April 17, 2023

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

Submitted via regulations.gov

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

Dear Ms. Tabor:

FMI - The Food Industry Association appreciates the opportunity to submit comments in response to the Federal Trade Commission's ("FTC") Notice of Proposed Rulemaking ("NPRM") entitled "Noncompete Clause Rule."[1] For the reasons set forth below, FMI respectfully urges the FTC to withdraw the proposed rule because it lacks the authority to issue it. If the FTC chooses to proceed with this rulemaking, it should at the very least narrow the scope of its proposed ban on non-compete agreements to accommodate employers' reasonable interests in using non-compete agreements to protect sensitive business information and trade secrets and to promote beneficial employment and corporate transactions.

I. About FMI - The Food Industry Association

As the food industry association, FMI works with and on behalf of the entire industry to advance a safer, healthier, and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain—from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services—to amplify the collective work of the industry.

Consistent with governing state law, many of FMI's members use non-compete clauses, and do so almost exclusively in agreements they enter into with executive-level and highly skilled workers. In FMI's experience, these agreements provide vital protection for companies' sensitive business information and trade secrets. Advanced research and development is a vital part of FMI members' businesses. FMI members are on the cutting edge of developing technology and business strategies that help sustain an efficient food supply chain in the United States, and non-compete agreements are essential in facilitating that work. Non-compete agreements also

[1] Fed. Trade Comm'n, *Notice of Proposed Rulemaking: Non-Compete Clause Rule*, 88 Fed. Reg. 3482 (Jan. 19, 2023).

promote mutually beneficial employment arrangements between FMI members and their employees and facilitate corporate transactions that help FMI members to grow and expand their operations.

II. The FTC Lacks Authority to Promulgate the Non-Compete Rule

The proposed rule would, if finalized, be unlawful because the FTC lacks statutory authority to issue it and, if the FTC Act could be read to authorize the rule, it would raise serious constitutional concerns that would weigh in favor of invalidating the rule.

The FTC lacks authority to issue new legislative rules that define and prohibit particular "unfair methods of competition" such as non-compete rules and instead should focus on enforcing laws already authorized by Congress. The only authority the agency cites in the NPRM to support its novel assertion of this rulemaking authority is *National Petroleum Refiners Association v. FTC*.[2] However, that case is unpersuasive on its own terms, and has been undermined by subsequent amendments to the FTC Act, which demonstrate that the FTC's rulemaking authority is confined to unfair or deceptive acts and practices.[3]

Moreover, the major questions doctrine instructs that any doubt about the FTC's statutory authority to issue the proposed rule must be resolved against the agency where, as here, it seeks to outlaw very common contractual provisions that govern the employment of approximately one-fifth of the United States workforce and that are integral to many business and employment arrangements.[4] The sheer magnitude of the proposal calls for congressional involvement, not solo agency action. Relatedly, if the open-ended terms of the FTC Act's competition provisions could be construed to authorize the proposed rule, it would raise significant concerns that Congress had made an unconstitutional delegation of authority to the agency.[5] Such a construction of the statute must therefore be avoided, if possible.[6] Here, an interpretation of the FTC Act that avoids the non-delegation problem is not only possible—it is, as noted above, the interpretation most faithful to the text and structure of the statute.

For all of these reasons, the proposed rule clearly transgresses the limits placed on the FTC's rulemaking authority by Congress and the Constitution. The FTC thus should withdraw the

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[2] 482 F.2d 672, 697–98 (D.C. Cir. 1973).

[3] *See* 15 U.S.C. § 46 (a), (c)–(d), (g)–(h).

[4] *West Virginia* v. *Envt'l Protec. Agency*, 142 S. Ct. 2587, 2609 (2022) ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" (alteration in original) (quoting *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001)).

[5] *See, e.g., A. L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935) (striking down as an unconstitutional delegation a provision of the National Industrial Recovery Act authorizing promulgation of "codes of fair competition").

[6] *See Rust v. Sullivan*, 500 U.S. 173, 190 (1991).

