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April 17, 2023

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

Submitted via: <https://www.regulations.gov>

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

Dear Federal Trade Commission:

The Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the request for comments on the *Non-Compete Clause Rule* notice of proposed rulemaking published in the Federal Register on January 19, 2023 (“Notice”).

IPO is an international trade association representing a “big tent” of diverse companies, law firms, service providers and individuals in all industries and fields of technology that own, or are interested in, intellectual property (IP) rights. IPO membership includes over 125 companies and spans over 30 countries. IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; supporting and advocating for diversity, equity, and inclusion in IP and innovation; and disseminating information to the public on the importance of IP rights.

IPO’s vision is the global acceleration of innovation, creativity, and investment necessary to improve lives. The Board of Directors has adopted a strategic objective to foster diverse engagement in the innovation ecosystem and to integrate diversity, equity, and inclusion in all its work to complement IPO’s mission of promoting high quality and enforceable IP rights and predictable legal systems for all industries and technologies.

IPO is grateful for this opportunity to share feedback. IPO’s members have extensive experience with the intellectual property system. IPO will primarily focus its comments below on the proposed rule’s potential impact on the protection of intellectual property and innovation embodied in confidential business information, technical information, and trade secrets. Maintaining this protection is crucial to U.S. industry, both to allow for a fair and predictable playing field in the U.S. and to allow U.S. companies to continue to compete with global competitors. Our organization hopes that these comments will be helpful to the FTC’s decision-making process.

1. *Non-Compete Clauses and Non-Disclosure Agreements Provide Important Protections Not provided by Trade Secret Laws or Other Similar Laws.*

In the experience of IPO's members, non-compete clauses are a legitimate and important tool organizations use to protect trade secrets and confidential information, which are vital to the nation's economy and security.¹ Theft of trade secrets and confidential information by employees does significant damage to our economy and undermines the incentive to invest in research and development. Non-compete clauses provide important protections that are not provided by trade secret laws or other similar laws.

IPO appreciates the FTC's desire to ensure fair methods of competition for employees and to address the consequences of non-compete clauses on employees. Such clauses have been and should remain subject to reasonableness restrictions.² Over the past decade, the majority of states updated their non-compete laws and most added further restrictions to address situations states viewed as inappropriate.³ To the extent there are problematic aspects of non-compete clauses, states have recognized and are actively dealing with these issues.

IPO has many concerns with the impact of the proposed rule. It would advantage companies outside the U.S. and the resulting loss of trade secrets and confidential information has the potential to harm our national security. The proposed "functional" test is unclear and could result in the questioning of existing non-disclosure agreements, which would further weaken protection of trade secrets and confidential information. The proposed rule applies equally to lower wage employees and senior employees even though there are important differences between the two groups, as explained below.

The FTC's proposal would override and deem inherently "unfair" a form of agreement enforced by courts innumerable times over hundreds of years.⁴ The experience of IPO members has been that reasonable non-compete clauses are vital for adequately protecting trade secrets and confidential information. IPO believes that there is a prevailing public misunderstanding regarding the role of non-compete and non-disclosure agreements in protecting trade secrets, which IPO attempts to clarify in these comments.

¹ See President's Statement on Signing the Economic Espionage Act of 1996 ("Trade secrets are an integral part of virtually every sector of our economy and are essential to maintaining the health and competitiveness of critical industries operating in the United States. Economic espionage and trade secret theft threaten our Nation's national security and economic well-being.") (Oct. 11, 1996), available at <https://www.presidency.ucsb.edu/documents/statement-signing-the-economic-espionage-act-1996>.

² Virtually every state that permits non-competes requires them to be reasonable. See Russell Beck, Beck Reed Riden LLP, *Employee Noncompetes: A State-by-State Survey* (February 11, 2023), available at <https://beckreedriden.com/50-state-noncompete-chart-2/>.

³ See Russell Beck, "Almost 60 percent of states updated their noncompete laws in the last decade," available at <https://faircompetitionlaw.com/2023/02/12/noncompete-law-changes-in-the-last-decade-updated-february-12-2023/>.

⁴ See, e.g., *Mitchel v Reynolds* (1711) 1 PWms 181.

