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Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

To the Federal Trade Commission:

The Consumer Technology Association (CTA)® submits this comment in response to the Notice of Proposed Rulemaking on a Non-Compete Clause Rule (NPRM) by the Federal Trade Commission (FTC).[1] CTA is North America's largest technology trade association. Our members are the world's leading innovators – from startups to global brands – helping support more than 18 million American jobs. CTA owns and produces CES®, the world's most influential tech event. CTA members operate in a competitive market to produce innovative products that benefit consumers and power the economy.

CTA has serious concerns about the FTC's proposed rule that would effectively ban all non-compete clauses and require the recission of existing non-compete agreements.[2] The proposed rule would apply without regard to fact-specific determinations about industry sector, type of employee or worker, or geographic or other market details. This approach departs from established antitrust principles, and threatens to disrupt the market by using amorphous "unfair methods of competition" language to make broad policy judgments, rather than relying on settled principles to promote competition and consumer welfare. The proposed rule is not grounded in the FTC's authority or the law, and draws support from a small handful of enforcement actions announced only one day before the proposed rule was published. CTA strongly encourages the FTC to reconsider its approach and reject the proposed rule.

[1] Non-Compete Clause Rule, Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (Jan. 19, 2023), https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule ("NPRM").

[2] *Id.* at 3483.

The Proposed Rule Would Harm American Innovation and Competitiveness.

The United States economy and thus Americans have benefitted from our global dominant role in innovation and competitiveness. This global economic advantage is multi-factorial and relies on our diversity, Constitutional freedoms, culture encouraging new ideas and new business forms, American creativity, and availability of investment capital.[3] But it also depends on the ability of our most creative companies to hire employees and trust that the employees they invest in cannot, consistent with state and federal law, take all they have learned and share it with an unscrupulous entrepreneur or company, including one based in or owned by a nation hostile to American interests. Non-compete contracts exist for valid reasons – including national competitiveness – and they are usually bounded by reasonable time, place, and manner restrictions.

Companies utilize non-compete agreements because they need them. In particular, they need to protect themselves against unfair and unethical competitors and the theft of much of their goodwill and intellectual capital. Otherwise, employees can depart to unscrupulous competition seeking a free ride to essentially expropriate the intellectual and investment capital not only of the one employee, but of all of the company's investment, research, sales prospects, customers, and strategy, which may have taken thousands of people and hundreds of million dollars to create. CTA acknowledges that applying non-compete agreements indiscriminately to all employees, including the lowest paid hourly workers without specialized knowledge, can be overbroad, but addressing that remains an opportunity for states. The harm in throwing out non-competes almost fully would be substantial and would be one more unjustified federal action further eroding the U.S.' ability to compete in a global environment.

Eliminating non-competes will have an additional unintended consequence: it would reduce acquisitions. For example, under the NPRM, if business owners with less than 25% equity want to sell their company, they will find fewer interested buyers and thus lower prices, because a company's going market price is based not only on revenue, profitability, and growth potential, but also on the confidence that it can retain its experienced employees and its competitive position.[4] To the extent the proposed rule reduces a company's ability to do either or both by banning non-competes, it will then reduce a company's value. Contrary to the misguided view that reducing acquisitions overall is positive, the reality is that potential acquisitions drive productive investment – investors who fund the seed capital of American competitiveness will be less likely to invest in startups when the exit price for their risky investments is reduced.

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[3] Gary Shapiro, *The Comeback: How Innovation Will Restore the American Dream* (2011).

[4] *See* Brian R. Henry & Joseph M. Miller, *"Sorry, We Can't Hire You... We Promised Not To": The Antitrust Implications of Entering Into No-Hire Agreements*, 11 Antitrust Fall 1996 39, 40 (1996) ("No-hire agreements that are ancillary to the sale of a business are supported by a valid procompetitive rationale—a buyer has a legitimate concern that a substantial portion of the assets it purchases not disappear shortly after the transaction closes.").

The NPRM Attempts to Overly Expand the FTC's Authority to Regulate "Unfair Methods of Competition."

The NPRM attempts to base its proposed rule on the "unfair methods of competition" authority in Section 5 of the Federal Trade Commission Act (FTC Act).[5] As with the recent announcement of the FTC's policy statement on unfair methods of competition,[6] the NPRM applies a novel interpretation of "unfair methods of competition" that is detached from traditional antitrust principles. Instead, the determination that a practice is "unfair" appears to be based on policy judgments of the majority of Commissioners rather than established legal principles.

