



Charles N. Kahn III
President and CEO

April 19, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Noncompete Clause Rule; 88 Fed. Reg. 3482 (RIN: 3084-AB74) (January 19, 2023)

Dear Chair Khan:

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 leading tax-paying hospitals and health systems throughout the United States (U.S.). The FAH's members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 States, Washington DC, and Puerto Rico. These members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals, and together they provide a wide range of inpatient, ambulatory, post-acute, emergency, children's, and cancer services to patients in diverse communities across the country.

The FAH appreciates this opportunity to submit comments to the Federal Trade Commission (FTC or Commission) regarding the Non-Compete Clause Rulemaking, Matter No. P201200, proposed in the Notice of Proposed Rulemaking published in the *Federal Register* on January 19, 2023 (Proposed Rule or Noncompete Rule).¹ The FAH applauds the important work that the FTC and its staff accomplish every day to protect consumers and promote fair competition across the national economy. The FAH also recognizes that, in certain circumstances, noncompete agreements can be unfair to certain workers. The Proposed Rule, however, is not the solution to this problem, and the FAH urges the FTC to withdraw it for the reasons discussed below.

First, the Proposed Rule plainly exceeds the authority of the FTC. The only precedent that supports the FTC's claim of authority to adopt substantive rules on unfair methods of

¹ 88 Fed. Reg. 3482 (Jan. 19, 2023).

competition—the fifty-year-old opinion in *National Petroleum Refiners Association v. FTC*²—is explicit that the FTC is “hardly free to write its own law.”³ Instead, that case explicitly limits the FTC’s rulemaking powers to narrow factual circumstances that simply do not apply to the Proposed Rule.

Next, by law, the FTC’s Section 5 authority extends only to corporations that are “organized to carry on business for [their] own profit or that of [their] members.”⁴ As the Proposed Rule recognizes, this limitation means that nonprofit institutions would largely be exempt from the Noncompete Rule.⁵ In healthcare, this exemption would swallow the rule. The large majority of hospitals across the U.S. are nonprofits. Accordingly, the Proposed Rule would create fundamentally different rules of competition for tax-paying hospitals and health systems, which are operated as for-profit entities, than it would for the majority of their competitors. The result would be a significant, unintended distortion in the competitive playing field—the antithesis of the FTC’s mandate to promote fair competition.

Finally, the Proposed Rule also reflects a flawed account of the empirical literature on the competitive effects of noncompete agreements. In particular, the Proposed Rule fails to recognize that “every study of NCA [noncompete agreement] use—including studies of the average worker and of physicians and senior executives—finds that NCAs themselves are associated with higher earnings.”⁶ This consistent evidence showing that workers earn more when they sign noncompetes undermines the entire premise of the Noncompete Rule.

The FAH respectfully urges the FTC to withdraw the Proposed Rule, as it is not authorized by Congress, exceeds the FTC’s statutory authority, is unfair for tax-paying hospitals, imposes anticompetitive distortions across the hospital industry, and is contradicted by the weight of empirical research. However, if the FTC elects to move forward with the Proposed Rule, the FAH urges the FTC to exempt hospitals and health systems or, at a minimum, two categories of workers—physicians and senior executives—as the empirical evidence specifically shows that these categories of workers earn more when they agree to noncompetes.

I. The Proposed Rule Exceeds the FTC’s Authority Under the FTC Act

A. The Proposed Rule is a Quintessential Example of a “Major Question”

The FTC does not have the statutory authority to issue a regulation that would invalidate existing and future noncompete agreements across the entire U.S. economy. The reasons for this lack of authority were expressed by multiple stakeholders during the February 16, 2023 Forum and elsewhere. The regulation of employee noncompetes is a classic example of a “major question,” for which clear congressional authorization is required before administrative

² 482 F.2d 672 (D.C. Cir. 1973).

³ *Id.* at 693.

⁴ 15 U.S.C. § 44.

⁵ *See* Proposed Rule, 88 Fed. Reg. at 3510.

⁶ Natarajan Balasubramanian et al., *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* 10 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403 (emphasis removed).

rulemaking powers will be found. In *West Virginia v. EPA*,⁷ the Supreme Court identified three factors that can inform whether a rulemaking constitutes a “major question”:

- Has the agency “claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority”?
- Has the agency “located that newfound power in the vague language of an ancillary provision” of the enabling act?
- Has the agency’s “discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself”?⁸

Here, the answer to all three questions is an unqualified “yes.” With respect to the first factor, the Noncompete Rule is the FTC’s first attempt to adopt a substantive rule on unfair methods of competition in over five decades. It marks the first time the FTC has ever attempted to adopt such a rule broadly applicable to all industries, and it also reflects the first time the FTC has asserted that its unfair methods of competition powers include the power to preempt State laws. In a word, the Noncompete Rule is truly unprecedented.

