Before the
FEDERAL TRADE COMMISSION
Washington, DC

Notice of Proposed Rulemaking	)	
	)	FTC-2023-0007-0001
Noncompete Clause Rule	)	

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

I. INTRODUCTION

The American Antitrust Institute (AAI) submits these Comments in response to the Federal Trade Commission's ("FTC's" or "Commission's") Notice of Proposed Rulemaking ("NPRM") on the Non-compete Clause Rule ("proposed rule") in Docket FTC-2023-0007-0001.[1] The proposed rule provides that it is an unfair method of competition under, and therefore a violation of, Section 5 ("S.5") of the Federal Trade Commission Act,[2] for an "...employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause."[3] The Commission solicits public comment on the NPRM, which AAI respectfully provides below.

AAI is an independent, nonprofit organization with a mission to promote competition that protects consumers, businesses, and society.[4] Over the last two decades, AAI has filed numerous comments in NPRMs and notices of inquiry on proposed guidelines at the U.S. antitrust agencies and

[1] Fed. Trade Commn., Notice of Proposed Rulemaking: Non-Compete Clause Rule, 88 FR 3482 (Jan. 19, 2023) ("NPRM," "Proposed Rule," or "Rulemaking").
[2] 15 U.S. Code § 45.
[3] NPRM, *supra* note 1, at p. 3521.
[4] AAI serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, please visit www.antitrustinstitute.org.

regulatory authorities.[5] AAI's goal in providing comments is to aid agencies in promulgating rules and guidance that support robust competition and make the best use of agency enforcement and policy tools for achieving pro-competition goals.

AAI applauds the FTC for exploring the use of rulemaking to address a major competition concern in labor markets. AAI's comments focus on how the FTC can minimize potential setbacks for the proposed rule that could arise on judicial review. One issue is how a final rule could be better supported by additional studies and more sophisticated analysis of economic evidence, including meta-analysis, to reinforce the basis upon which a near total ban on non-competes rests. A second issue is how the Commission can and should deploy other policy tools, such as guidelines, to aid transparency and predictability regarding how the agencies will go about evaluating whether non-compete clauses are anti-competitive.

II. ANTITRUST'S NEEDED FOCUS ON LABOR MARKET COMPETITION AND OVERVIEW OF THE PROPOSED RULE

Rising concern over the harm declining competition causes workers is backed by an expanding body of economic evidence.[6] Anticompetitive practices such as wage fixing, no-poach agreements, and non-compete clauses restrict competition in labor markets. Mergers that create more powerful buyers of labor, with greater bargaining power and enhanced incentives to depress wages and benefits, are now more common. Antitrust has only recently begun to address such issues in force. Several public and private antitrust cases involving wage fixing and no-poach agreements have been brought and won.[7] Just before the FTC issued the NPRM, it brought a number of cases involving non-compete

[5] *See, e.g.,* Public Comments and Testimony, AMERICAN ANTITRUST INST., https://www.antitrustinstitute.org/work-products/type/public-comments/.
[6] *See, e.g.,* Randy Stutz, The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice, AMERICAN ANTITRUST INST. (Jul. 31, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0.pdf.
[7] *See, e.g.,* Deslandes et al. v. McDonald's USA, Brief of the American Antitrust Inst. as Amicus Curie, Nos. 22-2333 and 22-2334 (7th Cir., Nov. 9, 2022), https://www.antitrustinstitute.org/wp-content/uploads/2022/11/TSAC-AAI-BRIEF-22-2333-AND-2334-.pdf. *See also* U.S. v. Ryan Hee, Case 2:21-cr-00098-RFB-BNW (Mar. 30, 2021, D. Nev.).

clauses.[8] And recently, the DOJ prevailed in the Penguin-Simon Schuster merger where the government alleged harm in a labor market.[9]

Anticompetitive agreements and mergers that affect labor markets reduce competition between employers, but also between workers. As a result, workers suffer from lower wages and benefits and a loss of bargaining power. And while it is not necessary to show that harm in an input market is transferred to an output market to establish an antitrust violation,[10] many labor market effects spill over to product and service markets, compounding their harmful effects. As noted in the NPRM, the effect of a non-compete clause on restricting labor mobility is likely a major mechanism through which harm is transferred to output markets where consumers feel adverse effects through higher prices, lower quality, and less innovation.[11]

