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Submitted via www.regulations.gov

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

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

Dear Ms. Lane:

On behalf of the National Association of Professional Insurance Agents (PIA)[1], thank you for the opportunity to comment on the Federal Trade Commission's (FTC) Notice of Proposed Rulemaking (NPRM) concerning the use of non-compete clauses and agreements by employers and workers.[2]

I. Background and Introduction

In January, the FTC issued a Notice of Proposed Rulemaking (NPRM) that would ban employers from entering into non-compete agreements with their workers. A non-compete agreement or clause is a contract or contract term, typically between an employer and an employee, that prevents the employee from working for a competitor or starting a competing business, usually within a certain geographic area and for a specified length of time that begins when the worker's employment relationship with the current employer ends. While non-competes typically apply to a time after the employer-worker relationship has concluded, under current federal law, employers and workers can enter into them at any time—before, during, or at the conclusion of the relationship.

The proposal claims that non-compete agreements and clauses constitute "unfair methods of competition." On the contrary, particularly for independent insurance agencies like PIA's member agencies, non-compete clauses and agreements are used to protect employers from workers who would steal their ideas, business practices, and/or intellectual property for use in

[1] PIA is a national trade association founded in 1931 whose members are insurance agents and agency owners in all 50 states, Puerto Rico, Guam, and the District of Columbia. PIA members are small business owners and insurance professionals serving insurance consumers in communities across America.
[2] https://www.regulations.gov/document/FTC-2023-0007-3959.

their own competing businesses or to share with a competitor of their employer, likely to enhance their own opportunities for professional advancement.

The value of an independent insurance agency cannot be measured, but it is marked by the depth, breadth, and loyalty of its book of business. The clientele of independent agencies exists because agency owners cultivate and invest in professional relationships, often over the course of decades. Independent insurance agencies launch and develop their businesses in communities of all sizes, and those businesses often grow by word-of-mouth and civic goodwill, both of which are strengthened by agency owners' ongoing economic and social investments in their local communities. Independent agencies use non-compete clauses and agreements to protect against the theft of their business assets in part because, for many of them, it would be prohibitively expensive for them to rebuild their businesses after such a theft.[3]

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[3] Indeed, when asked how the proposed ban might affect their businesses, many PIA members expressed fear that their businesses could be destroyed if they could no longer use non-competes to protect them. Specifically, here are a few examples of agency owners' concerns, in their own words:

This [ban] would destroy our business and our ability to grow it.

As a Kansas family agency we have relied on non-compete … agreements to protect our business for over 60 years.

While we understand the desire to allow people to work in their trained field, our concern as an insurance agency is the theft of proprietary and private personal information that can occur as well as the transfer of revenue that was only obtained as a result of their training and association with the employer.

I built my agency from the ground up. The use of noncompete [sic] *is critical to maintaining the integrity of my business …*

Our non-compete and non-solicitation agreements … are essential to our business.

The non-compete agreement is critical to the long-term viability of an insurance agency. There are years of work and dollars invested into developing an agency that provides a high level of service to customers.

A ban on noncompete agreements could be devastating to my business.

I remain thankful that I had [a non-compete] agreement in place. Competing for business is difficult, yet a natural part of what we do. The elimination of these agreements would create an environment in which … my intellectual property could be legally stolen.

As a small business owner, without a non-compete agreement, I risk losing my business.

Withdrawal of even limited non-compete agreements between me and my employees would be extremely detrimental to my business and would immediate [sic] *wipe away untold dollars of value in insurance agencies.*

This [proposal] could probably destroy my business and my career…. I have both sold insurance agency business and purchased other agencies. Without the safety of the non-compete it would be total chaos in the insurance industry…. It would also destroy my opportunity to sell the business and eventually retire with some sort of dignity and reward for building my business over 40 plus years.