2. *Non-Compete Clauses Provide Important Protections that Organizations Cannot Achieve with Trade Secret Laws Alone*

U.S. businesses lose an estimated \$180 billion to \$450 billion to trade secret misappropriation each year.⁵ Non-compete clauses help address some of the many limitations that make trade secret enforcement difficult.

First, it is very difficult to detect and prove trade secret misappropriation. By definition, a trade secret is information that can be used by a company in secret without the information being “readily ascertainable” by others.⁶ Thus, when misappropriators implement stolen trade secrets in their own business, it is usually impossible to detect that use from outside appearances. Indeed, the likeliest sources of potential evidence are controlled by the guilty parties and are usually inaccessible to the trade secret owner. This often leaves a wronged trade secret owner without a remedy, as mere suspicion of trade secret misappropriation is not enough of a basis to justify bringing a lawsuit. Even where it might be possible to bring a suit, due to the lack of access to evidence there is often not enough knowledge to provide a business justification for the significant risk, expense and internal disruptions that come with bringing a lawsuit.

Second, trade secret litigation is expensive and many of the key issues are unpredictable, such as whether a court will view the owner’s protective measures as reasonable under the circumstances, a standard that is flexible but subjective and contextual.⁷ In general, our economy benefits to the extent we avoid litigating disputes. Trade secret cases are fact intensive and require litigating challenging questions such as the precise contours of the stolen trade secrets.⁸ Litigating the theft of trade secrets and other confidential information can be even more disruptive, and harder to settle, than other types of litigation in view of confidential information that by its nature can be built through decades of committed protection and investment.

Third, trade secret suits typically arise after irreparable harm has already occurred. Suspicion of trade secret misappropriation often emerges long after the trade secrets were misappropriated and sometimes after the trade secrets have been publicly disclosed. As courts have recognized, once a trade secret is disclosed, its value to the owner cannot be

⁵ See “Safeguarding Trade Secrets In The United States,” hearing before the U.S. House of Representatives, Commerce Committee, Subcom. on Courts, Intellectual Property & the Internet, April 17, 2018 (statement of Chairman Goodlatte), available at <https://www.govinfo.gov/content/pkg/CHRG-115hhrg32940/html/CHRG-115hhrg32940.htm>.

⁶ See 18 U.S.C. § 1839(3)(B) (defining “trade secret” for the purposes of the Economic Espionage Act and Defend Trade Secrets Act).

⁷ See, e.g., Bloomberg Law, “Costs Soar for Trade Secrets, Pharma Patent Suits, Survey Finds” (Sept. 10, 2019), available at <https://news.bloomberglaw.com/ip-law/costs-soar-for-trade-secrets-pharma-patent-suits-survey-finds> (reporting median litigation costs in trade secret cases from \$7.5 million to \$4.1 million); 18 U.S.C. § 1839(3)(A) (requiring that the owner has taken “reasonable measures” to keep the information secret).

⁸ See The Sedona Conference, Working Group on Trade Secrets, “Commentary on the Proper Identification of Asserted Trade Secrets in Misappropriation Cases,” 22 SEDONA CONF. J. 223, at 234 (2021) (April 2020) (explaining why the identification of asserted trade secrets poses special challenges in litigation), available at https://thesedonaconference.org/sites/default/files/publications/3_Identification_of_Trade_Secrets_0.pdf.

fully recovered.⁹ “The very nature of a trade secret mandates that misappropriation will have significant and continuous long-term effects,’ such as permanent loss of competitive business advantage or market share.”¹⁰ For this reason, courts grant injunctions in trade secret cases more often than other types of litigation, but the availability and effectiveness of such injunctions is far from certain.

In sharp contrast, non-compete clauses allow businesses to protect against misappropriation *before* it happens. Non-compete clauses serve to deter workers from misappropriating a former employer’s confidential information and trade secrets for the benefit of a competitor because contractual remedies are more straightforward and the restricted conduct more clearly understood by the parties (and therefore easier to assess before deciding to litigate as well as to prove or to disprove). Violations of non-compete clauses are easier to detect, easier to remedy, and, when they result in litigation, have more predictable outcomes. Former employers tend to have easier access to evidence of imminent non-compete clause violations and can seek injunctions before irreparable harm occurs. Non-compete clauses thus mitigate the risk of a departing employee’s unintentional disclosures to a new employer, as well as aid awareness and sensitivity of the new employers in mitigating risks of potential disclosures, as the protection of confidential information in some circumstances is immediately imperiled once the employee takes the new job.

