

**Comments of**

**TechFreedom**

Bilal Sayyed<sup>i</sup>

**In the Matter of**

*Non-Compete Clause Rulemaking*

Matter No. P201200

Docket No. FTC-2023-0007

**April 19, 2023**

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## INTRODUCTION

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible and thus unleashes the ultimate resource: human ingenuity.

TechFreedom submits three comments in response to the above-referenced docket. Our comments address three related but distinct aspects of the proposed rulemaking, namely

- 1) Why the Commission lacks authority to make substantive rules with the force of law governing Unfair Methods of Competition under Section 6(g) of the FTC Act (cited internally as *TechFreedom I*);
- 2) How the proposed rule would affect intellectual property, if enacted (internally, *TechFreedom II*); and
- 3) A more limited rulemaking that would be consistent with the Commission's current understanding of its authority to prohibit, and enact rules with respect to, unfair or deceptive acts and practices (internally, *TechFreedom III*).

The present comment, *TechFreedom III*, addresses the final point offered above.

TechFreedom<sup>1</sup> welcomes the Federal Trade Commission's ("Commission") request for comment on its proposed rule prohibiting non-compete clauses as an unfair method of competition.<sup>2</sup> We submit this comment to identify an alternative path to regulating the use of employer-employee non-compete agreements under the existing authority of the Commission.

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<sup>1</sup> Our recent submissions to the Commission include Comments of TechFreedom (James E. Dunstan and Berin Szóka) on Petition for Rulemaking to Prohibit the Use on Children of Design Features that Maximize for Engagement (Jan. 18, 2023), <https://techfreedom.org/wp-content/uploads/2023/01/TechFreedom-Comment-on-CDD-Engagement-Petition.pdf>, and Comments of TechFreedom (Bilal Sayyed) on Request for Information on Merger Enforcement (Apr. 21, 2022), <https://techfreedom.org/wp-content/uploads/2022/04/TechFreedom-Comments-Merger-Guidelines-April-21-2022.docx.pdf>.

<sup>2</sup> Non-Compete Clause Rule, Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. 910), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>.

## I. The Commission Should Consider an Alternative Path to Regulating the Use of Non-Compete Clauses

The Commission’s proposed rule “preventing employers from entering into non-compete clauses with workers and requiring employers to rescind existing non-compete clauses”<sup>3</sup> defines such clauses as “an unfair method of competition” and raises complex issues of law, of fact (including the economic impact of non-compete clauses), and of the proper balance of federal and state authority and responsibility.<sup>4</sup> These issues are covered elsewhere in the comments to the rulemaking record, in previous submissions to the Commission, and in other public remarks and comments; this comment will not restate them.<sup>5</sup> However, the

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<sup>3</sup> FED. TRADE COMM’N, *Non-Compete Clause Rulemaking* (Jan. 5, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

<sup>4</sup> The Commission, over the dissent of then-Commissioner Wilson, recently identified its understanding of the scope of what constitutes an unfair method of competition. *See* FED. TRADE COMM’N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf); Dissenting Statement of Commissioner Christine S. Wilson Regarding the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf).