As a small business owner …, the best way to protect my business, my employees and my customers is the ability to use a non-compete…. I am not restricting anyone from the ability to stay within their field and earn a living, I am protecting the rest of my employees so they continue to have a place to work. This proposed rulemaking not only puts my business in jeopardy, it puts my 16 employees in jeopardy as well. That is 16 families that are at risk.

If finalized as proposed, the ban would invalidate millions of private contracts and have a substantial but unpredictable effect on employer/worker relationships in nearly every industry across the United States. Plus, considerable litigation is likely to arise over both the legality of the ban itself and the FTC's power to issue it.

II. FTC Does Not Have Administrative Authority to Ban Non-Competes

The FTC's power to issue a ban on non-compete clauses and agreements is dubious, and its promulgation would infringe on states' rights to regulate contracts, impair the parties' abilities to discharge obligations set forth in legally executed contracts (which will, in turn, lead to costly contract disputes and increased litigation arising out of such disputes), and infringe on the rights of employers and workers to freely enter into such agreements. Additionally, the FTC has little precedent on which to base its sudden attempt to restrict commercial agreements between consenting parties. At best, the agency's authority to engage in rulemaking concerning unfair methods of competition is ambiguous and is expected to generate expensive and complex litigation.[4]

The agency may see its authority challenged on the grounds of what is known as the "major questions doctrine," which states that broad legislative language is insufficient to allow a federal agency to regulate on topics of national significance without clear Congressional authorization. The use of non-competes is a topic of national significance, and, furthermore, the proper use of non-competes has historically been addressed by state law. Congress has never provided the FTC with the level of power it would need to lawfully promulgate a nationwide ban on non-competes.

These legal issues will likely take years to resolve, and the protracted litigation and resulting uncertainty could permanently damage the already fragile labor market. While the FTC litigates

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My agency has a non-compete with our 1099 employees. This agreement is the bedrock of [our agency]. Without this in place, our business would be in peril.

Removing our ability to protect our accounts [using non-competes] will threaten the long-term financial health of our agency.

I am a small woman owned insurance agency in NJ. I have been in the industry for over 35 years.… I could not run my business without non-competes.

This bill would be extremely detrimental to my business. Over many years and at great expense, we have developed proprietary processes and procedures that have helped us to gain clients and be successful against competitors in the insurance sales space. All of our licensed producers currently have non-competes and always have for many years. It is common and expected in our industry. These agreements stop employees from leaving and … opening their own office…. Of course these agreements are limited to reasonable geographic distance from our location. If you allow these agreements to be nullified, it would be extremely detrimental to our business.

Banning non-compete provisions would be extremally [sic] *detrimental to my insurance agency…. [A ban on non-competes] would be financially devastating to us…. This would destroy the value of my business and most likely put me in bankruptcy.*

[4] The FTC's authority to engage at all in rulemaking concerning unfair methods of competition is not conclusively settled; rather, it depends on one's interpretation of the 1975 *Magnuson-Moss Warranty-Federal Trade Commission Improvements Act*. For text of the Act, see the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act (last visited on March 14, 2023).

the issue, employers will spend money on legal advice to aid them in properly navigating their obligations in the context of any existing non-competes; understanding whether they may enter into new non-competes while the future of the ban remains unknown, depending on the outcome of pending litigation; and addressing issues related to existing non-competes among current and former workers in an ambiguous regulatory environment.

For these reasons and those that follow, we urge the FTC to withdraw this NPRM.

III. Proposed Ban is Overly Broad

The FTC claims that its NPRM is drafted to address the perceived challenge posed by employers that "overuse" non-compete clauses and agreements. However, the FTC has not tailored its proposal to target the problem it claims to be solving; rather, it bans non-compete clauses and agreements for all employers, regardless of the facts surrounding any employer's historical or current use of such tools. This NPRM is extremely broad; it defines "workers" as employees, externs, volunteers, apprentices, interns, or independent contractors, without regard to whether one was paid or unpaid. If adopted as proposed, the rule would prohibit the future use of non-compete agreements and clauses between employers and "workers," would require employers to rescind any non-compete agreements and clauses currently in use, and would even require employers to proactively inform both current and former workers that any non-compete agreements they had previously signed are no longer effective.

