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NCLA Comment Warns Against FTC’s Novel Assertion of Power in Proposed Non-Compete Rule

Comments to the Non-Compete Clause Rulemaking, Matter No. P201200

Washington, DC (April 19, 2023) – The Federal Trade Commission’s (FTC) proposed “[Non-Compete Clause Rule](#)” would ban the use of non-compete clauses as “an unfair method of competition.” The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [Comment](#) today objecting to FTC’s attempt to federalize state contract law with virtually no attention to the various interests of the states and market participants developed by the contract law over more than a hundred years. In particular, the Proposed Rule completely ignores the traditional legal analysis of non-competes based on factors such as length of time, subject matter, or geographic scope.

The Proposed Rule affects 30 million workers spread across the entire country and is subject to a myriad of contracts and under many different contract law requirements. There is no national non-compete law the FTC is enforcing. Instead, the states regulate non-compete laws, and these laws, reflecting the conflicting interests, arguments, and widespread differences in labor markets throughout the country, differ widely. The Proposed Rule upends the laws of most states, affects over one-fifth of the working population, and is a significant departure from all previous FTC practice. This Proposed Rule is, therefore, subject to the Major Questions Doctrine.

If the Proposed Rule is implemented, it will also demonstrate the FTC Act has no intelligible principle to guide the agency and thus violates the non-delegation doctrine. In addition, the requirement to reform existing contracts and inform workers that they cannot and will not be enforced is a taking of property as it seizes 100% of the value of the non-compete clause and transfers it to one party.

FTC, through its policy and enforcement mechanisms, wields tremendous power over large swaths of America’s economy. The Proposed Rule seeks to expand that power by broadly reading its regulatory power under the FTC Act. The Proposed Rule, untethered to the consumer standard, the Clayton or Sherman Act, or the clear precedent of antitrust law, is not meaningfully tied to any statute passed by Congress, including the FTC Act. FTC has issued the Proposed Rule to grab as much of the American employment market as possible. Proposing a rule that is likely to both cause disruption and to be struck down squanders FTC’s limited resources. Because of the well-developed case law on the nature of non-competes, it is likely that the Proposed Rule would be immediately enjoined as inflicting irreparable harm whenever a legal challenge to it is brought.

NCLA released the following statement:

“If the FTC believes it is the agency in charge of everything and can sweep aside every state government and private actor in the making of contracts, it’s time to teach it otherwise.”

— **John J. Vecchione, Senior Litigation Counsel, NCLA**

For more information visit the comments page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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