Anticompetitive mergers and restrictive conduct that put labor in the cross-hairs demonstrate the importance of vigorous antitrust enforcement in labor markets. In promoting competition in labor markets, the Commission has chosen rulemaking as a policy tool to address the harmful effects of non-compete clauses. The proposed rule would effectively prohibit non-compete clauses other than in very limited circumstances (i.e., a narrow sale-of-business exception) and would cover employees, independent contractors, interns, and volunteers.[12] The proposed rule would also extend to "de facto" non-compete provisions that have the effect of prohibiting workers from seeking or accepting employment or operating future businesses.[13]

De facto non-compete provisions include broad non-disclosure agreements that effectively preclude a worker from working in the same field and requirements that workers repay training costs.

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[8] FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers, FED. TRADE COMM'N. (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers.
[9] United States v. Bertelsmann SE & Co., Slip Op. at 21 n.13, 77, 79-80, No. 1:21-cv-02886-FYP (Nov. 7, 2022).
[10] *Id.*
[11] NPRM, *supra* note 1, at p. 3489.
[12] *Id.,* at p. 3511.
[13] *Id.,* at p. 3484.

The proposed rule sets forth a functional test for what constitutes an actual or de facto non-compete clause. This functional test 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."[14]

III. A FINAL RULE COULD BE BETTER SUPPORTED BY ADDITIONAL STUDIES AND MORE SOPHISTICATED ANALYSIS OF ECONOMIC EVIDENCE

AAI urges the Commission to frame a final rule that is designed to withstand judicial review. A major feature of a final rule should be a compelling argument for why there is sufficient economic evidence to support a near-total ban on non-compete clauses *and* an adequate systematic review of that evidence. Indeed, the more sweeping a policy proposal, the larger are its potential impacts, and the more systematic should be an assessment of the available economic evidence to support it. The Commission's literature review of economic studies on non-compete clauses plays a critical role in the NPRM because it serves as the primary support for a near total ban, as well as the analysis of the benefits of the proposed rule.[15] The NPRM requests public comment on all aspects of its description of the literature.[16]

A. The Literature Review Reveals a Need for Additional Studies on Non-Competes

Section II.B. of the NPRM contains a major exposition on the evidence relating to non-compete clauses. Citing more than 40 studies, the NPRM unpacks the literature on the effects of non-compete clauses on labor markets and product and service markets. The survey on labor market effects covers five major areas: the prevalence of non-compete clauses; effects on earnings of workers across the labor force; effects on earnings of workers not covered by non-compete clauses; earnings and distributional effects; and job creation.[17] The literature review on product and service market effects

[14] *Id.,* at p. 3509.
[15] *Id.,* at §VI.
[16] *Id.*, at p. 3493.
[17] *Id.*, at pp. 3484-3489.

covers six major areas: effects on labor mobility; consumer prices and concentration; foreclosure of competitors' ability to access talent; new business formation; innovation; and training and other investment.[18]

The literature review raises a number of questions that AAI urges the Commission to resolve in order to increase the chances of success on judicial review. First, AAI observes that there are gaps in the literature across the 11 major areas surveyed in the NPRM. For example, most of the economic evidence on labor market effects goes to the use of non-competes and the effects of non-competes on workers. While these two categories of evidence are particularly compelling, there are relatively few studies that address other important adverse effects of non-competes, such as on workers not covered by non-competes, distributional effects, and effects on job creation. Likewise, most of the literature on product/service markets goes to the harmful effect of non-competes on labor mobility in downstream markets, new business formation, and innovation. Here again, there are relatively few studies that examine the effects on other important metrics, such as consumer prices and concentration, foreclosure of rivals' ability to attract talent, and on training and other investment.

There are, therefore, some gaps in the literature. And while a major purpose of a literature review is to reveal such gaps, the NPRM does not address their ramifications for the proposal to ban almost all non-competes. AAI thus urges the Commission to identify deficits in the literature and pursue ways to address them, or to narrow the scope of literature to that which can best support a proposed rule.