Many of PIA's insurance agency members have, over the course of years, specifically adapted to the use of alternatives to non-compete clauses and agreements, like non-disclosure and non-solicitation agreements, for instance, because of the degree to which the use of non-compete clauses and agreements is already limited.[5] Such agencies justifiably view this NPRM with great trepidation because of its references to "*de facto* non-compete clauses," which, while not actually non-compete clauses, may have what the FTC deems to be a similar effect on a worker subject to it.

The NPRM does not sufficiently elaborate on what would distinguish a legal non-solicitation clause or agreement from a *de facto* non-compete clause or agreement. It indicates that a restrictive covenant that has the effect of preventing a worker from looking for or accepting work with a competitor after the worker has ended their employment relationship with the employer. As described further below, however, even this standard will vary based on state law and the vagaries of the federal circuit court in which disputes arising from it are heard.

[5] One PIA agency owner observed, "Many insurance agencies utilize restrictive covenants in hiring employees and contractors. Our agency doesn't include territory/location restrictions.… However, we do include non-solicitation and non-disclosure language in our agreements." The agency owner concluded that, if finalized as drafted, the NPRM would be widely viewed as banning all restrictive employment covenants, not just non-competes, because "most of the population is not aware of the nuance between non-compete and non-solicitation, etc. Moving forward with this rule will create tremendous confusion in the industry," increased litigation arising from common misunderstandings about precisely what a non-compete is, and increased legal costs associated with rewriting existing agreements to ensure compliance.

The vagueness of this distinction will make it challenging for independent insurance agencies and other employers to know with confidence whether they are complying with the rule, if it is finalized as proposed.

The FTC's definition of "non-compete clause" generally does not include non-disclosure contracts or clauses, for instance. A non-compete clause is defined as a "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." This definition will likely invite expensive and protracted litigation on the subject, particularly because the issue is relatively new, and courts have not yet produced sufficient case law for future disputes to be easily resolved.

A non-disclosure clause or agreement, on the other hand, does not prevent a worker from competing with their former employer altogether, nor does it prevent other employers for competing for that worker's labor. If a worker signs a non-disclosure agreement (NDA) with their employer and then leaves to work for a competitor, the NDA will prevent the worker from sharing sensitive information with the competitor, but it will not prevent the worker from accepting the job with the competitor altogether.

However, in the NPRM, the FTC expresses concern that "some employers may seek to evade the requirements of the Rule" by imposing unreasonable restrictions on workers using contracts that "restrain such an unusually large scope of activity that they are *de facto* non-compete clauses." The NPRM offers as an example of a *de facto* non-compete agreement an NDA that is "written so broadly that it effectively precludes the worker from working in the same field."

Much of the NPRM suggests the FTC views employers as inherently bad actors and expects them to consistently engage with their workers in bad faith. The NPRM further indicates that the FTC should anticipate that employers will attempt to bypass any narrowly tailored non-compete ban by calling them by other names and hoping to elude the FTC's attention. The NPRM refers to such provisions or contracts as "functional equivalents," and, according to the NPRM, they would be viewed as non-compete clauses for purposes of enforcing the ban, regardless of whether they were drafted intentionally to evade it.

Moreover, the rescission provision extends the requirement that employers provide notice of rescission to not only current workers but former workers as well. For independent insurance agencies, which regularly collect detailed, nonpublic personal information from both clients and prospective clients out of necessity, this poses a particular challenge. Ideally, a worker who has signed a non-compete agreement will have also signed a non-solicitation agreement (NSA) and/or an NDA as well. However, if the NPRM is finalized as written, and a worker has signed *only* a non-compete agreement, the rescission of said agreement will leave the agency and its assets largely unprotected from a former worker for whom poaching the agency's entire book of business suddenly would not violate their agreement.