NPRM and confine its enforcement of the FTC Act's competition provisions to the case-by-case adjudicatory process required by the statute.[7]

III. The Proposed Rule Is Misguided as a Policy Matter

a. The Proposed Rule Is Overbroad as Applied to Executive-Level and Higher-Skilled Employees, and Would Undermine Protections For Sensitive Information

If the FTC moves forward with this rulemaking, it should modify the proposed rule's definition of "worker" to exclude executive-level employees and other highly skilled workers, such as those involved in research and development. As the FTC acknowledges, executive-level employees are not vulnerable to the supposed coercive and exploitative practices that the proposed rule purports to address.[8] That is also true of highly skilled employees. Information and power asymmetries are not prevalent to justify any ban. The reason is clear: Executive-level employees generally are more sophisticated negotiators and possess greater bargaining power, which allows them to meet a prospective employer on equal footing and engage in a mutually beneficial, arm's length negotiation over the terms and conditions of employment.[9] The same is true of highly skilled employees, whose training, education, and experience often give them a strong position when negotiating with a prospective employer.

Further, executive-level and highly skilled employees often have access to sensitive business information and trade secrets, which allows them to perform their work effectively. Non-compete agreements provide essential protection for employers against having their information used improperly once these workers leave their employment, and thus help facilitate productive and collaborative work by and among executives and other highly skilled

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[7] Even assuming the FTC had authority to issue competition rules, it certainly is not authorized to apply those rules retroactively, which is additional reason why the provision of the proposed rule that would require employers to rescind non-compete agreements entered into before the rule's compliance date would be *ultra vires* if finalized. *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."); *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269 (1994) ("[E]very [law], which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." (quoting *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814)).

[8] *See* 88 Fed. Reg. at 3502-04.

[9] *See 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 publicly 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)).

employees. The FTC's least restrictive alternatives—non-disclosure agreements and trade secret litigation—are not sufficient to protect employer's intellectual property and business know-how.

The FTC's assertion that non-compete clauses are anti-competitive because they "reduce earnings for workers across the labor force" is flatly inconsistent with practical experience and the agency's own conclusion that higher-level employees enter into non-compete agreements freely and in the absence of coercive pressure from a prospective employer.[10] It is also contradicted by research cited in the NPRM that found that the increased enforcement of noncompete agreements is associated with wage increases for highly skilled workers.[11] Simply put, when there are more terms and conditions of employment left open to arm's length negotiations, the more competitive the labor market will be, as job applicants can differentiate themselves from one another in more ways and tailor the terms of their employment to the unique needs of a prospective employer.

From the employer's perspective, a non-compete agreement can be a critical term of a higher-level worker's employment because it allows the employer to impart sensitive business information and trade secrets to the worker—without which the worker could not properly perform her duties—without fear that this information will be used to undermine the employer's business in the future.[12] For example, executive-level employees must be able freely and openly to discuss business decisions and share ideas with other executives. That sort of collaborative environment, coupled with access to sensitive business information, are essential components of strategic, executive-level decision-making. Likewise, highly skilled workers responsible for advanced research and development are necessarily immersed in an employer's trade secrets in their day-to-day work and must be able to collaborate with other skilled workers to drive innovation. Non-compete agreements make these kinds of collaborative environments possible. Without the ability to share information internally and to adequately protect that information from disclosure externally, innovation and entrepreneurship will suffer dramatically.

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[10] 88 Fed. Reg. at 3501; *see* Evan P. Starr, James J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & Econ. 53, 57 (2021) (finding that "[n]oncompetes are associated with more training, greater access to information, and higher wages and job satisfaction when noncompete is presented along with the job offer"); Kurt Lavetti, Carol Simon, & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers Evidence from Physicians*, 55 J. Hum. Res. 1025, 1051 (2020) (finding that use of non-compete clauses is associated with increased earnings for physicians).

[11] *Id.* at 3487 (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)).

[12] *See 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.").

Thus, the FTC's conclusion that non-compete agreements "obstruct[] the sorting of workers and employers into the strongest possible matches" is not only mistaken, it gets things exactly backwards.[13] When negotiated between employers and higher-level employees, non-compete agreements play a crucial role in facilitating the matching of workers with the right employers in a labor market. They help employers identify workers who are willing to agree to a condition of employment that is essential to how the employer operates its business, and they help higher-level workers bargain for more compensation.

Relatedly, in FMI's experience, non-compete agreements do not "restrict[] a worker's ability to change jobs."[14] To the contrary, non-compete agreements help create job opportunities for higher-level employees. Without the reassurance provided by a non-compete agreement that its sensitive business information will be protected, an employer will often be reluctant to expand its executive-level team beyond a few trusted individuals or may restrict employees' access to information. This limits opportunities for higher-level workers and impedes the employer's ability to field a full and effective team of executives or other skilled employees. These inefficiencies, in turn, will likely increase prices for consumers, reduce innovation, and make it harder for smaller businesses to break through.