With respect to the second factor, the Proposed Rule relies on the general grant of authority in Section 6(g) of the FTC Act (Section 6(g))⁹ “to make rules and regulations for the purpose of carrying out the provisions of this subchapter.” This Section 6(g) language is an afterthought,¹⁰ contained within a subpart, contained within a statute about the FTC’s secondary and tertiary powers. Thus, for purposes of the major questions doctrine, Section 6(g) is certainly an “ancillary” provision. Moreover, in *National Petroleum Refiners Association v. FTC* (“*National Petroleum*”),¹¹ the D.C. Circuit Court of Appeals observed that it is “not implausible”¹² to read Section 6(g) as merely conferring the power to adopt rules of practice or procedure; although the court ultimately disagreed with this reading, it acknowledged that Section 6(g) is “arguably ambiguous”¹³ on this point and that “the specific intent of Congress here cannot be stated with any assurance.”¹⁴ For purposes of the major questions doctrine, the fact that Section 6(g) is “arguably ambiguous” means that it is “vague.”

⁷ 142 S. Ct. 2587 (2022).

⁸ *Id.* at 2610 (internal quotations and alterations omitted).

⁹ 15 U.S.C. § 46(g).

¹⁰ Section 6(g) primarily authorizes the FTC “[f]rom time to time [to] classify corporations.” *Id.*

¹¹ 482 F.2d 672 (D.C. Cir. 1973).

¹² *Id.* at 686.

¹³ *Id.* at 692.

¹⁴ *Id.* at 686.

With respect to the third factor, Congress has repeatedly, and recently, considered federal legislation that would significantly curtail the use of noncompetes.¹⁵ To date, none of these bills has passed Congress.

Accordingly, the FAH joins the chorus of commentators in asserting that the Proposed Rule is a “major questions” issue for which Section 6(g) does not confer proper congressional authorization. In particular, the FAH agrees with comments and case law that Congress does not “hide elephants in mouseholes;”¹⁶ that courts “greet assertions of extravagant statutory power over the national economy with skepticism;”¹⁷ and that courts must “presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.”¹⁸

The FAH adds that, under the plain language of Section 5(n) of the FTC Act, the FTC is forbidden from declaring a practice to be “unfair” unless the practice “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.”¹⁹ The Proposed Rule makes no effort to satisfy this requirement; in fact, it does not even acknowledge Section 5(n)’s existence. Finally, the FAH adds that the drafters of the Magnuson-Moss Act pointedly declined to grant the FTC authority to adopt substantive rules on unfair methods of competition, and instead only envisioned the FTC issuing “interpretive rules” or “general statements of policy.”²⁰

B. Even Under *National Petroleum*, the Proposed Rule Plainly Exceeds the FTC’s Authority

Moreover, *even under the precedent that the FTC itself relies upon*, the Proposed Rule plainly exceeds the FTC’s authority. *National Petroleum* is the only precedent the Proposed Rule cites in support of its claim of authority to adopt the Noncompete Rule. *National Petroleum*, it is true, recognized Section 6(g) to grant the FTC “authority to issue regulations declaring practices to be unfair methods of competition.”²¹ But—assuming for sake of argument that *National Petroleum* even applies for major questions²²—the power to declare *some* practices to be unfair methods of competition does not imply the power to declare *any* practice that the FTC finds objectionable to be so.²³ On this point, *National Petroleum* could not be any more clear:

¹⁵ See, e.g., Workforce Mobility Act of 2019, S.2614, 116th Cong. (2019); Workforce Mobility Act of 2021, S.483, 117th Cong. (2021); Freedom to Compete Act, S.2375, 117th Cong. (2021); Workforce Mobility Act of 2023, S.220, 118th Cong. (2023).

¹⁶ *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001).

¹⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quotations omitted).

¹⁸ *Id.* (quotations omitted).

¹⁹ 15 U.S.C. § 45(n).

²⁰ 15 U.S.C. § 57a(a)(2).

²¹ See Proposed Rule, 88 Fed. Reg. at 3499.

²² To be clear, the FAH does *not* consider *National Petroleum* to apply to rulemakings that decide major questions, and the FAH doubts that *National Petroleum* even remains valid law generally.