Should the non-compete ban be finalized as written, to minimize the likelihood of this issue arising in the aftermath of its promulgation, we urge the FTC to allow employers to replace

rescinded non-compete language with a 12- or 18-month NSA for a limited period (for instance, 2-3 years) following the rule's effective date.

The rescission requirement also demands that the employer notice of rescission be provided in an "individualized communication," even if the notice is going to a former worker rather than a current one. The FTC handles the practical challenge associated with requiring an employer to locate former workers by limiting the notice requirement to former workers whose "contact information [is] readily available" to the employer. No details are offered to assist an employer in determining whether a former worker's contact information is "readily available," though, which will make it difficult or impossible for an employer to know which former workers must be contacted and when they have complied with this aspect of the new requirement. The NPRM provides model language for employers to use and a safe harbor provision deeming employers in full compliance with the notice requirement to have complied with the rescission requirement in full, but the FTC's failure to elaborate on the meaning of "readily available" makes its rescission guidance difficult to follow.

IV. Ban Would Improperly Preempt State Law

In general, laws regarding employment, trade secrets, and antitrust restrictions are promulgated and enforced by the fifty states, not by the federal government. Indeed, an extensive history of state laws governing non-compete provisions and agreements has been refined by state courts over the years and produced extensive case law governing the use of non-compete provisions and agreements. However, if finalized as written, this NPRM would preempt every "state statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent" with the ban. This action by the FTC represents an inappropriate encroachment into the legislative and regulatory jurisdiction of the states over employment, trade secrets, and antitrust law.

The federal government generally should be prohibited from invalidating existing contracts for legal goods or services between consenting parties. This proposal constitutes an improper restraint on trade and an illegal preemption of existing state law. Were this ban to go into effect, even in a situation where both parties to an agreement operate exclusively within a single state that permits non-compete clauses and agreements, and even when the agreement is executed fully in accordance with applicable law, and even when the validity of the non-compete is undisputed by the parties thereto, a non-compete that runs afoul of this proposed ban would be invalidated without regard for the interests or incentives of the parties involved.

No federal agency should have the power to uniformly nullify all contracts of a particular type to which the parties have agreed. As previously mentioned, employment law is typically governed by the states. Where consenting parties have agreed to a legally binding agreement, the interests of the parties to the agreement should be prioritized over the interests of unelected federal officials. The rights of all parties will be violated if their will is permitted to be nullified by federal regulation. A ban on non-competes would undermine worker independence and self-determination, and it would deny employers the right to manage their businesses as they deem appropriate without paternalistic intervention by an unelected governmental agency.

The federal government should not intrude into the state oversight of employment to impose potentially illegal, overly restrictive bans on employment agreements, particularly when the states have historically regulated these issues and continue to do so effectively. The NPRM raises issues of federalism and states' rights that will inevitably become the subject of prolonged litigation. Plus, while employers manage the uncertainty associated with the pending FTC ban, they will be required to continue to comply with various and ever-changing state laws on non-compete clauses and agreements.

Forty-seven states permit the use of non-compete clauses and agreements in some way, while three states (California, North Dakota, and Oklahoma) already prohibit non-compete clauses and agreements. More than ten states allow non-compete clauses or agreements only for certain employees. When state legislatures craft their own restrictions on non-compete clauses or agreements, they do so with a comprehensive understanding of the labor market in their state and the ways in which a new state law may interact with existing laws and regulations. Moreover, if a state's restrictions generate litigation, state and federal courts are available to scrutinize non-compete clauses and determine their legality.

The FTC has exhibited no such resourcefulness, instead issuing an NPRM that attempts to overrun states' efforts to draft laws that are responsive to state-specific problems and address state-specific needs. While the patchwork of state law and regulation can be imposing, the message of state legislatures is clear: state legislatures and regulators are fully capable of addressing any challenges posed by non-compete clauses and agreements and should be permitted to do so without federal intervention.