Second, the studies included in the survey examine the effects of non-competes on more granular features of competition. But the analysis of the effects of non-competes on broader structural and performance metrics of competition are particularly important for supporting a proposal as sweeping as what is contained in the NPRM. Some studies assess effects on the structural features of

[18] *Id.*, at pp. 3488-3493.

labor and product/service markets, including concentration, new business creation, and entry and mobility barriers. But fewer studies assess the effects of non-competes on important performance metrics in labor and product/service markets, including, for example, rates of job offers, markups, profits, and comparative firm performance.[19] To the extent such literature is not available, AAI urges the Commission to consider ways in which to augment the existing body of empirical work, or to consider other analytical tools that better address structural- and performance-based effects.

Third, the NPRM's criticism of some studies of labor market and product/service market effects appears to weaken the empirical support for the scope for the proposed rule. For example, the NPRM notes that some studies are not sufficiently probative,[20] that they fail to disentangle certain effects,[21] or that do not necessarily show a certain effect.[22] As a result, the NPRM rightly gives some studies "minimal weight."[23] In general, while few literature reviews would turn up unequivocal support for a particular proposal, how the foregoing critiques are resolved relative to the broader body of literature is vitally important. Despite the Commission's concerns about some of the studies surveyed, the NPRM concludes that their results are contextually or qualitatively in line with more supportive studies, or that the weight of the studies supports the NPRM's proposal.[24] It is not clear from the NPRM, however, how these qualitative conclusions were derived. AAI urges the Commission to provide this needed clarification.

B. A Meta-Study of Empirical Work on Non-Competes Could Provide Additional Support for the Proposed Rule

AAI observes that a literature review, as a research tool, does not provide the strongest possible basis for a policy proposal as broad as what is proposed in the NPRM. Therefore, AAI

[19] Methodologies to Measure Market Competition, OECD Competition Committee Issues Paper, OECD (Jun. 11, 2021), https://www.oecd.org/daf/competition/methodologies-to-measure-market-competition.htm.
[20] NPRM, *supra* note 1, at p. 3487.
[21] *Id.*
[22] *Id.*, at p. 3487.
[23] *Id.*, at pp. 3487 and 3493.
[24] *Id.*, at pp. 3491, 3493, and 3502.

suggests that the Commission refine its analysis of the empirical work to better support the proposed rule. Reviews and assessments of research range from scholarly reviews, to scoping reviews, and systematic reviews. While the NPRM does not explain how the Commission conducted its review of the economic evidence on the effects of non-compete clauses, it appears typical of most literature reviews. As such, it is largely subjective, does not specific a research question, or set forth criteria for how results are interpreted.

AAI suggests that the Commission perform a more systematic review of the economic evidence on non-competes. Meta-analysis, or a "study of studies," is a form of systematic review that has been used a number of times to inform antitrust enforcement and policy.[25] Such a review would feature objective criteria for inclusion of studies of non-competes in the scope of the review and statistically analyze the combined results of individual studies to test for the significance of joint outcomes. These results can be helpful in answering specific questions that are relevant to policymaking. A meta-analysis of the economic studies on non-compete clauses could focus on research areas where there are a larger number of *similar* studies. These include, for example, the effects of non-competes on workers, on labor mobility, and new business formation.

IV. The FTC Should Consider Promptly Issuing Guidelines on the Use of Non-Competes

As noted above, many comments already submitted to the FTC make clear that the NPRM, if implemented as proposed, and the FTC's rulemaking authority itself, will face court challenges. Given the legal risks, AAI respectfully suggests that the agency not wait to deploy other policy tools against harmful non-competes. A multi-pronged approach would be consistent with the agency's commitment in proposing the NPRM rule to "make progress on the agency's broader initiative to use all of its tools

[25] *See, e.g.,* John M. Connor and Yuliya Bolotova, *Cartel Overcharges: Survey and Meta-Analysis*, 24 INT'L. J. OF INDUSTRIAL ORGANIZATION (2006) and John E. Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY, MIT Press (2014).

and authorities to promote fair competition in labor markets."[26] Parallel deployment of other policy tools at the FTC's disposal is especially important because, as the FTC has notes and AAI agrees, the systemic problem of non-competes continue to cause a range of harms including artificially reducing workers' wages, stifling new businesses, and hindering economic liberty.[27]

