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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 Members of the Federal Trade Commission,

I am the Chair of the Labor and Employment Department for Coolidge Wall Co., LPA, a full-service business law firm in Dayton, Ohio, tracing its history back to 1853. Over the years, we have represented thousands of businesses, including everything from small local start-ups to Fortune 500 companies, in essentially every industry in the private sector, including manufacturing, service, banking, and healthcare. We also frequently represent executives, entrepreneurs, and other individuals who are starting their own businesses or who are changing jobs. We have counseled, represented, and litigated for all three sides of the typical non-competition dispute at different times: the prior employer, the new employer, and the employee.

From that vantage point, and although this comment is not intended to be legal advice, I am writing to express my thoughts and concerns regarding the proposed new subchapter J, consisting of part 910, to chapter I in title 16 of the Code of Federal Regulations, referred to by the Commission as "Non-Compete Clause Rulemaking." As an advocate and a concerned citizen, I believe it is essential for the Commission to enact regulations that protect against harmful business practices and promote fair competition in the marketplace. However, the proposed rule prospectively and retroactively banning non-competition clauses in private contracts falls short of these goals and will do more harm than good to the economy, private business, the sovereignty of states, and, ironically, job creation and employee rights in the United States.

As recently stated by Commissioner Christine S. Wilson, "the proposed rule is a departure from hundreds of years of precedent and would prohibit conduct that 47 states allow." (FR 2023-07036.) This status quo, embracing a nuanced local treatment of non-competition agreements, has been reached after over two hundred years of careful American jurisprudence and the constantly evolving and deliberative actions of state-level courts and legislatures in all 50 states; it should not be so easily set aside with the stroke of a pen.

A. Private Individuals Should be Allowed to Contract for Mutually Beneficial Goals.

The United States Constitution protects the right of private parties to enter into contracts, implicit in the Due Process Clause of the Fifth and Fourteenth Amendments, which protects individual liberties and rights from being deprived by the government without due process of law. Contract law is also governed by state and federal statutes and common law, which establish the rules and principles for entering into, interpreting, and enforcing contracts. Private parties have the right to freely negotiate and enter into contracts.

The right to enter into contracts is a fundamental aspect of economic freedom and individual autonomy, and it is an important cornerstone of the American legal system. Employers and employees should be permitted to contract together without government interference. Moreover, non-competition agreements achieve appropriate and mutual goals, including:

1. Protection of Intellectual Property: Employers often invest significant time, money, and resources into developing proprietary technology, customer lists, trade secrets, and other confidential information. Non-competition agreements can help protect this valuable intellectual property by preventing employees from taking it to a competitor.

2. Incentivizing Investment in Training and Development: Employers will be more likely to invest in training and development for employees if they know that the employee will not immediately leave for a competitor and use their newly acquired skills and knowledge against them.

3. Encouraging Innovation: Non-competition agreements also promote innovation by allowing employers to freely share sensitive information and trade secrets with employees, without fear that they will take this information to a competitor. This can foster a collaborative and open work environment, which can lead to new ideas and discoveries.

The proposed rulemaking would not only curtail private parties' right to contract by making these useful, mutually beneficial contractual exchanges forbidden, but it would also retroactively destroy employment agreements already negotiated, executed, and performed by private parties in good faith. Especially in light of the external protections against abuse already provided under state laws, applying a one-size-fits-all approach rather than letting the parties define their own relationship would be improper.

Moreover, the lengthy constitutional challenges that would inevitably follow the rulemaking as currently proposed will, at a minimum, create incredible uncertainty in the economy and the job market. The unintended consequence will be to stifle productivity and job creation for the foreseeable future rather than stimulating them.

B. Current State Law Protections Are Adequate to Prevent Abuse.

As noted by Commissioner Wilson, 47 states currently permit non-competition agreements, either through application of common law contract rights, statutory enactments, or both. In the extreme minority of states where non-competition agreements are already prohibited by law, each of those states arrived at its respective status quo through the democratic process over time and not by executive fiat. In the states where non-competition agreements are permitted, courts and legislatures already protect against abuses.

The limitations placed on the scope of non-competition agreements vary by jurisdiction, but essentially universal limitations include:

1. Reasonableness: Non-competition agreements must be reasonable in scope, duration, and geographic area. The restrictions imposed on the employee must be necessary to protect the employer's legitimate business interests and cannot be overly broad or oppressive.

2. Protectable Interests: Non-competition agreements must protect legitimate business interests, such as confidential information, trade secrets, customer goodwill, and specialized training or knowledge. The interests that the employer seeks to protect must be significant enough to warrant the restrictions imposed on the employee.