This NPRM is unnecessary and supplants the judgment of locally elected state legislators with the judgment of federal bureaucrats in Washington, D.C. It will sow confusion among employers and workers around compliance and their contractual obligations to one another. For the reasons outlined herein, the adoption of this non-compete ban would worsen rather than improve conditions for businesses, workers, and, ultimately, consumers.

V. Non-Competes Benefit Both Workers and Employers

In all different types of employment, including in independent insurance agencies, non-compete agreements and provisions play a vital role in maintaining the longevity of their businesses. Employers and workers alike benefit from the availability of non-competes in countless ways, including but not limited to the following:

a. **Employers have stronger incentives to hire, comprehensively train, and retain workers because they can rely on non-competes to protect their businesses.** Without the protection of a non-compete, independent insurance agencies will find their existing struggle to hire and retain qualified workers exacerbated. Agencies will still invest in hiring and training new workers out of necessity, of course, but they may hire fewer new workers and invest less in training them because agency owners will no longer be protected by a non-compete. Agency owners rely on non-competes to keep newly trained workers from leaving for a competitor as soon as an opportunity presents itself. Non-

competes allow employers to maximize their return on their investment into each of their workers by making it less likely that those workers will accumulate expertise and then immediately leave to share that expertise with a competing employer that did not initially invest in them. A ban on non-competes could even incentivize an unscrupulous business to reallocate existing resources away from hiring and training new workers and toward luring away the workers of a competitor.

b. **Non-compete agreements and clauses benefit workers as well as employers.** As an example, one PIA member has a competing agency that consistently solicits her employees to move from her agency to the competitor's. In that case, she reported, her employees value their non-competes because they provide a convenient reason for the employees to quickly decline such overtures.

c. **Non-compete agreements and clauses are entered into willingly by consenting parties.** These agreements and the terms thereof are agreed upon voluntarily by consenting participants in the negotiation process. Either party can terminate a negotiation or decline to execute the agreement that results if they feel dissatisfied with the terms. However, once the agreement is signed, the law views the executed agreement as evidence that the parties ultimately came to a "meeting of the minds," indicating that the terms of the agreement are acceptable to everyone involved.

d. **Workers sign non-compete agreements in exchange for compensation or some other form of remuneration**; any contract necessarily involves the exchange of something of value for it to be enforceable. Non-competes exist because the labor market permits them to; if workers were unwilling to exchange the promise not to compete for an offer of employment, compensation, or some other article of value, non-competes would cease to exist.

e. **Non-compete clauses and agreements protect businesses that develop proprietary business information at their own expense from losing that information to a competitor** without being provided any compensation for it. They also protect employers that disclose trade secrets to their workers by incentivizing workers not to exploit those trade secrets for professional gain at the expense of the employer who shared them.

f. **Non-compete clauses and agreements encourage innovation by providing employers with assurance that their novel ideas are safe in their workers' hands.** They also offer employers a means of reclaiming some or all the value of their innovation, should the non-compete be violated.

g. **Non-compete clauses and agreements promote competition** because they provide a means by which every business is equal to every other business; every employer in an industry and region has the power to protect itself using this valuable tool.

h. **A ban on non-compete clauses and agreements would do a disservice to the public at large** by disregarding the value that non-compete clauses and agreements provide in the circumstances described above.

VI. Ban Would Impose Unnecessary and Burdensome Costs on Employers

a. Litigation costs. While the proposed ban might reduce litigation costs associated with disputes over the enforceability of a given non-compete clause, it is likely that the decrease in legal disputes over non-competes would be accompanied by an increase in legal disputes, and associated litigation costs, over other related issues, like the use of trade secrets, disclosures of proprietary information, or the enforceability of other employment provisions like NDAs or NSAs. At best, it would be speculative to conclude that a ban on non-competes would lead to a net decrease in litigation costs.

b. Other legal costs. If finalized as currently drafted, the rule would function both proactively and retroactively. It would not simply ban the use of non-competes going forward; it would also require employers to rescind existing agreements that included non-compete clauses *and* inform affected current and former workers that they were no longer subject to the non-compete provision to which they had agreed. However, non-competes are frequently accompanied by numerous other essential provisions that employers will naturally seek to preserve, the non-compete ban notwithstanding. For that reason, the rescission aspect of the NPRM is likely to force businesses to incur additional legal costs associated with amending existing employment agreements—even with workers who no longer have an employment relationship with the employer but remain subject to a newly-banned non-compete—so that any existing non-compete provisions that are no longer effective may be replaced by a non-solicitation provision or other legally binding restriction applicable to both current and former workers.