Several other tools are available to the FTC and the DOJ to discourage harmful non-compete clauses and to support competition in labor markets more generally. Primary among these are direct challenges to mergers that strengthen buyer power vis-à-vis labor, and continued vigorous enforcement actions against anti-competitive non-compete, wage fixing, and no-poach agreements. Complementary to that, however, are other policy tools such as guidelines that can provide more general direction for the agency, the business community, and the public. AAI urges the Commission to consider promptly issuing guidelines on non-compete clauses. As they do on the merger and other fronts, guidelines can have an important deterrent effect that works differently from compliance and sanction-oriented approaches.[28]

A. Well-Crafted Guidelines Can Achieve Many of the Goals of Rulemaking

Well-crafted guidelines can achieve many of the goals of rulemaking without the legal uncertainties, for several important reasons.[29] First, guidelines, like the proposed rule, can reduce ambiguity around the legality of non-competes. Guidelines that are informed by public comment in the NPRM could, for example, clarify what kinds of non-competes the agencies would consider *per se* illegal and which might be evaluated under the rule of reason. Distinguishing between the two would

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[26] FTC Proposes Rule to Ban Non-compete Clauses, Which Hurt Workers and Harm Competition, FED. TRADE COMM'N. (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-non-compete-clauses-which-hurt-workers-harm-competition.
[27] Fact Sheet, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, FED. TRADE COMM'N. (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf.
[28] *See, e.g.,* Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647 (2013), at p. 2658.
[29] *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 UNIV. CHI. L. REV. 363 (2020) (Describing rulemaking as (1) reducing ambiguity around what the law is, (2) reducing opacity and enhancing transparency, and (3) reducing the burdens of litigation and enforcement.)

allow enforcers to prioritize eliminating the most competitively harmful types of non-compete clauses and to put pressure on businesses to stop using them.

Second, guidelines, like rulemaking, increase transparency and encourage broader public participation. To better explain the agency's position, guidelines could describe the features of a non-compete clause that would almost always be deemed anticompetitive, such as a boilerplate clause in a labor contract that is not subject to negotiation. Guidelines could further identify why certain non-compete clauses are more likely to be sanctioned, such as when they bind workers whose compensation falls below a certain level.

Finally, guidelines issued by the antitrust agencies, despite their non-binding nature, have already proven to be effective means of providing persuasive frameworks to judges. The Horizontal Merger Guidelines in their various iterations have been frequently cited approvingly by courts.[30] Changes to the Merger Guidelines, strong evidence suggests, profoundly influence the development of antitrust caselaw.[31] For example, when the 1982 Merger Guidelines introduced the HHI to replace the CR4 measure of concentration, courts, previously hesitant to adopt the newer measure, quite markedly changed direction and followed suit. More recently, the 2010 Merger Guidelines have been credited for courts' increased willingness to block mergers based on unilateral effects.[32] Moreover, although not immediate, the courts have historically adopted new guidelines relatively quickly.[33]

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[30] Hillary Greene, *Guideline Institutionalization: The role of merger guidelines in antitrust discourse,* 48 WM & MARY L. REV. 771 (2006), Graphs 2-3 (tracking citations to merger guidelines in Section 7 cases from 1970-2003).
[31] *Id.,* p.788-796. *See also* Leah Brannon and Kathleen Bradish, *The Revised Horizontal Merger Guidelines: Can the Courts Be Persuaded?* THE ANTITRUST SOURCE (Oct. 2010) (citing other examples of judicial adoption of changes in Merger Guidelines); Judd Stone and Joshua Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. OF INDUSTRIAL ORG. 145 (Jan. 2011) (collecting commentary on effect of Merger Guidelines on antitrust law).
[32] Joseph Farrell and Carl Shapiro, *The 2010 Horizontal Merger Guidelines After Ten Years*, 58 REV. OF INDUSTRIAL ORG. (2021).
[33] Greene, *supra* note 30.

B. Guidelines Provide Benefits That Rules Do Not

In addition to fulfilling many of the purposes the FTC has cited for choosing rulemaking, guidelines provide some benefits that rules do not. For example, as labor markets in a fast-changing economy continue to evolve, agency guidance may prove more "flexible and adaptable" than formal rulemaking.[34] Guidelines are also compliance-friendly. The antitrust agencies, the courts and private plaintiffs can all play a part in enforcing them. Rules, on the other hand, rely on a sanctions-based approach, and are therefore highly resource-intensive. As the FTC has noted, the sheer number of businesses using non-compete clauses today is staggering. To enforce compliance with the notice provisions of the NPRM alone, it would take the time and energy of a massive number of agency staff.