The NPRM applies an overly broad and expansive interpretation of what is "unfair." For example, the NPRM asserts that "Section 5 reaches conduct that, while not prohibited by the Sherman or Clayton Acts, violates the spirit or policies underlying those statutes."[7] It further states that "Section 5 reaches incipient violations of the antitrust laws—conduct that, if left unrestrained, would grow into an antitrust violation in the foreseeable future."[8] The NPRM also bases its justification of the rule in part on broad, economy-wide statements about workers' bargaining power.[9] It makes judgments about the effects of non-compete clauses across the entire economy, rather than focusing on the facts of particular markets, including specific industry sectors, geographic regions, and employee levels that may face different conditions.

The NPRM therefore unfortunately continues the FTC's recent trend of turning away from a focus on promoting competition to improve consumer welfare, in favor of more amorphous policy-driven judgments about "unfair" conduct.

The NPRM's Reliance on Broad-Brush Policy Judgments About "Unfair" Conduct is Unwise and Should Be Abandoned.

While CTA's members have a broad range of approaches to non-compete clauses (reflecting the variety of unique conditions under which they and their employees operate), they have a common desire for regulatory predictability and certainty in competition policy. That predictability is undermined when an agency like the FTC changes course on applying a legal standard like "unfair" methods of competition, and introduces amorphous new guidance that heavily weights towards the policy judgment of a few Commissioners and lacks the traditional bipartisan Commission support for an important policy position. In this case, the proposed rule would retroactively invalidate contractual clauses that were implemented under controlling state

[5] Pub. L. No. 63-203, 38 Stat. 717 (1914); 15 U.S.C. § 45(a)(1).

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

[7] NPRM at 3499.

[8] *Id.*

[9] *Id*. at 3503 ("[T]he employer-worker relationship is defined by an imbalance of bargaining power generally . . . .").

law, which already regulates non-compete clauses. Companies that had taken care to monitor and comply with state laws would suddenly find themselves in violation of new, unforeseen rules. Further, the inclusion of "*de facto*" non-competes in the proposed rule will lead to significant uncertainty and could prompt litigation to determine whether a particular agreement is indeed a *de facto* non-compete covered by the rule. More broadly, applying the "unfair methods of competition" language in this way would undermine the predictability of competition rules and enforcement going forward, and make it more difficult for companies to understand the rules of the road.

The FTC is misguided when it departs from traditional competition principles based on the consumer welfare standard. These well-understood principles have been wildly successful, facilitating decades of technological innovation and economic growth, driven in no small part by CTA's members. Additionally, innovation and investment are best protected and promoted when companies understand the rules and are not concerned that government policy could shift and undermine their existing business arrangements. Companies cannot fully pursue innovative policies or structure their business arrangements if they are concerned that regulatory expectations of what is "unfair" conduct in the marketplace can change based on the views of individual Commissioners, rather than being grounded in objective legal standards. An FTC approach to "unfair methods of competition" that is based on broad policy preferences, as in this NPRM, runs counter to the interests of consumers and companies alike.

Further, in this case, states' existing regulation of non-compete provisions makes them a particularly poor area for broad and disruptive policymaking by the FTC. Forty-seven states allow non-compete agreements in some form. Several states permit and enforce non-compete agreements, while limiting their use only in certain industries or contexts. Florida, for example, prohibits restrictive covenants on a county-by-county basis for doctors who practice a medical specialty,[10] while Hawaii bans non-compete agreements for software development and information technology workers.[11] Other states regulate non-compete provisions when they involve workers who earn less than a designated threshold.[12] These state laws reflect diverse policy judgments that consider sectors, employee seniority and income levels, and geographic considerations, and demonstrate that state legislatures are best positioned to assess the market factors in their individual states. While the NPRM cites state law as a reason to expand certain state-specific policies nationally, in fact the traditional role of the states in regulating this area is reason for the FTC to defer rather than stretch its authority.

[10] *See* Fla. Stat. § 542.336 (2019).

[11] Haw. Rev. Stat. § 480-4(d) (2015).

[12] *See, e.g.*, Colo. Rev. Stat. § 8-2-113 (2021) (setting a "threshold amount" of earnings above which a non-compete agreement is legal).

The FTC Would Exceed Its Legal Authority in Adopting the Proposed Rule.

Beyond these prudential reasons for the FTC to exercise restraint, use of the "unfair methods of competition" authority in the wide-ranging manner proposed here would be unlawful.[13]

Initially, the FTC lacks substantive rulemaking authority for unfair methods of competition. Congress has not clearly delegated such authority to the FTC. As commentators have noted, until 1973, the FTC itself did not believe it had the authority to enact binding, substantive rules defining unfair methods of competition.[14] When the D.C. Circuit upheld the Commission's authority to issue a substantive rule in *National Petroleum Refiners Association v. Federal Trade Commission*, it acknowledged that the legislative history of the FTC's substantive rulemaking authority was "ambiguous."[15] Congress then declined to specifically authorize the FTC's substantive rulemaking authority for unfair methods of competition in two subsequent laws amending FTC procedures: the 1975 Magnuson-Moss Act,[16] and the FTC Improvements Act of 1980.[17]

More, even if such rulemaking authority exists, the FTC here seeks the power under "unfair methods of competition" authority to issue rules that govern nearly every aspect of the US economy with limited procedural safeguards, which runs afoul of both the Major Questions and Nondelegation Doctrines.