<sup>5</sup> *See, e.g.*, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule (Jan. 5, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p201000noncompetewilsondissent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf); U.S. Chamber of Commerce Comment on Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule (Apr. 17, 2023), [https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter\\_FINAL\\_04.17.23.pdf](https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf); Alexander Raskovich, Bruce H. Kobayashi, Abbott B. Lipsky, Joshua D. Wright, & John M. Yun, *Always or Almost Always Anticompetitive? The Global Antitrust Institute Comment on the FTC’s Proposed Rule Banning Non-Compete Clauses in Employment Contracts* (George Mason Law & Economics Research Paper No. 23-08, Apr. 19, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4421548](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4421548); Comments of the International Center for Law & Economics and Scholars of Law and Economics on Non-Compete Clause Rule NPRM (Apr. 19, 2023); Comments of TechFreedom (Berin Szóka & Corbin Barthold) on Non-Compete Clause Rule NPRM (Apr. 19, 2023), <https://techfreedom.org/wp-content/uploads/2023/04/FTC-Non-Competes-TechFreedom-I-Szoka-and-Barthold.pdf>; Comments of TechFreedom (James Dunstan) on the Non-Compete Clause Rule NPRM (Apr. 19, 2023), <https://techfreedom.org/wp-content/uploads/2023/04/FTC-Non-Competes-TechFreedom-II-Dunstan.pdf>; Letter from TechFreedom to Chair Khan, Commissioner Slaughter, Commissioner Wilson, & Commissioner Bedoya (Mar. 23, 2023), <https://techfreedom.org/wp-content/uploads/2023/03/FTC-Noncompetes-Reply-Comments-Letter.pdf>; Comments of TechFreedom (Berin Szóka, Bilal Sayyed, and Andy Jung) on Non-Compete Clause Rulemaking (Mar. 16, 2023), <https://techfreedom.org/wp-content/uploads/2023/03/FTC-Open-Meeting-Comments-March-16-2023.pdf>; Comments of TechFreedom (Berin Szóka & Bilal Sayyed) on Non-Compete Clause Rulemaking (Feb. 16, 2023), <https://techfreedom.org/wp-content/uploads/2023/02/FTC-Non-Compete-Forum-Comments-2-16-2023.pdf>; Comments of TechFreedom (Berin Szóka & Corbin Barthold) on Petition for Rulemaking to Prohibit Worker Non-Compete Clauses; Petition for Rulemaking to Prohibit Exclusionary Contracts (Sept. 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/FTC-UMC-Rulemaking-Authority-FTC-Comment-9.30.2021-FINAL.pdf>; Comments of TechFreedom (James E. Dunstan) on Request for Public Comment Regarding Contract Terms That May Harm Fair Competition (Sept. 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/Comments-FTC-Non-Compete-UMC-Rulemaking-10.2021.pdf>; Prepared Remarks of Commissioner Noah Joshua Phillips, Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020),

referenced comments and commentary as well as the materials cited within suggest that there are significant hurdles to enacting the proposed rule, and to enacting any rule predicated on non-compete clauses being an unfair method of competition. This comment proposes an alternative path for the Commission to consider.

For the reasons discussed in the comments and commentary referenced in footnote 5—calling into serious question the ability of the Commission to promulgate this proposed rule, and competition rules more generally—the Commission should consider regulating the use of non-compete agreements through its authority to prohibit unfair or deceptive acts or practices (UDAP), and not through its authority to prohibit unfair methods of competition.<sup>6</sup> Reliance on its UDAP authority, and its right to enact legislative-type rules under the grant of authority in the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act (Mag-Moss Act), may better ensure that the Commission’s interest in expanding the employment prospects and employment mobility of workers is successful.<sup>7</sup> While this approach is not without challenges—in particular the requirement of showing *consumer* injury or *consumer* harm—the Commission has, in the past, extended the application of its UDAP authority to conduct that affects entities or person beyond a narrow definition of *consumer*.

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[https://www.ftc.gov/system/files/documents/public\\_statements/1561697/phillips\\_-\\_remarks\\_at\\_ftc\\_nca\\_workshop\\_1-9-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf); Camila Ringeling, Joshua D. Wright, Douglas H. Ginsburg, John M. Yun & Tad Lipsky, *Noncompete Clauses Used in Employment Contracts: Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University* (George Mason Law & Economics Research Paper No. 20-04, Feb. 7, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3534374](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374), as well as the sources cited within these comments and commentary.

<sup>6</sup> Other commenters also suggest a rule limited to prohibiting conduct that is unfair or deceptive may be appropriate. *See, e.g.*, U.S. Chamber of Commerce Comment on Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule at 44 (Apr. 17, 2023), [https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter\\_FINAL\\_04.17.23.pdf](https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf) (“the Commission should consider issuing a rule under its Section 5 authority related to unfair and deceptive acts and practices” including “a rule requiring greater transparency around non-compete agreements”); Alan J. Meese, *Don’t Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 632, 639 (2022) (states or the Federal Trade Commission could encourage or require pre-contractual disclosure of non-compete agreements). *See also* Comments of the International Center for Law & Economics and Scholars of Law and Economics on Non-Compete Clause Rule NPRM at 72 (Apr. 19, 2023) (“imposition of an NCA (non-compete agreement) could be a material omission, and potentially actionable under the Commission’s UDAP authority”).

<sup>7</sup> *See* Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975); 15 U.S.C. § 57a.

## II. The Commission Asserts That Its Authority to Prohibit Unfair and Deceptive Acts and Practices Protects Employees & Workers

Section 5 of the FTC Act prohibits unfair or deceptive acts or practices when such practices are in, or affect, commerce.<sup>8</sup> An act or practice is *deceptive*: (i) if there is a representation, omission or practice that is likely to mislead the consumer; (ii) where the consumer is acting reasonably in the circumstances; and (iii) the representation, omission or practice is material.<sup>9</sup> An act or practice is *unfair* if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>10</sup>

The hurdle to addressing non-compete agreements between employers and employees within the scope of the Commission’s UDAP authority is the requirement of finding *consumer* injury or *consumer* harm. But recent enforcement actions and policy statements by the Commission suggest this is not a significant limitation in its authority.