3. *Evidence and Experience of IPO Members Show that Reasonable Non-Compete Clauses Are Necessary*

The Notice concludes from the fact that there were 1,382 trade secret lawsuits filed in federal court in 2021 that employers view trade secret laws as a sufficient means of protecting their trade secrets.¹¹ IPO believes that the high number of lawsuits shows the opposite—*i.e.*, that trade secret theft is a significant problem despite the existence of trade secret laws at both federal and state levels. Given the detection difficulties and litigation hurdles discussed above, the actual scope of trade secret theft must be significantly greater than the number of lawsuits filed. Businesses generally view trade secret litigation as a last-resort option because it is costly, slow, disruptive, and often fails to provide an adequate remedy for the loss of the secret. Trade secret litigation is particularly problematic when criminal theft occurs and the government institutes an investigation that might take precedence over the trade secret owner’s desire for private enforcement.¹² If a trade secret owner has proof that an employee misappropriated their trade secret, that employer can and may sue under trade secret law, but businesses view filing a lawsuit as a worst-case outcome that is unlikely to fully make up for their loss.

The Notice concludes that non-compete clauses are unnecessary because the agency “is not aware of any evidence non-compete clauses reduce trade secret

⁹ See *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999) (“We have held that ‘loss of trade secrets cannot be measured in money damages’ because ‘[a] trade secret once lost is, of course, lost forever.’”) (quoting *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984)).

¹⁰ *Arminius Schleifmittel GmbH v. Design Indus., Inc.*, No. 1:06CV00644, 2007 U.S. Dist. LEXIS 10847, at *22 (M.D.N.C. Feb. 15, 2007) (quoting *Barr-Mullin, Inc. v. Browning*, 424 S.E.2d 226, 230 (1993)).

¹¹ See Non-Compete Clause Rule, 88 Fed. Reg. at 3506.

¹² See Peter Menell et al., TRADE SECRET CASE MANAGEMENT JUDICIAL GUIDE, § 1.2.3, at 1-6 (describing various tensions that “courts and litigants need to navigate when dealing with potentially parallel civil and criminal proceedings”), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360102.

misappropriation or the loss of other types of confidential information.”¹³ IPO notes, however, that reliable empirical evidence of trade secret theft is hard to obtain for the reasons discussed above, such as the difficulty detecting misappropriation. In addition, California has stricter limits on non-compete clauses and there are a high number of trade secret lawsuits in that state, which is evidence that stricter limits on non-competes may result in more alleged losses of trade secrets.¹⁴

Further, most trade secret misappropriation is by former employees,¹⁵ who have access to the information, understand its value, and know how to use it. Non-compete clauses reduce the risk that an employee will use confidential information in the service of their new employer by reasonably delaying the date when they can work for certain types of competitors without restricting their ability to obtain other employment immediately. Some employees intentionally misuse a former employer’s confidential information when they join a new employer, but often the misuse occurs innocently due to the employee’s misunderstanding of the law and their obligations. As some courts have recognized, misuse of a former employer’s confidential information in some situations (but not all) may be inevitable due to the nature of the new position. Arguably, concluding that non-compete clauses can be banned because trade secret theft is prohibited by law would be like concluding that car doors can be made without locks because car theft is against the law. Even though there are laws against stealing, to adequately protect their assets, car owners should use car locks to prevent car theft and businesses should be able to use reasonable non-compete agreements to reduce the risk and impact of trade secret misappropriation.