As the Supreme Court held recently in *West Virginia v. EPA,* the "major questions" doctrine requires "clear congressional authorization" for any agency rule,[18] particularly when an agency seeks to interpret a statute in novel ways to "substantially restructure" a market.[19] Justice Gorsuch's concurrence highlights that the requirement for clear congressional authorization applies when Congress has "considered and rejected" bills authorizing something akin to the

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[13] These arguments are also outlined in Commissioner Wilson's dissent from the NPRM. *See* FTC, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for Non-Compete Clause Rule, File No. P201200-1, at 11 (Jan. 5, 2023).

[14] *See* Noah Joshua Phillips, Against Antitrust Regulation, American Enterprise Institute, at 3 (Oct. 13, 2022), https://www.aei.org/researchproducts/report/against-antitrust-regulation/ ("[T]he Conference Committee [considering legislation that created the Federal Trade Commission] was between two bills, neither of which contemplated substantive rulemaking. . . . The legislative history does not demonstrate congressional intent to give the FTC substantive rulemaking power: The House considered and rejected it, the Senate never proposed it, and neither the Conference Committee's report nor the final debates mentioned it.").

[15] *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 685–86 (D.C. Cir. 1973).

[16] *See* Magnuson-Moss Warranty-FTC Improvement Act, Pub. L. No. 93-637, § 202(a), 88 Stat. 2183, 2193–98 (1975) (codified at 15 U.S.C. § 57a).

[17] *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

[18] *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

[19] *Id*. at 2610.

agency's proposed course of action, and the agency seeks to "regulate a significant portion of the American economy," or "intrud[e] into an area that is the particular domain of state law."[20]

In this case, Congress has recently considered and rejected legislation to address non-competes at the federal level.[21] Further, given that the NPRM suggests that as many as 30 million American workers have signed non-compete agreements, the FTC clearly seeks to regulate a significant portion of the economy.[22] And, as the existing state laws in Hawaii, Florida, and elsewhere (mentioned above) demonstrate, the FTC is attempting to intrude into an area that is the established domain of state law. This NPRM also proposes a novel reading of the FTC Act, in an area the agency has not previously used its authority. In sum, Congress did not clearly authorize the FTC to make use of Section 5's "unfair methods of competition" authority in this manner, and indeed we are unaware that Congress had ever envisioned nationwide regulation of non-compete clauses when establishing Section 5. The proposed rule therefore would be unlawful under the Major Questions Doctrine.

Finally, under the Nondelegation Doctrine, if Congress does not provide an "intelligible principle" for an administrative agency to develop rules, the congressional authorization can be held to be an improper delegation of legislative authority.[23] In applying this rule long ago to the FTC, the Supreme Court upheld the FTC's authority to prohibit unfair methods of competition when using "quasi-judicial" methods that address conduct "in the light of particular competitive conditions . . . ."[24] The Supreme Court separately struck down efforts to enact wide-ranging "fair competition" codes.[25] As Commissioner Wilson also noted in her dissent from the NPRM, the NPRM's proposal to ban non-compete agreements is far closer to a creation of a competition code than a quasi-judicial proceeding addressing specific competitive conditions, and therefore presents significant questions about FTC authority.[26]

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CTA shares the FTC's interest in maintaining strong competition policies that promote innovation and investment. The tech industry has been at the forefront of American innovation, bringing substantial capabilities and benefits to American consumers. The NPRM, along with the FTC's changing view that acquisitions should be measured to protect competitors and not consumers, will hurt American innovation and competitiveness. We are on a dire economic path when our own federal government increasingly takes strong steps to chill innovation, investment,

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[20] *Id*. at 2621 (Gorsuch, J., concurring) (internal quotations and citation omitted).

[21] For example, the Restoring Workers' Rights Act of 2022, H.R. 8755, 117th Cong. § 2 (2022) and the Freedom to Compete Act of 2019, S. 124, 116th Cong. § 3 (2019).

[22] NPRM at 3501.

[23] *See generally J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

[24] *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 533 (1935).

[25] *Id*. at 541.

[26] FTC, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for Non-Compete Clause Rule, File No. P201200-1, at 11 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

and the economic system and legal standards which have strengthened our economy and made our tech companies the envy of the world.

The FTC's open-ended approach to regulating "unfair" methods of competition based on wide-ranging policy judgments threatens this environment by diverging from decades of established precedent and creating uncertainty about what rules will apply. The FTC should reconsider its approach and not move forward with the proposed rule.

Respectfully submitted,

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