VII. Ban Would Have Negative Effect on Insurance Consumers

Studies have shown that weakening the power of non-competes can lead to higher prices for consumers.[6] In our current economic environment, the government should be acting to make insurance products more accessible to consumers, not less. Banning non-competes will incentivize employers to take actions that will negatively affect the consumer experience of purchasing insurance in the following ways:

a. **Less likely to hire new producers:** A ban on non-competes will create increased anxiety for agency owners seeking to expand their agencies and hire new workers, because each new worker will present a potential threat to the security of the entire agency. Smaller agencies with fewer producers may be less able to respond

[6] https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf (citing surveys that demonstrate that the use of non-competes increases prices specifically in the financial services sector) (last viewed on March 16, 2023).

nimbly to a changing marketplace and evolving consumer needs, and they may not be able to offer as wide a selection of insurance products because of the size of their workforce.

b. **Less likely to invest in worker training and/or likely to invest less in training:** Agency owners invest hundreds of thousands of dollars in training each of their workers. Without the protection of a non-compete to ensure the benefit of that training redounds to their agency rather than a competitor, agency owners will be less motivated to invest the time and money required to fully develop their workers. Agencies with workers who are less thoroughly trained may not be able to respond as competently to the needs of their consumers, and they may not be able to offer as wide a selection of insurance products because of the lack of expertise of their workforce. Moreover, investments in training can help agencies avoid liability for errors and omissions (E&O); cutting back on training could potentially increase agency liability.

c. **Resulting decreases in employment and training opportunities for workers will lead to a cascade of negative effects for consumers.** Fewer job opportunities, and fewer opportunities for comprehensive training at those jobs, will prompt workers to change employers more frequently. That turnover will cost employers substantially in terms of the institutional knowledge of departed workers and the extra time and money required to educate their replacements. The greater worker turnover will result in a decrease in the quality of service and an increase in consumer prices.

These are only a few of the many unintended consequences likely to emerge from the proposed ban on non-competes.

VIII. Ban Would Establish Anti-Competitive Precedent Permitting Federal Invalidation of Existing Agreements Between Consenting Private Parties

The banning of non-compete agreements and clauses would set a dangerous precedent by allowing a federal government agency to invalidate existing agreements between consenting private parties and could create a roadmap for federal agencies seeking to ban other activities in the future. The NPRM makes clear that the FTC categorizes non-compete agreements and clauses the same way (as "contractual provisions [that] restrict what a worker may do after they leave their job") as NSAs and NDAs. This characterization leaves open the possibility that, after the FTC finalizes a ban on non-compete clauses and agreements, it may move on to banning NSAs, NDAs, and other employment covenants it deems overly restrictive.

Such bans would further infringe on the rights of business owners to freely manage their workforces and on the rights of workers to enter into agreements both parties view as mutually beneficial. Indeed, agency principals who are members of PIA report they and their workers find the use of non-competes mutually beneficial, particularly because they last for a limited period of time.

Bans like the one proposed here would jeopardize the future stability of our national economy.

IX. Proposed Ban Has Already Introduced Unnecessary Uncertainty into Labor Market

Even though it is not final, the NPRM has already injected unnecessary and disruptive uncertainty into the labor market for employers in all sectors, including for independent insurance agencies. While the NPRM is pending, agencies may rationally begin to devote time, money, and human resources to identifying workers subject to existing non-compete provisions or agreements and initiating plans of action to address the potential nullification of those provisions. Agencies may also begin to weigh alternative options and create plans to protect their business assets in a post-non-compete provision world.