As justification for the change that the proposed rule would impose, the Notice relies greatly on its reading of “current economic evidence about the consequences of non-compete clauses.”¹⁶ The Notice contains a long analysis of various studies and other sources. Rather than comment on each individually, IPO directs the FTC to the recent analysis of Jonathan Barnett and Ted Sichelman that reviews the literature comprehensively and finds little support for the view that non-compete clauses hurt innovation.¹⁷ They show that “all of the major economic studies claiming negative effects on innovation and economic growth from noncompetes have significant errors or are incomplete” and that “these studies are produced by economists and business school professors whose interpretations of state law are over-simplified or contain serious errors.”¹⁸ They compare the economies of Silicon Valley and Route 128 in Massachusetts and show there is little reason to attribute Silicon Valley’s success to differences in the enforceability of non-compete clauses.¹⁹ As they explain, there are various reasons for

¹³ See Non-Compete Clause Rule, 88 Fed. Reg. at 3505 (“The Commission’s understanding is there is little reliable empirical data on trade secret theft and firm investment in trade secrets in general, and no reliable data on how non-compete clauses affect these practices.”)

¹⁴ See Russell Beck, “California Trade Secrets Litigation Supplants Noncompete Litigation,” *available at* <https://faircompetitionlaw.com/2017/06/25/california-trade-secrets-litigation-supplants-noncompete-litigation/>.

¹⁵ See The National Law Review, “Workplace Confidential: Preventing Former Employees from Using Your Trade Secrets” (Aug. 24, 2020), *available at* <https://www.natlawreview.com/article/workplace-confidential-preventing-former-employees-using-your-trade-secrets>.

¹⁶ See Non-Compete Clause Rule, 88 Fed. Reg. at 3482.

¹⁷ See Jonathan Barnett & Ted Sichelman, “The Case for Noncompetes,” U. OF CHICAGO L.R. 953 (Vol. 87, Issue 4, Art. 2).

¹⁸ Jonathan Barnett and Ted Sichelman, “The Flawed Case Against Noncompetes,” THE HILL (Jul. 29, 2021), *available at* <https://thehill.com/opinion/judiciary/565333-the-flawed-case-against-noncompetes/>.

¹⁹ See Jonathan Barnett & Ted Sichelman, “The Case for Noncompetes,” U. OF CHICAGO L.R. at 963.

Silicon Valley's success and it would be overly simplistic to conclude that California's vibrant economy was caused by the state's limits on non-compete clauses. They also document a resurgence of Route 128 that contradicts the basic premise that non-compete clauses harm innovation.²⁰ As a result of California making it harder to enforce preventative measures such as non-compete clauses, some of the thefts that would have been prevented by non-compete agreements result in trade secret lawsuits because there is often no other mechanism of redress available. It stands to reason that non-compete clauses, by delaying an employee from taking employment in a competing business, reduce the leakage of confidential information from an employee to that new company.

4. *The Proposed "Functional" Test is Unclear and Likely to Create Unpredictability*

The proposed "functional" test for treating certain post-employment restrictive covenants as banned *de facto* non-compete clauses is too vague to provide the level of predictability that businesses and employees deserve. The proposed test—whether the clause "has the effect of prohibiting the worker from seeking or accepting employment"²¹—does not provide meaningful guidance for drafting covenants with confidence that the FTC or a court will not find them objectionable. While a given restriction might make alternative employment less attractive or more difficult to obtain, it is not at all apparent what might trigger the prohibited "effect" when drafting an agreement. This creates unknown (and unknowable) risks for both employer and employee. In contrast, current state statutes and developed case law, which examine enforceability of non-compete covenants based on factors such as the reasonableness in scope, geography and duration, have protected employees and provided employers with predictability in drafting and enforcement. The Notice has not demonstrated that such existing state laws are inadequate.

IPO is particularly concerned with the Notice's suggestion that non-disclosure agreements (NDAs) could fall afoul of the proposed functional prohibition, which the Notice would codify with an NDA-specific section of the rule.²² NDAs play a critical role in the protection of confidential information and trade secrets by safely enabling an employer's disclosure of such information to its workers so they can carry out their job functions. Trade secret statutes define "misappropriation" to include acquiring a secret from someone who has a duty to keep it secret;²³ that duty is typically embodied in an NDA. In addition, employers often depend on NDAs among key reasonable measures to protect their information and thus qualify it as a trade secret.²⁴

Under the proposed rule, an NDA functions as a non-compete clause if "written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment."²⁵ No definition or other guidance about how to

²⁰ *Id.* at 1006-09.