Former FTC Chairman, Commissioner, and General Counsel William (Bill) Kovacic discussed whether a non-compete rule based on unfairness and deception principles was within the scope of the Commission’s authority at the Commission’s 2020 workshop on non-compete agreements.<sup>11</sup> Mr. Kovacic suggested caution—but not inaction—because “the consumer protection mandates that [the Federal Trade Commission] . . . work[s] with *tend to be* so explicitly consumer-facing that they *don’t address very directly* the employer/employee relationship.”<sup>12</sup> Mr. Kovacic recognized, however, that the Commission has not limited its definition of “consumer” to the individual, or to *a* consumer, but has extended the scope of its UDAP authority to cover “a number of business-to-business relationships” where a business was “the consumer ... the customer.”<sup>13</sup> Further:

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<sup>8</sup> 15 U.S.C. § 45(a)(1).

<sup>9</sup> Fed. Trade Comm’n, Policy Statement on Deception (appended to *Cliffdale Associates*, 103 F.T.C. 110, 174 (1984)), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

<sup>10</sup> 15 U.S.C. § 45(n).

<sup>11</sup> FED. TRADE COMM’N, TRANSCRIPT OF THE NON-COMPETE CLAUSES IN THE WORKPLACE WORKSHOP: EXAMINING ANTITRUST AND CONSUMER PROTECTION ISSUES, at 29 (Jan. 9, 2020) [hereinafter NON-COMPETE WORKSHOP TRANSCRIPT], [https://www.ftc.gov/system/files/documents/public\\_events/1556256/non-compete-workshop-transcript-full.pdf](https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf).

<sup>12</sup> NON-COMPETE WORKSHOP TRANSCRIPT at 27 (emphasis added).

<sup>13</sup> *Id.* at 30.

Without a doubt, the FTC has, through litigation, through policymaking, fairly well established an administrative practice and . . . widely accepted custom to treat business-to-business relationships as falling within the ambit of its consumer protection authority.<sup>14</sup>

Mr. Kovacic also identified two instances where the then-Chair of the Commission gave assurances to other entities that the Commission’s authority extended to the protection of (and privacy of) data provided by *employees* located outside the United States but transferred to the United States. Mr. Kovacic recognized that this authority protected “the privacy interest of the worker [as a worker], not the privacy interest of a consumer . . . not a consumer-facing issue.”<sup>15</sup>

More recently, the Commission has alleged harm to workers under its deception authority. In 2021, in *Amazon.com/Amazon Logistics*, the Commission alleged deception from Amazon’s representations to prospective drivers (and to customers) that drivers for Amazon Flex kept 100% of their tips.<sup>16</sup> Although the complaint alleged that customers were also deceived, the Commission’s press release and statements of three Commissioners make clear that this was an instance of the agency applying its anti-deception authority to workers.<sup>17</sup> Similarly, in

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<sup>14</sup> *Id.* at 31. See also Dissenting Statement of Chairman Majoras In the Matter of Negotiated Data Solutions LLC, File No. 0510094, 5 (Jan. 23, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122majoras.pdf>. More generally, see FED. TRADE COMM’N, STATEMENT IN THE MATTER OF NEGOTIATED DATA SOLUTIONS LLC, File No. 0510094, 3 (Jan. 23, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122statement.pdf> (“This Commission—unanimously—has often found an unfair act or practice proscribed by Section 5 in conduct that victimized businesses (as well as individuals) who are consumers.”).

<sup>15</sup> NON-COMPETE WORKSHOP TRANSCRIPT at 32-33. Kovacic was discussing assurances necessary to effectuate the Safe Harbor and Privacy Shield requirements for data transfer.

<sup>16</sup> Complaint ¶¶ 7, 51, *Amazon.com & Amazon Logistics*, FTC Docket No. C-4746 (June 9, 2021), [https://www.ftc.gov/system/files/documents/cases/192\\_3123\\_-\\_amazon\\_flex\\_complaint\\_final\\_not\\_signed.pdf](https://www.ftc.gov/system/files/documents/cases/192_3123_-_amazon_flex_complaint_final_not_signed.pdf).