Importantly, non-compete agreements' unique role in helping match executive and skilled talent with employers cannot be filled by available alternatives, like non-disclosure agreements ("NDAs") and trade secrets laws. For example, litigation to protect an employer's trade secrets is often costly and time consuming. According to a recent survey, the typical cost of litigating a trade secret case is $550,000 when less than $1 million is at issue, and $7.4 million if more than $25 million is at stake.[15] That means that trade secret litigation is simply not an adequate substitute for the protection non-compete agreements provide.

Likewise, NDAs provide far less protection for employers than non-compete agreements. Once an executive has learned an employer's sensitive business information and trade secrets, he will carry that information with him in any future undertaking. Even if he does not disclose the information to anyone, it will inevitably inform his decision-making on matters related to his past employment, which could be highly damaging to his prior employer if the executive is working for a competitor. Non-compete agreements thus provide a safeguard against the improper use of an employer's sensitive information that NDAs cannot offer.

Moreover, the FTC's suggestion in the proposed rule that NDAs provide adequate protection for employers' sensitive business information is undermined by other parts of the proposal, which would ban certain NDAs as *de facto* non-competes. This is especially true given the vague way in which the proposal defines what counts as a *de facto* non-compete agreement. In particular, the proposed rule would ban any term that the FTC decides "has the effect of prohibiting the

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[13] 88 Fed. Reg. at 3500.

[14] *Id.* at 3501.

[15] Am. Intell. Prop. L. Ass'n,, *2019 Report of the Economic Survey* 68 (2019).

worker from seeking or accepting work with a person or operating a business after the conclusion of the worker's employment with the employer."[16] The proposal has no further guidance on what may qualify. Under this indeterminate standard, employers would face significant uncertainty about what kinds of NDAs are permissible and would almost certainly refrain from using them in many situations where their use is common under current law and beneficial to both employers and employees.

This is also true of many other, mutually beneficial arrangements employers enter into with their employees. Many of FMI's members, for example, provide generous relocation bonuses to their employees when they open a new office or if they have a position to fill in a particular location. These bonuses both cover the costs of moving and incentivize employees to relocate and are conditioned on the employees remaining with the company for a period of time after they have relocated. Similarly, FMI members often make substantial investments in training their employees and helping them acquire specialty licenses or certifications, like Commercial Driver's Licenses, that many employees would be unable to afford without financial assistance. To protect their investments, FMI members typically require that employees pay back the costs of training or obtaining a license if they leave their jobs shortly after receiving these benefits.

Again, the FTC's proposed rule provides virtually no guidance on whether these arrangements are permissible. The proposal offers only two examples of what counts as a *de facto* non-compete clause, neither of which sheds light on how numerous arrangements, like relocation bonuses or investments in specialty license, will be treated.[17] Further, the example the FTC provides regarding training repayment agreements says only that such agreements would be unlawful "where the required payment is not reasonably related to the costs" of the training.[18] How an employer should determine whether a payment is reasonably related to training costs is left unanswered. Without more guidance on what the *de facto* non-compete ban covers, employers will not know whether they are in compliance with the FTC's rule and may abandon these valuable employment arrangements altogether.

In sum, none of the three preliminary findings underlying the proposed non-compete ban supports applying the ban to executive-level and highly skilled workers. The fact that these workers possess significant bargaining power means that the non-compete agreements into which they enter are the fruits of an efficient and competitive labor market that benefits workers, employers, and, ultimately, consumers. The proposed rule does not take into account those benefits, which would render it arbitrary and capricious were it to be finalized.[19] The proposal is also, for this reason, impermissibly overbroad because it would apply the ban to a class of

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[16] *Id.* at 3509.

[17] *See* 88 Fed. Reg. at 3535.

[18] *Id.*

[19] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where it "entirely fail[s] to consider an important aspect of the problem").

workers—namely higher-level workers—even though doing so is not necessary to address any of the supposed competitive harms identified by the agency.[20] Any final rule the FTC issues should therefore exclude executive-level and highly skilled workers from its scope.

b. The Proposed Rule Should Not Apply to Severance Agreements

The proposed rule is also overbroad insofar as it applies to non-compete clauses included in severance agreements. These arrangements provide valuable consideration to a worker in exchange for his promise not to compete against his former employer and do so on terms that are consistent with the prior employment arrangement into which the worker voluntarily entered. There is no basis to conclude that such agreements are coercive or exploitative.[21]