²¹ See Non-Compete Clause Rule, 88 Fed. Reg. at 3535 (proposed section 910.1(b)(2)).

²² See *id.* (proposed section 910.1(b)(2)(i)).

²³ See, e.g., 18 U.S.C. § 1839(5)(B)(ii) (specifying types of misappropriation under the Economic Espionage Act and Defend Trade Secrets Act).

²⁴ See 18 U.S.C. § 1839(3)(A) (defining "trade secret," for the purposes of the Economic Espionage Act and Defend Trade Secrets Act, as information for which the owner has taken reasonable measures to keep such information secret).

²⁵ See Non-Compete Clause Rule, 88 Fed. Reg. at 3535 (proposed section 910.1(b)(2)(i)).

determine whether a position is in the “same field” is provided.²⁶ Without adequate guidelines, this test creates profound uncertainty and risk that an NDA may be deemed a *de facto* non-compete clause, which could undermine the company’s ability to protect its information assets and to assert trade secret misappropriation.

The Notice cites as support for this proposed rule, *Brown v. TGS Management*, reading the case as holding that the NDA at issue was too broad, and that it restrained a far broader scope than is typical, because it defined “confidential information” as any information that is “usable in” or “relates to” the securities industry.²⁷ However, IPO believes that *Brown*, and the occasional case like it, are outliers. They should not be the reason for regulatory intervention and the imposition of a broad and unclear national rule that would leave employers unsure what facially valid restrictions might later “effectively preclude” some type of work. To the extent cases of overly broad and vague NDAs occasionally arise, courts are available to step in and address them.

Employers will not be equipped to determine whether particular employee confidentiality agreements fall within the *de facto* rule. This would make compliance with the proposed regulation even more difficult, a result that is particularly troubling given the proposed rule’s requirement that all employee non-compete clauses be affirmatively rescinded and notifications be given to all current and former employees.²⁸ In addition to the scale and practical challenges of such notifications, the rescission requirements of the proposed rule create specific concerns for employers who may have NDAs with current and former employees that could be interpreted by some as impermissible *de facto* non-competes under the new rule. Employers in this position would likely seek to revise NDAs to comply with the rule. This is likely impractical for former workers (which include contractors under the rule), with the result being irrevocable loss of confidentiality protections upon which businesses have relied, perhaps for decades. This result could endanger the ability of employers to show that they have taken reasonable measures to protect their trade secrets from disclosure.

In addition, many confidentiality agreements between companies (between, *e.g.*, sellers and customers, partners to a joint development agreement, etc.) require each party

²⁶ Consider a worker who is by education and training an immunologist and under an NDA covering employer’s confidential information and trade secrets. At the time the NDA was entered into, without the FTC’s guidance, there is no context and no predictability whether “in the field” would be construed broadly, as in the field of “immunology,” or more narrowly, for example, the field of “development of specific antibodies from particular antigens,” or even more narrowly to the field of “use of a particular molecular technique such as recombinant DNA, Crispr, tissue culture, stem cell isolation or gene therapy.” Or is the field to be broadly defined by the worker’s study of a certain disease, like cancer, aging, Parkinson’s, and diabetes? These are real multidimensional uncertainties and they exist for workers, particularly those involved in research and development, quality control, and manufacturing, in the biotech, aerospace, energy, automotive, chemical, medical device, electronics, semiconductor, and artificial intelligence industries, to name a few. The problematic nature of determining “in the field” is evident from considering the different job opportunities available to workers such as recent biology graduates, *see* <https://www.utsc.utoronto.ca/aacc/career-options-after-molecular-biology-and-biotechnology>, and those in the medical device sector, *see* <https://www.srgtalent.com/career-advice/roles-in-focus/medical-devices>, and diagnostic services, *see* <https://www.healthcarepathway.com/health-care-careers/diagnostic-services/>. These handful of examples demonstrate that “in the field” is neither a useful nor a practical measure.

²⁷ *See* Non-Compete Clause Rule, 88 Fed. Reg. at 3509 (quoting *Brown v. TGS Mgmt. Co., LLC*, 7 Cal. App. 5th 303, 306, 316–19 (Cal. Ct. App. 2020)).

