163 J. INSTITUTIONAL & THEORETICAL ECON. 531 (2007).

<sup>93</sup> See Scott Miller, *Will You Still Need Them, Will You Still Play Them, When They're 41?*, NYT (Dec. 19, 2022), <https://www.nytimes.com/2022/12/16/sports/baseball/carlos-correa-giants-contract.html>.

<sup>94</sup> Proposal at 150.

although not exploitative and coercive at the c-suite level, non-compete clauses present concerns distinct from that of the average worker.<sup>95</sup>

The Commission now considers alternatives, one of which is to adopt a rebuttable presumption approach to non-compete clauses.<sup>96</sup> Under the rebuttable presumption approach, employers' use of non-compete clauses "would be presumptively unlawful."<sup>97</sup> However, the use of a non-compete "would be permitted if the employer could meet a certain evidentiary burden" based on a standard set by the Commission.<sup>98</sup> In short, if this approach were adopted, non-compete clauses would be permitted if the employer can show that the circumstances warrant the clause's use. Even here, misallocation of executive talent and labor, and in turn, inefficiency across firms justifies a presumption against non-compete clauses.<sup>99</sup>

We believe that the rebuttable presumption should only apply to senior executives, if at all. Anything broader than this narrow application of a rebuttable presumption will likely result in the continued overuse of non-compete clauses by employers. This may be especially true for minority and female executives, who are less frequently employed in these roles.<sup>100</sup> These groups, although they possess more bargaining power than the average worker at this level, may not exercise it to its fullest extent.

The Commission presents several supporting reasons for why non-compete clauses are not exploitative as applied to senior executives. Perhaps the most compelling is the fact that executives possess greater bargaining power than the average worker.<sup>101</sup> This is especially true where counsel is retained to aid in contract negotiations.<sup>102</sup>

Based on this evidence, it may be appropriate to allow non-compete clauses for senior executives based on a factor test. Here, the Commission should define "senior executive" by considering factors beyond mere salary. In the past few decades, c-suite executives began to favor incentive-based compensation packages.<sup>103</sup> Despite being among the highest compensated Americans, many of the country's wealthiest CEOs opt to accept a \$1 annual salary.<sup>104</sup> Some of these \$1 CEOs include Steve

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 139 (Although the Commission is seeking general comment on whether it should adopt a rebuttable presumption approach or a categorical ban for *all* workers, we take the position that a rebuttable presumption approach should *only* be applied to senior executives. The Commission should apply the categorical ban for all other non-competes).

<sup>97</sup> *Id.* at 139.

<sup>98</sup> *Id.*

<sup>99</sup> See Liyan Shi, *Restrictions on Executive Mobility and Reallocation: The Aggregate Effect of Non-Competition Contracts*, SOC'Y ECON. DYNAMICS 1 (2019), [https://economicdynamics.org/meetpapers/2019/paper\\_852.pdf](https://economicdynamics.org/meetpapers/2019/paper_852.pdf).

<sup>100</sup> See generally Jessica Guynn & Jayme Fraser, *Asian Women Are Shut Out of Leadership at America's Top Companies. Our Data Shows Why*, USA TODAY (Apr. 25, 2022), <https://www.usatoday.com/story/money/2022/04/25/asian-women-executives-discrimination-us-companies/7308310001/?gnt-cfr=1>; see also *Only Two Latinas Have Been CEOs at a Fortune 500 Company: Why So Few Hispanics Make It to the Top*, USA TODAY (Aug. 2, 2022), <https://www.usatoday.com/story/money/2022/08/02/hispanic-latina-business-demographics-executive/10157271002/?gnt-cfr=1>; Khadeeja Safdar, *Black Executives Are Sharing Their Experiences of Racism, Many for the First Time*, WALL STREET J. (June 26, 2020), <https://www.wsj.com/articles/black-executives-are-sharing-their-experiences-of-racism-many-for-the-first-time-11593182200>.

<sup>101</sup> Proposal at 88.

<sup>102</sup> *Id.*

<sup>103</sup> Zachary Crockett, *Why Some of America's Top CEOs Take A \$1 Salary*, HUSTLE (Dec. 8, 2019), <https://thehustle.co/1-ceo-salary/>.

<sup>104</sup> *Id.*

Jobs, Mark Zuckerberg, and Larry Ellison.<sup>105</sup> Of course, this \$1 salary figure veils billions of dollars in compensation, the bulk of which comes in the form of equity and bonuses.<sup>106</sup>

Should the Commission adopt a rebuttable presumption or outright exemption in the context of senior executives, it should define “senior executive” by virtue of the total annual value of the executive’s compensation package, as well as their position title and description, and an analysis of what their job duties have been/are precisely, not simply what is states in an employment contract.

This approach will ensure that most workers the Commission seeks to protect are not unduly prejudiced by an overly broad application of the rebuttable presumption. Likewise, this approach ensures the Commission’s distinct concerns in the context of senior executives are adequately addressed.

## **VII. Conclusion**

We agree with the Commission’s Proposal for a near outright ban. Non-compete clauses are an unfair method of hindering competition by controlling workers during and after employment. Non-compete clauses affect a wide range of workers, many of which are without the ability or means to turn down employment that is coupled with a non-compete clause or to litigate unenforceable terms. Non-compete clauses do more harm than good. Non-compete clauses hinder workers and their families from finding their best work opportunities— in geographic and compensation terms. Wealth disparities and retirement savings crises are exacerbated. However, when workers and the businesses that employ them are aligned and matched appropriately our whole economy works better.

We thank the Commission for the opportunity to comment.

Respectfully,

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

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