²³ *National Petroleum Refiners Association v. FTC*, 482 F.2d 672, 685 (D.C. Cir. 1973) (“Of course, [the FTC’s] regulatory authority is not complete.”).

The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard. Although the Commission's conclusions as to the standard's reach are ordinarily shown deference, *the standard must get its final meaning from judicial construction.*²⁴

National Petroleum, in other words, only recognizes the FTC's power to adopt substantive regulations that follow from *judicial* decisions. For example, if courts consistently found noncompete agreements to be "unfair" for purposes of Section 5 when the worker makes minimum wage, or when they last longer than one year, or after the employer terminates the worker, then *National Petroleum* might support a limited rule declaring those specific situations to be unfair. But the substance of such a rule must come from the courts, not from the FTC. This limitation on the FTC's rulemaking power follows from the plain language of *National Petroleum*, and is rooted in Supreme Court precedent explaining why the FTC's power to prevent "unfair methods of competition" comports with fundamental separation-of-powers principles.²⁵

Of course, as the Proposed Rule recognizes, the courts have *not* consistently found noncompetes to violate either the antitrust laws or Section 5. Quite to the contrary, every litigated antitrust challenge to an employee noncompete agreement on record either has failed on the merits or otherwise does not support the Noncompete Rule.²⁶ The primary reason that these challenges have failed is because noncompete agreements between workers and employers are vertical, non-price restrictions. Under settled law, the competitive effects of vertical, non-price restrictions *must* be reviewed on a case-by-case basis under a flexible, fact-dependent, rule of reason, rather than condemned summarily as illegal *per se*, like the Noncompete Rule

²⁴ *Id.* at 693 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965)) (emphasis added, citations omitted, and internal alteration omitted).

²⁵ See generally *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The National Industrial Recovery Act of 1933 authorized the President to adopt codes of "fair competition" for certain industries. On review, the Supreme Court held that this power to adopt codes of "fair competition" amounted to "an unconstitutional delegation of legislative power." *Id.* at 542. Significantly, the Court distinguished the "fair competition" authority of the National Industrial Recovery Act from the "unfair methods of competition" authority of the FTC Act. Although the Court noted that the FTC Act's language "does not admit of precise definition," the Court held that the language satisfies fundamental separation-of-powers principles because its scope is "left to judicial determination as controversies arise." *Id.* at 532. In particular, the Court noted that the FTC Act's provision "for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review . . . give assurance that the action of the Commission is taken within its statutory authority." *Id.* at 533.

²⁶ The Proposed Rule reports that 15 out of 17 antitrust challenges to noncompetes brought under a Sherman Act Section 1 theory have failed on the merits, as did the only such case brought under a Section 2 theory. Proposed Rule, 88 Fed. Reg. at 3496–97. And significantly, neither of the two cases that had any success support the Noncompete Rule in any way. In one case, *United States v. American Tobacco Co.*, 221 U.S. 106, 151 (1911), noncompete agreements were only referenced once, in a single sentence. Even then, the reference arose in the context of a horizontal, multi-company conspiracy, rather than a vertical, employer-employee agreement. In the other case, *Signature MD, Inc. v. MDVIP, Inc.*, No. CV 14–5453, 2015 WL 3988959 (C.D. Cal. Apr. 21, 2015), the court denied a motion to dismiss a Sherman Act challenge to a noncompete agreement, but in doing so held that "the reasonableness of the restrictions will ultimately be a factual determination," meaning that the court adopted a rule-of-reason analysis rather than condemning the noncompete agreement outright. *Id.* at *7.

envisions.²⁷ The Noncompete Rule’s attempt to replace the court-mandated rule-of-reason analysis with a *per se* ban—a ban that would reach all industries, all geographies, and all categories of employees—runs contrary to settled judicial precedent and thus amounts to the FTC “writ[ing] its own law,” in direct contravention to *National Petroleum*.

Additionally, when the FTC adopts a substantive rule, *National Petroleum* holds that the FTC must make reasonable, case-by-case exceptions, for example, “where the rationale of the rule does not appear to apply to [a particular company’s] own situation or a compelling case of hardship can be made out.”²⁸ *National Petroleum* simply does not allow the FTC to adopt substantive rules that impose categorical, *per se* unlawfulness, which is exactly what the Noncompete Rule purports to do.

II. Unless Tax-Paying Hospitals and Health Systems Are Exempted, The Proposed Rule Would Create Significant Distortions in the Competitive Playing Field Across the Hospital Industry

As discussed above, the FAH does not believe the FTC has the authority to issue the Proposed Rule to any industry. However, if the FTC were to move forward with finalizing the Proposed Rule, then at a minimum, an exemption should be made for tax-paying hospitals and health systems.