²⁸ *See id.*, 88 Fed. Reg. at 3535 (proposed section 910.2(b)(2)(ii)).

receiving confidential information to assure that its employees and contractors that have access to the other party's confidential information be subject to confidentiality agreements with their employer that would extend to the other party's information. The sudden and possibly irreversible loss of employee NDAs could potentially throw some employers into breach of their own NDAs with customers, vendors, partners and others. Sweeping NDAs into the non-compete rules can thus place U.S. employers at risk of losing trade secret rights and breaching their own confidentiality obligations.

For these reasons, IPO suggests that the *de facto* provisions should be excluded from any final rule and that, should the FTC go forward with its proposed ban on non-compete clauses, it should withdraw the functional test. IPO agrees that the label parties give to a clause, such as "NDA" or "non-compete agreement," do not govern its meaning (although it can indicate the parties' intent). Courts are already capable at crediting substance over form; an FTC rule on the subject, as much as it is intended to provide generally applicable guidance for all situations, is more likely to only introduce more confusion. At a minimum, if there must be a "functional test" in an FTC rule, it should also identify restrictions that are presumed valid, such as providing a safe harbor for NDAs that protect only information that is actually confidential to the employer.

5. *The Proposed Ban Would Advantage Companies Outside the United States and the Resulting Loss of Trade Secrets Would Harm National Security*

As has been widely reported, the valuable secrets of U.S. companies are under significant threat from companies outside the U.S. As described above, non-compete clauses and non-disclosure agreements allow companies to better protect confidential information and trade secrets. IPO believes it would be a mistake for the United States to impose the ban proposed in the rule, while many other major economies gave their companies an advantage by allowing reasonable use of these tools. Examples of countries that allow non-competes include China, France, Germany, and Italy.²⁹

Banning non-compete clauses in the U.S. would result in even greater loss of trade secrets to the detriment of our economy and national security. At a March 8, 2023 House subcommittee hearing entitled "Intellectual Property and Strategic Competition With China: Part 1," subcommittee Chairman Issa suggested during his questioning of a witness that, where other countries permit limited non-compete agreements, the U.S. "cannot

²⁹ See DLA Piper, "Guide to Going Global – Employment," at 96, 146, 155, and 226, available at <https://www.dlapiperintelligence.com/goinggloble/employment/> (downloaded Mar. 6, 2023). This guide, which summarizes laws on post-employment restraints for many countries, reports for example that:

China allows non-compete restrictions of less than two years, with compensation required per local rules;

France allows non-competes if justified by the company's business and employee's role and if they are essential to the protection of the company's legitimate interests, limited in time, limited in space, take into account the specificities of the employee's duties, and provide for financial compensation;

Germany allows for non-compete clauses if less than a maximum of 2 years and provided that 50% of the employee's salary is paid during the non-compete period;

Italy allows for non-competes if agreed in writing and limited in scope, territory, time and if they provide an adequate compensation.

compete against those countries if they have that kind of non-compete, essentially protecting their trade secrets and their developments, and we don't.”³⁰

Allowing U.S. non-compete clauses are particularly important in cases involving trade secret misappropriation involving jurisdictions outside the U.S., where the evidentiary burdens imposed on a plaintiff to prove that their confidential information is in the hands of another party are often insurmountable particularly because, unlike in the U.S. system, discovery is often extremely limited. In addition, companies may be hesitant to file trade secret misappropriation cases in countries whose court systems do not adequately protect the confidential information introduced into the case; by bringing a trade secret action in these countries, a U.S. plaintiff may face an even more detrimental situation because the secret could be lost to further foreign competitors in addition to the original defendant. As discussed above, reasonable non-compete clauses are a prophylactic that prevents harm, rather than attempting to discover and redress trade secret misappropriation (often with great difficulty) later. With our nation's position in the world dependent upon our ability to protect the secrecy of our most sensitive and valuable information, the FTC should not take away an effective tool and should not provide an incentive to remove sensitive jobs to jurisdictions outside the U.S. that respect reasonable non-compete agreements.