With today's resource-limited antitrust enforcement agencies, parties subject to a rule may have incentives to avoid compliance. They may, for example, bank on going undetected or unpunished as legal challenges to the rule wind their way through the courts.[35] Thus, businesses may feel little need to proactively fix their employment agreements. Guidelines help open the door right away for anyone with the standing to bring suit to challenge problematic non-competes. In such an environment, businesses have greater incentives to proactively eliminate non-compete clauses. We have already seen the effect of the FTC's attention to the issue well before the NPRM was issued. For example, some large employers, like Microsoft, have publicly announced the end of non-competes in any of their employment contracts.[36] AAI believes that well-crafted and promptly-issued guidelines will put more

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[34] *See, e.g.,* Cameron F. Kerry, John B. Morris, Jr., Caitlin t. Chin, and Nicol E. Turner Lee, *Bridging the Gaps: A path forward to federal privacy legislation*, GOVERNANCE STUDIES AT BROOKINGS (Jun. 2020), at p. 51, https://www.brookings.edu/wp-content/uploads/2020/06/Bridging-the-gaps_a-path-forward-to-federal-privacy-legislation.pdf.

[35] *See, e.g.,* Najah A. Farley, *How Non-Competes Stifle Worker Power and Disproportionately Impede Women and Workers of Color*, NATIONAL EMPLOYMENT LAW PROJECT (May 18, 2022), https://www.nelp.org/publication/faq-on-non-compete-agreements/; Maurer, Roy, *How Should Employers Respond to the Proposal to Ban Non-Competes?* SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Jan. 19, 2023), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/how-should-employers-respond-ftc-proposal-ban-noncompete-agreements.aspx (noting that "it's premature for companies to make too detailed or comprehensive a plan for complying with the proposed rule.").

[36] *Microsoft says it will not enforce non-compete clauses in U.S. employee agreements*, REUTERS (Jun. 9, 2022), https://www.reuters.com/legal/litigation/microsoft-says-it-will-not-enforce-non-compete-clauses-us-employee-agreements-2022-06-08/.

effective pressure on businesses than a rulemaking whose fate is caught up in a web of potentially lengthy legal challenges.

The rulemaking and guidelines paths are not necessarily mutually exclusive. In fact, their goals can be highly complementary. Strengthening the analysis of economic evidence that supports the NPRM, as AAI advises above, will also support future enforcement actions by public and private enforcers. Judges are more likely to adopt guidelines and to do so quickly if presented with a robustly supported economic framework for understanding the harm. Finally, as guidelines encourage more legal challenges to non-compete clauses, the agency's experience with the provisions will increase, strengthening the case for any potential future rulemaking.[37]

V. Conclusion

In conclusion, AAI applauds the work the FTC continues to do to bring attention to the widespread harms non-compete clauses have on workers and consumers. It further appreciates the focus both antitrust agencies have brought to competition issues in labor markets generally. In both spheres, however, there is still much work to be done. To maximize the effectiveness and speed with which the agencies can address these pressing issues, AAI encourages a multi-pronged approach. The FTC should:

- **Work to develop the strongest possible economic support for any rulemaking it may adopt, including by identifying areas where further empirical work is necessary and conducting meta-analysis.**
- **Promptly issue guidelines to encourage enforcers to target the most harmful types of non-competes and incentivize businesses to proactively eliminate their use.**

AAI also encourages both agencies to continue to bring enforcement actions that address competition issues in labor markets, including by taking into account these effects as a regular part of

[37] Chopra & Khan, *supra* note 29 at p. 371 ("extensive enforcement record" as a factor weighing in favor of rulemaking); Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, Commission File No. P201200-1, p. 1 (criticizing NPRM for, among other things, acting despite lack of enforcement experience).

merger review. Only by addressing the issue from multiple angles will the agencies effectively reduce anti-competitive conduct in labor markets.

Respectfully submitted,

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