3. Public Policy: Courts may refuse to enforce non-competition agreements that violate public policy. For example, some states already prohibit non-competition agreements for certain professions, such as doctors and lawyers, because they believe that these agreements limit the availability of essential services.

4. Notice: Employers must provide adequate notice to employees when presenting non-competition agreements, and the employee must have an opportunity to review and negotiate the terms of the agreement. Notice and due process rights are similarly protected by the courts when employers seek to enforce non-competition agreements.

5. Consideration: Non-competition agreements must be supported by adequate consideration, such as new employment, continued employment, signing bonus, promotion, or access to confidential information. Consideration is necessary to ensure that the employee receives something of value in exchange for the restrictions imposed on them.

C. Employee Wages Are Not a Relevant Factor.

The Commission specifically invited comments on whether, as an alternative to a complete ban, non-competition agreements should be enforced only against highly paid employees. But this is a Hobson's choice, as the common protectable interest inherent in non-competition agreements – the reason they exist – has little or nothing to do with the net worth or revenues of either party. For example, sales employees may have relatively low pay (and certainly this is usually true for commissioned employees early in their employment). But sales employees are commonly entrusted with proprietary information – pricing, margins, customers, etc. – that would unquestionably be valuable in the hands of competitors.

The proposed rulemaking would, ironically, have the opposite of its intended effect on lower-paid employees: employees are actually able to command higher compensation in exchange for signing non-competition agreements. Banning non-competition agreements will incentivize employers to mitigate risks in other ways, such as by hiring fewer employees to start with, entrusting fewer employees with proprietary information that will help them succeed in their careers, or reducing employee pay on the assumption that employees will eventually share proprietary information and training with competitors when they move on.

Of course, as noted above, any such non-competition agreements must be reasonable in scope, duration, and geographic area, and this is perhaps most important for employees with low compensation. But as noted above, a non-competition agreement that prevents a low-wage employee from working in a similar job for several years, or in an unreasonably broad geographic area, would already be viewed as overly restrictive and would be struck down or modified by a court.

It is also important to consider the impact of non-competition agreements on worker mobility and economic growth. Non-competition agreements that prevent low-wage workers from finding new employment in their field will limit their earning potential and harm their ability to support themselves and their families. This would be yet another negative impact on economic growth and productivity.

D. Tenth Amendment Concerns.

The Tenth Amendment states, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Tenth Amendment therefore affirms the principle of federalism, which divides power between the federal government and the states. It recognizes that the federal government has only those powers explicitly granted to it by the Constitution, while the states retain a broad range of powers that are not delegated to the federal government.

Federal government has limited powers, and the states have a significant degree of autonomy to experiment with different approaches, to respond to local conditions, and to innovate in areas where the federal government has not explicitly delegated authority. Allowing states to apply their own rules to non-competition agreements allows for greater flexibility and responsiveness to local conditions.

States have different economic and legal environments, and what might be considered a reasonable non-competition agreement in one state may not be appropriate in another. Allowing each state to create its own rules and standards for non-competition agreements allows for greater tailoring to the specific needs of that state.

Furthermore, state-level regulation can provide greater protections for employees than a one-size-fits-all federal approach. Some states, for example, prohibit non-competition agreements for low-wage workers, while others require employers to pay employees additional compensation in exchange for signing a non-competition agreement.

Finally, allowing states to create their own rules for non-competition agreements allows for experimentation and innovation. States can experiment with different approaches and learn from each other's successes and failures, ultimately leading to better policies over time.

E. Other Constitutional Challenges.

There are several other reasons an executive order setting a national prohibition on non-competition agreements would likely be unconstitutional, including:

1. Separation of Powers: The Constitution grants the power to make laws to the legislative branch, not the executive branch. Executive orders are intended to be

used to direct the executive branch in how to enforce laws passed by Congress, not to create new laws or regulations.

2. Lack of Authority: The President does not have the authority to unilaterally regulate employment contracts or impose new obligations on employers and employees without the approval of Congress.

3. Due Process: Non-competition agreements can significantly boost an individual's ability to earn a living and an employer's ability to participate in the economy. Finding the right balance of these interests must be subject to due process protections. An executive order will not provide the necessary procedural protections, such as notice and an opportunity to be heard, that are required to ensure that all parties' rights are protected.

Overall, an executive order setting a nationwide ban on non-competition agreements would violate individual rights and constitutional protections, infringe on the rights of states, and exceed the President's authority under the Constitution. It would also have all the classic unintended consequences of any centralized government planning for the economy. These constitutional requirements should not become political issues, and they should not be overturned by executive order.

Thank you for considering my comments on this important issue. I hope that the Commission will take into account the concerns of citizens like myself and the individuals and businesses we represent.

Very truly yours,

Marc L. Fleischauer