Further, severance agreements promote mobility and dynamism in the labor market and are thus conducive to competition. A worker who leaves his job after entering into a severance agreement is free to seek other employment and can do so from a stronger bargaining position than would be the case if he were without both a job and an income stream. That helps workers find employment that better matches their preferences and skill level. A temporary restriction on the kind of work a worker can undertake, agreed to in exchange for severance pay, thus has the effect of facilitating a smoother transition for the worker into a new position. If non-compete clauses were banned, severance agreements would be far less common since employers would have much less of an incentive to provide severance pay, and the benefits of severance agreements for worker mobility would be lost.

c. The Proposed Rule Would Impede Corporate Transactions

Recognizing the important role non-compete agreements play in "protect[ing] the value of a business acquired by a buyer," the FTC proposes an exception to the ban for non-compete clauses agreed to by a person who is selling a business entity under certain circumstances.[22] That is a laudable goal. In fact, business valuation is also critically important to entrepreneurs, whether or not they are seeking to sell. Unfortunately, the proposed exception is ill-suited to serve the business interest the FTC wishes to accommodate.

The proposed rule would exempt non-compete clauses entered into by a person selling a business where the person is a "substantial owner," which the proposal defines as a person

[20] *Nat'l Min. Ass'n v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999) ("[A] regulation is both arbitrary and capricious [where] it is irrationally overbroad.").

[21] That is particularly true for executives. As the NPRM acknowledges, the overwhelming majority of severance agreements for CEOs include compensation that is equal to or greater than what the departing employees would have received had they remained employed for the length of the non-competition period required by the agreements. 88 Fed. Reg. at 3504 n. 288.

[22] 88 Fed. Reg. at 3508.

holding a 25 percent ownership stake.[23] However, setting the percentage cutoff for the substantial owner exception at 25 percent will impede many corporate sales where non-competes provide vital reassurance to purchasers of stakes much smaller than 25 percent that the seller will not undermine the value of their purchase after the sale. It is unclear how the FTC chose 25 percent as the threshold. The NPRM states only that this percentage "strikes the appropriate balance."[24] The FTC does not discuss why 25 is the appropriate figure, and it appears arbitrary and insufficient to withstand challenge.[25] Depending on the size of a business, a far smaller ownership stake may still represent substantial value for which non-compete protection is justified. The FTC should therefore, at a minimum, reassess where it sets the percentage threshold, taking into account the fact that a five percent stake in a large, multinational business, for example, may represent far greater value than a 50 percent stake in small, local business, and that a seller who owns and sells a stake far smaller than 25 percent can still pose a significant competitive threat to the value of the acquired business.

Relatedly, the FTC's reliance on a percentage cutoff is not rationally tailored to its goal of allowing non-competes where they are needed to protect the value of a purchase. If the FTC intends to allow buyers to protect the value of their purchase where that value is substantial enough to justify a non-compete restriction, and where the seller was a sufficiently important figure in the acquired business so as to pose a threat to the business if she were to become a competitor, a dollar-based threshold (as opposed to a percentage) would be more logical. A one-size-fits-all percentage cutoff is a poor metric for determining the financial value of the many and widely varying kinds of business transactions that occur in the United States every day.

Moreover, the distinction the proposal draws between an owner who goes to work for the buyer after an acquisition and an owner who does not has nothing to do with the buyer's interest in protecting his purchase.[26] Fundamentally, there is no reason to treat these two situations differently, yet that is exactly what the proposed rule would do. That also makes the proposed exception arbitrary and capricious and warrants a complete reconsideration of how the agency crafts the exception.[27]

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[23] *Id.*

[24] *Id.* at 3510.

[25] *See Time Warner Ent. Co., L.P. v. F.C.C.*, 240 F.3d 1126, 1137 (D.C. Cir. 2001) (justification of percentage limit on grounds that it was "appropriate to balance the [agency's] goals" was arbitrary).

[26] *See* 88 Fed. Reg. at 3514.

[27] *See Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) ("A fundamental norm of administrative procedure requires an agency to treat like cases alike.").

IV. Conclusion

FMI respectfully requests the FTC withdraw the proposed rule, both because the agency lacks the authority to issue it and because the proposal fails to support its determination that non-compete agreements are *per se* anticompetitive, particularly as those agreements are used between employers and executive-level and highly skilled workers. A categorical ban of agreements that have long been deemed reasonable under state law is not justifiable. If the Commission proceeds with the rulemaking, it should significantly narrow its scope, including by exempting executive level and highly skilled workers and severance agreements, and by tailoring its substantial owner exception to accommodate more fully and rationally buyers' interest in protecting the value of businesses they purchase.

Sincerely,

Stephanie Harris

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