6. *Other Specific Issues Raised by the Notice, Including Distinguishing Between Different Categories of Workers*

The Notice asked for public input on two key questions underlying several “alternatives related to the rule's fundamental design.”³¹ First, the Notice seeks comment on whether it should adopt a rebuttable presumption instead of a categorical ban. The Notice acknowledges that there may be specific factual scenarios that the FTC does not currently anticipate and that do not “implicate the anticompetitive concerns the Commission is concerned about,”³² and it sees a rebuttable presumption as being advantageous because it could allow the non-compete clause to be valid in such situations. IPO is confident that there are many scenarios that no one can anticipate among the many millions of employment relationships in the United States. For this reason, and the other reasons provided in this letter, IPO recommends the FTC not issue any rule that would categorically ban non-compete clauses.

The Notice also acknowledges the concern that a rebuttable presumption approach “could foster confusion among employers and workers because the question of whether an employer may use a non-compete clause would depend on an abstract legal test rather than a bright-line rule.”³³ Again, IPO agrees that the FTC is right to have this concern. IPO is confident that the rebuttable presumption tests that the Notice describes would cause confusion among employers and workers, especially because there will be little or no case law developments to explain the rule, as the Notice acknowledges. This would undoubtedly lead to more litigation. For the reasons discussed in this letter, IPO believes

³⁰ Chairman Darrell Issa, “Intellectual Property and Strategic Competition With China: Part 1,” hearing before the U.S. House of Representatives, Commerce Committee, Subcom. on Courts, Intellectual Property & the Internet (staring at time 1:51:10) (Mar. 8, 2023).

³¹ See Non-Compete Clause Rule, 88 Fed. Reg. at 3516. The FTC intends this request for input on alternatives to satisfy a rulemaking requirement in the FTC Act. See *id.* at n. 410.

³² *Id.* at 3518.

³³ *Id.* at 3517.

that neither a categorical ban nor a rebuttable presumption is necessary nor advisable to address this issue.

Second, the Notice seeks comment on whether there should be different non-compete clause rules for “different categories of workers based on a worker’s job function, occupation, earnings, another factor, or some combination of factors.”³⁴ If the FTC does issue a non-compete clause rule, IPO recommends that the differentiation be made based on an objective standard, such as salary level, because it is important that this distinction be easily understood by all parties. There is a genuine cost to everyone if it is difficult to predict whether the non-compete ban will apply to a particular employee. It should not require expensive, burdensome and uncertain litigation to answer this question. Employers, workers, and courts all benefit from clarity and predictability.

Perhaps an optimal objective standard would be a rule that would only ban non-compete clauses for employees below a certain salary level with modest exceptions. Such a rule should account for the different costs of living in different parts of the country. Thus, for example, it could be tied into a function of the Fair Labor Standards Act or a multiple of the state poverty level or minimum wage.³⁵ In any case, whatever standard is used, the threshold should be judged as of the time the contract is executed.

There are a number of good reasons to differentiate based on a factor such as salary level. First, as the Notice acknowledges, any concerns that non-compete clauses are exploitative and coercive at the time of contracting and at the time of a worker’s potential departure do not apply to senior executives.³⁶ Second, higher-paid employees are more likely to possess confidential information and trade secrets with access to broader business context and information that could be protected by an enforceable non-compete agreement. Third, many higher paid employees have greater responsibilities and are compensated well enough to account for any reasonable limitations on their ability to compete with the company on behalf of a new employer.

The Notice states that non-compete clauses harm product markets by preventing senior executives from switching to jobs “in which they would be better paid and more productive,” thus denying them “the benefits of higher earnings through increased competition in the market for their labor.”³⁷ IPO believes, however, that as an initial matter, it is not always the case that a senior employee leaves a job to work at a competitor in order to obtain a higher salary. For example, the employee may simply choose to leave their current employer for professional development or personal reasons, or, more disconcerting to the trade secret issues at hand, they may have misused confidential information and may be separating from their current employer for cause. Further, if a senior employee does not wish to enter into a non-compete agreement, they generally have the ability to negotiate. If the FTC does issue a non-compete clause ban, it should not apply to senior employees.