<sup>17</sup> See Press Release, Fed. Trade Comm’n, Amazon to Pay \$61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers>; Statement of Commissioner Rohit Chopra Regarding the Deception of Delivery Drivers by Amazon.com, File No. 1923123, 1 (Feb. 2, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1587003/20200102\\_final\\_rchopra\\_statement\\_v2.pdf](https://www.ftc.gov/system/files/documents/public_statements/1587003/20200102_final_rchopra_statement_v2.pdf) (“Today, the FTC is sanctioning Amazon.com . . . for expanding its business empire by cheating its workers . . . [B]y allegedly misleading its workers about their earning, the company made it less likely that drivers would seek better opportunities elsewhere, helping Amazon attract and retain workers.”); Joint Statement of Acting Chairwoman Rebecca Kelly Slaughter and Commissioner Noah Joshua Phillips In the Matter of Amazon Flex, File No. 1923123, 1 (Feb. 2, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1586967/1923123amazonflexrksnpjstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1586967/1923123amazonflexrksnpjstatement.pdf) (“[P]latforms that facilitate [the] gig economy must treat their workers fairly and non-deceptively, just as they must consumers . . . that is what this case resolving our investigation into [Amazon’s] treatment of delivery drivers is so important.”).

2018, the Commission sanctioned *Uber Technologies, Inc.*, for failing to maintain the privacy of its drivers' data and because of its misrepresentation of the company's efforts to protect such data.<sup>18</sup>

The current Commission believes that its UDAP authority extends to "workers." The Commission's recently released *Policy Statement on Enforcement Related to Gig Work* ("*Policy Statement*") is replete with assertions that the Commission's unfairness and deception authority extends to workers.<sup>19</sup> The *Policy Statement* defines "workers who supply labor" as "consumers."<sup>20</sup> According to Chair Lina Khan, gig workers can include "independent contractors, online platform workers, contract workers, temporary workers, or on call workers that provide service."<sup>21</sup> The Commission provides the predicate for its enforcement position in the *Policy Statement*, stating that "gig workers [may be] more exposed to harms from unfair [and] deceptive . . . practices"<sup>22</sup> and that "unfair and deceptive practices by one platform can proliferate across the labor market, creating a race to the bottom that participants in the gig economy, and especially gig workers, have little ability to avoid."<sup>23</sup> Through the *Policy Statement*, the Commission puts firms on notice that "the manifold protections enforced by the Commission do not turn on how gig companies choose to classify working consumers" and that "the Commission will use the full portfolio of laws it enforces to prevent unfair, deceptive . . . and otherwise unlawful practices affecting gig workers."<sup>24</sup> The *Policy Statement* also identifies a number of practices that may constitute unfair or deceptive practices.<sup>25</sup>

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<sup>18</sup> See Complaint, In the Matter of Uber Technologies, Inc., FTC Docket No. C-4662 (Oct. 25, 2018), [https://www.ftc.gov/system/files/documents/cases/152\\_3054\\_c-4662\\_uber\\_technologies\\_revised\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/152_3054_c-4662_uber_technologies_revised_complaint.pdf). The complaint refers to Drivers as both "consumers" (because they use an "app" distributed by the company to match drivers with riders) and "contingent workers" (because they choose when they wish to work). Complaint ¶¶ 5, 12.

<sup>19</sup> FED. TRADE COMM'N, POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK, Matter No. P227600 (Sept. 15, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf) (hereinafter "Policy Statement").

<sup>20</sup> *Id.* at 1, n. 3.

<sup>21</sup> Comments of Chair Lina Khan, FTC Open Commission Meeting, at 11 (Sept. 15, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ftc\\_open\\_commission\\_meeting\\_september\\_15\\_2022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ftc_open_commission_meeting_september_15_2022.pdf). This description of a gig worker falls within the proposed definition of "worker" in the proposed rule.

<sup>22</sup> Policy Statement, *supra* note 19, at 5-6.

<sup>23</sup> *Id.* at 6.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> *Id.* at 8-12.



The Commission recently confirmed the scope of its authority in testimony before the House Energy and Commerce Committee:

The Commission is making clear that, regardless of whether gig workers are treated as employees or independent contractors under labor laws, they are fully protected by the FTC's prohibition on unfair or deceptive practices.<sup>26</sup>

### **III. The Commission Can Advance a Non-Compete Rule Focused on Unfair and Deceptive Acts and Practices, Subject to the Rulemaking Requirements of the Magnuson-Moss Act**

As an alternative to the proposed rule, the Commission should consider a non-competes rule focused on, and bounded by, its unfairness and deception authority. Such a proposal may increase the likelihood of successfully promulgating a rule that protects workers from some of the most egregious actions associated with employer-employee non-competes clauses.