Many of our agencies have expressed concern about whether their existing non-solicitation provisions and agreements will survive the promulgation of a proposal like this, and, based on the NPRM's explanation of *de facto* non-competes and "functional equivalents," a definitive response remains elusive. The NPRM offered several examples of "functional equivalents." However, because issues involving the enforceability of employment contracts are typically addressed at the state level, case law defining the scope of a "functional equivalent" necessarily varies depending on geography, which exacerbates the overall uncertainty created by the NPRM. The uncertainty of the future availability of the agreements on which independent agencies rely makes it nearly impossible for them to take necessary steps to keep their businesses functioning.

Plus, the NPRM list of examples is explicitly not exhaustive, meaning that any business seeking to adjust its use of restrictive covenants to comply with the proposed ban could face litigation if the courts decide its creativity has crossed over into functional equivalence.

Finally, the FTC is contemplating expanding the proposed prohibition to include not only contract terms but also terms of employment, like those set forth in an employee handbook, for example. Workers should realize that terms of employment in a "workplace policy" or handbook may not be legally binding and certainly do not have the force of an employment contract. There is no need for the FTC to announce that employee handbooks and workplace policies are not contractually binding, nor does the FTC have the authority to decree the enforceability of employee handbooks or workplace policies in 50 states, each of which has its own set of existing employment laws and regulations.

X. Ambiguities Raised by NPRM

Despite its voluminousness, much about the proposed ban remains unknown. For instance, the section of law on which the FTC bases its claim of authority for this rulemaking includes no information regarding how the ban would be enforced by the agency or the potential imposition of sanctions on noncompliant employers.

Additionally, the NPRM mentions "no-business" provisions, but it leaves open whether or when such provisions would ultimately be deemed non-competes by the FTC. Were the FTC to conclude that no-business provisions are functionally prohibited as non-competes, it would

substantially hamper employers' ability to run their businesses. Before any ban on non-competes is finalized, it would be helpful for the FTC to offer sample language of a no-business provision that would be deemed acceptable after the promulgation of a final rule banning non-competes.

The NPRM also does not establish whether non-compete clauses or agreements that depend on employment status are to be treated differently than those that would be applicable regardless of employment status.

We implore the FTC to elaborate on these issues before promulgating a final rule.

XI. Responses to Specific Requests for Input

The FTC seeks input on several specific areas, including whether the ban should be universally applied or should be viewed as a rebuttable presumption of illegality. Another area of inquiry is whether some categories of workers, like senior executives or higher-wage workers, should be exempted from the ban.

a. Rebuttable presumption v. categorical ban

A rebuttable presumption would view the use of non-competes as presumptively unlawful. However, an employer could rebut the presumption of unlawfulness if it could meet a specific evidentiary threshold that would be set forth in the final rule. Because non-compete clauses and agreements have inherent value in many circumstances, any federally imposed limitation on their use should be a rebuttable presumption of unlawfulness rather than a categorical ban. A rebuttable presumption would acknowledge that non-competes are appropriate in certain circumstances, though it would still indicate that the FTC generally disapproves of them.

This construction would be similar in certain respects to the current treatment of non-competes in state law and by state courts, which would make a federal regulation on the topic redundant and arguably unnecessary. As the FTC notes, if the agency adopts a rebuttable presumption, it should "adopt a test that is more restrictive than the current common-law standard. Otherwise, the Rule would be no more restrictive than current law, and the objective of the Rule … would not be achieved." For that reason, our first choice is for the FTC to wholly withdraw its proposed ban on non-competes, However, compared to the cascading catastrophes that we fear would result from a categorical ban, a rebuttable presumption would be preferred.

Any test for a rebuttable presumption should be as broad as possible; the employer should be permitted to show by a preponderance of the evidence that the use of the non-compete clause is unlikely to harm competition in the overall economy, rather than in the specific market in which the employer's non-compete is being used. Another option would be to require the employer to demonstrate by a preponderance of the evidence that it has a legitimate business interest for using a non-compete and that said interest cannot be achieved with a less restrictive covenant.