³⁴ *Id.* at 3518.

³⁵ *See, e.g.*, M.G.L. c. 149, § 24L(c) (Massachusetts: “employee who is classified as nonexempt under the Fair Labor Standards Act, 29 U.S.C. 201-219”); 26 M.R.S. § 599-A (Maine: “400% of the federal poverty level”); N.H. RSA § 275:70-a (New Hampshire: “200 percent of the federal minimum wage”); R.I. Gen. Laws § 28-59-3 (Rhode Island: “employee who is classified as nonexempt under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219”).

³⁶ *See* Non-Compete Clause Rule, 88 Fed. Reg. at 3520.

³⁷ *Id.* at 3518.

7. *States Have Recognized and Are Dealing with Problematic Aspects of Non-Compete Clauses*

As laboratories of democracy,³⁸ states are actively taking various approaches to perceived problems with employee non-compete agreements.³⁹ Several set thresholds of income below which no non-compete clause is valid.⁴⁰ Several have also created categories of minimum wage and other conditions regarded as abusive.⁴¹ They have through legislation or court precedents defined duration limits for such covenants. Some states make the covenant invalid if the employer terminates employment without cause.⁴² Some states give their attorney general, courts and others authority to impose fines for abusive non-compete practices, such as inadequate notice of the covenant or flagrant over-reach of scope of the covenant, complementing long standing practice of their courts (and federal courts addressing state law issues in diversity and adjunct jurisdiction cases).⁴³ While reasonable limits on non-compete clauses are appropriate, these are already applied at the state level.

The ability of enterprises to adequately protect confidential information and trade secrets is vital to our economy. Without adequate contractual protections, employers are less likely to allow information to be shared and to invest in their employees. Some companies will be much more restrictive in the size of teams and in allowing the sharing of information across teams, even within the same company, which would inhibit innovation in the United States. Trade secret misappropriation by a departing employee does not just damage the employer, it hurts those employees who remain at that company.⁴⁴ Reasonable non-compete agreements are a legitimate and important tool that organizations should continue to have available to protect trade secrets and confidential information.

³⁸ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, dissent) (“Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

³⁹ See Russell Beck, “Almost 60 percent of states updated their noncompete laws in the last decade,” available at <https://faircompetitionlaw.com/2023/02/12/noncompete-law-changes-in-the-last-decade-updated-february-12-2023/>; Russell Beck, “42 noncompete bills in 18 states – and 3 federal bills,” available at <https://faircompetitionlaw.com/2023/02/05/42-noncompete-bills-in-18-states-and-3-federal-bills/>.

⁴⁰ See Russell Beck, “New Noncompete Wage Thresholds for 2023,” available at <https://faircompetitionlaw.com/2023/02/06/new-noncompete-wage-thresholds-for-2023/>.

⁴¹ *Id.*

⁴² See, e.g., *Insulation Corp. of Am. v. Brobston*, 446 Pa. Super. 520, 667 A.2d 729, 735 (Pa. Super. Ct. 1995) (“It is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests.”). For a summary of all states, see Russell Beck, Beck Reed Riden LLP, *Employee Noncompetes: A State-by-State Survey* (February 11, 2023), available at <https://beckreedriden.com/50-state-noncompete-chart-2/>.

⁴³ See, e.g., Colo. Rev. Stat. § 8-2-113(8)(b) (Colorado); 820 I.L.C.S. §§ 90/30(d) (Illinois); Me. Rev. Stat. Ti. 26, c. 7, § 599-A(6) (Maine); RCW § 49.62.80 (Washington); D.C. Code § 32-581.04 (Washington, D.C.).

⁴⁴ See Defend Trade Secrets Act of 2016, 130 Stat. 376, Pub. Law No. 114-153, at § 5(2) (“It is the sense of Congress that . . . trade secret theft, wherever it occurs, harms the companies that own the trade secrets and the employees of the companies . . .”).

IPO thanks the Federal Trade Commission for its attention to the comments submitted herein and welcomes further dialogue and opportunity to provide additional comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karen Cochran', is centered below the word 'Sincerely,'. The signature is fluid and cursive.

Karen Cochran
President