Public commentary, including but not limited to comments to the Commission in this rulemaking, suggest that employers may, intentionally or through negligence, fail to provide notice or disclosure of non-competes clauses to employees and prospective employees, may engage in various forms of opportunistic behavior to obtain employee or worker agreement to a non-competes clause, and may engage in fraudulent, deceptive, and otherwise unreasonable and unjustified conduct with the intention of affecting post-separation employment by current or former employees. Such conduct should be prohibited and sanctioned.

Using the procedures required by the Magnuson-Moss Act,<sup>27</sup> as an alternative to the current proposed rule, the Commission should provide advance notice of an intention to promulgate a rule prohibiting the use of unfair or deceptive acts in the adoption of non-competes clauses.<sup>28</sup>

After the appropriate development of a record, a rule could require that employers provide:

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<sup>26</sup> *Hearing on Fiscal Year 2024 Federal Trade Commission Budget Before the Subcomm. on Innovation, Data, and Commerce of the H. Comm. On Energy and Commerce*, 117th Cong., at 22 (Apr. 18, 2023) (prepared statement of the Fed. Trade Comm'n), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p210100testimonyfy2024budget.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p210100testimonyfy2024budget.pdf).

<sup>27</sup> 15 U.S.C. § 57a.

<sup>28</sup> The Commission may choose to propose this alternative with or without withdrawing the current proposed rule, but consideration of the proposed rule and an alternative rule should be done in parallel, if the current proposed rule is not withdrawn, so the Commission can better weigh the strengths, weaknesses and legal infirmities of each rule.

- Notice to all employee candidates that as a condition of employment, a person may be required to agree to a non-compete clause limiting post-separation employment, and that the employer may seek to enforce the terms of the agreed upon non-compete clause; and
- Disclosure of the specific terms of any non-compete clause at the time an offer of employment is extended to an employee candidate, to include written explanation of the restrictions contained in the non-compete clause.

A proposed rule might also indicate an intention to prohibit, as an unfair or deceptive practice:

- Once employed, conditioning continued employment in a person's existing position on agreement to be bound by a non-compete clause, unless the employer can show a material change in circumstances that justifies requiring, as a condition of continued employment, a non-compete clause;
- Once employed, conditioning continued receipt of salary or benefits on agreement to a non-compete clause, absent a material change in circumstances that justifies requiring, as a condition of continued employment, a non-compete clause;
- An employer's adoption of, or unilateral change to an existing, non-compete clause;
- Threats to enforce, through litigation or some other means, a non-compete clause where the relevant state does not allow for enforcement of such clauses (or prohibits entry into such agreements); or the harassment of an employee or former employee with respect to post-separation employment, where the employee is not bound by a non-compete clause;
- Threats to enforce non-compete clauses entered into without the required disclosure;
- Falsely telling any other person that an employee or former employee has agreed to a non-compete clause; and
- Attempts to enforce a non-compete clause that is unreasonable as to length, scope, or effect on the employee:
  - as previously determined by the Commission acting in its adjudicative role (where such determination has not been overruled by an appellate court sitting in review of the Commission determination), or,
  - as previously determined by an appellate court sitting in review of the Commission (where the Commission may or may not have found such clause to be unreasonable) or,

- as previously determined by an appellate court sitting in review of a district court decision on a Commission complaint alleging unreasonableness, or,
- as previously determined by the highest state court in the relevant state.

### CONCLUSION

The Commission's concern for the effect of non-compete clauses on a worker's future employment prospects and opportunities is laudable, as is the Commission's concern that the broad use of such clauses may have economy-wide effects. However, the decision to advance a rule prohibiting or limiting the use of non-compete clauses as an unfair method of competition is risky. There are a myriad of reasons why the Commission's approach may fail, as detailed in *TechFreedom I* comments and elsewhere.<sup>29</sup> In support of addressing the most egregious abuses associated with non-compete clauses, the Commission could move forward with a narrower, but still significant, non-compete rule based on its UDAP authority. Such a rule would not preclude case-by-case enforcement actions alleging that non-compete clauses had the effect of limiting or preventing competition, and thus may be an unfair method of competition, but would avoid the risks of losing on one or more of the many constitutional, statutory, and federalism questions associated with the broad, competition-based rule the Commission has proposed.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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<sup>29</sup> See, e.g., the materials referenced *supra* note 5.