Similarly, while PIA supports the continued allowance of non-competes subject to applicable state law and absent influence from the FTC, we would greatly prefer the establishment of exemptions or varying standards for different categories of workers over a global ban on non-

competes as to all workers. We encourage the FTC to consider a wide variety of factors when determining the applicable standards for different categories of workers, including job functions, earnings and potential earnings, extent of required training, applicable licensure procedures, or some combination of factors.

b. Uniform application to all workers v. differentiation among workers

As currently drafted, the proposed rule would create a categorical ban on all non-competes and apply said ban equally to every worker. Employers would be prohibited from using a non-compete clause in all instances, other than in the limited circumstance where the non-compete is being used by a seller and a buyer of a business.

However, the NPRM notes that the ban could also be applied to different categories of workers based on job functions, earnings and potential earnings, extent of required training, applicable licensure procedures, etc. Workers could be categorized by their earnings or some other threshold, below which they would be eligible for a rebuttable presumption or a full exemption from the ban. Some categories of differentiation could include job functions or occupations or a combination of job functions/occupations and earnings.

Any ban on the use of non-compete clauses or agreements should include exclusions that recognize the specialized value of certain categories of workers. For instance, senior executives, highly skilled workers, and sales professionals, all of whom are more likely than the average worker to be exposed to important trade secrets, could be subject to more lenient standards for permitting the use of non-competes, or they could be exempt from a ban altogether.

Senior executives are frequently privy to the most sensitive and proprietary information in any workplace; regardless of the industry, their discretion is vital to our national economy, and non-competes should therefore be enforceable by their employers. For the same reasons senior executives should be exempt, higher-wage workers and sales professionals should be exempt. Their employers should be able to enforce the protection of their proprietary knowledge. Similarly, independent contractors theoretically have a greater level of negotiating power than other workers, so they should be presumed capable of negotiating an agreement with which they are satisfied.

Independent insurance agencies are often the incubators of future business owners who eventually leave to develop their own insurance agencies. That progression facilitates the creation of new job opportunities and provides economic value in the communities and states in which they operate. Independent insurance agencies both power and protect local economies, and their workers are frequently highly skilled and commensurately compensated.

Should the FTC opt to proceed with some version of a ban on non-competes, we encourage the agency to incorporate both a rebuttable presumption and a worker differentiation scheme.

XII. NPRM Effective Date is Unworkable

The rule proposes an effective date of 60 days and a compliance date of 180 days from the date of publication of a final rule in the Federal Register. Employers would be required to rescind all existing non-compete clauses and agreements within 180 days of the date of publication of the final rule. Then, following the rescission, employers would be required to provide notice of the rescission to all affected current and former workers, "in an individualized communication," within 45 days of the rescission date. Employers who have relied extensively on non-compete clauses and agreements over a course of years will find this timeframe challenging, particularly in light of the requirement that each current and former worker be communicated with individually.

XIII. Conclusion

The Federal Trade Commission does not have the authority to promulgate a rule banning non-compete clauses and agreements in the absence of an explicit delegation of such power by Congress. The NPRM is overly broad and would unfairly impede business practices nationwide. It constitutes an improper incursion into areas of law traditionally left to the states and would improperly preempt existing state law. Additionally, non-compete clauses and agreements serve many valuable purposes in the labor market and should be permitted to continue to serve those purposes.

Finally, the FTC has exacerbated existing economic uncertainty by its stated commitment to banning not only non-compete provisions and agreements but also their "functional equivalents." We urge the FTC to withdraw this proposed rule.

As always, we appreciate the opportunity to provide the independent agency perspective. Please contact me at lpachman@pianational.org or (202) 431-1414 with any questions or concerns. Thank you for your time and consideration.

Sincerely,

Lauren G. Pachman
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