FAH members are tax-paying hospitals and health systems, *i.e.*, they are organized as for-profit companies. According to data from the American Hospital Association, approximately 24% of U.S. community hospitals are owned by such tax-paying organizations.²⁹ By comparison, approximately 58% of U.S. community hospitals are owned by tax-exempt, nonprofit organizations, and approximately 19% are owned by State or local governments.³⁰

As the Proposed Rule makes clear, the FTC Act does not apply to entities that are not “organized to carry on business for [their] own profit or that of [their] members.” Accordingly, nonprofit organizations “would not be subject” to the Noncompete Rule.³¹ As a matter of statutory interpretation, the FAH agrees with the FTC’s conclusion that nonprofits would be exempt from the Noncompete Rule. But as a matter of policy, this exclusion would mean that the Noncompete Rule would not apply to the large majority of hospitals in this country that are tax-exempt.

²⁷ See, e.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 901 (2007); *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977).

²⁸ *National Petroleum*, 482 F.2d at 692 (“Moreover, in light of the concern evident in the legislative history that the Commission give attention to the special circumstances of individual businesses in proceeding against them . . . some opportunity must be given for a defendant in a Section 5 proceeding to demonstrate that the special circumstances of his case warrant waiving the rule’s applicability, as where the rationale of the rule does not appear to apply to his own situation or a compelling case of hardship can be made out.”).

²⁹ *Fast Facts on U.S. Hospitals Infographics*, AMERICAN HOSPITAL ASSOCIATION, <https://www.aha.org/infographics/2020-07-24-fast-facts-infographics> (Mar. 2, 2023).

³⁰ *Id.*

³¹ See Proposed Rule, 88 Fed. Reg. at 3510 (citing 15 U.S.C. § 44).

The uneven playing field the Noncompete Rule would impose between tax-paying and tax-exempt hospitals is illogical and would create significant, unintended, and anticompetitive distortions. It would create fundamentally different rules of competition for different companies in the same industry, based solely on their tax status.

It would be inherently unfair to subject tax-paying hospitals and healthcare organizations to the Noncompete Rule when the great majority of their competitors would be exempt from it. Far from preventing an “unfair method of competition” as between workers and employers, in healthcare the Noncompete Rule would instead only *enable* an unfair method of competition between nonprofits and their tax-paying counterparts. This result is not supported by any empirical findings on the competitive effects of noncompetes, and it defies both common sense and any notion of “fairness” as described in the FTC’s recent *Section 5 Policy Statement*.³² Significantly, there is not a single State that bans or limits the enforceability of noncompete agreements based on the tax-paying status of the employer. Moreover, the purported benefits of the Noncompete Rule—the FTC’s predictions of increases to wages and reduction of barriers to entry—cannot be achieved in healthcare if the great majority of workers in that industry remain bound by noncompetes.

In addition, for hospitals, a noncompete ban based on tax status would come at a time of increasing competition for a shrinking pool of skilled professionals, as hospitals across the board are coping with workforce challenges. Nonprofit systems would be free to recruit physicians, nurses, technicians, and senior executives from their tax-paying competitors without restriction, while tax-paying systems would be unable to compete in kind. This result is inequitable and anticompetitive on its face. If anything, this uneven playing field could also create an incentive for hospitals not covered by the Noncompete Rule to engage even more aggressively in noncompetes at all levels of service since their competitors are not able to compete in kind—which is exactly what the Proposed Rule intends to prevent.

Finally, the fact that the FTC Act deliberately excludes nonprofits,³³ banks, common carriers, and other narrow categories of businesses implies that Congress did not intend for the FTC to have broad powers to adopt sweeping, substantive regulations defining “unfairness” across the entire national economy. In other words, the FTC Act’s exclusions show that the FTC’s mandate to prevent “unfair methods of competition” is intended to be a limited one. It would poorly serve this limited mandate to fundamentally rewrite American employment law through a rule that only applies to a small minority of competitors in a vital segment of the national economy, when the vast majority of these businesses’ competitors are exempt.

Accordingly, if the FTC moves forward with the Proposed Rule, tax-paying hospitals and health systems care should be exempted, to prevent unfair and unintended competitive distortions from occurring in this vital segment of our economy.

³² See generally *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FTC File No. P221202 (Nov. 10, 2022).

³³ Based on the legislative history of the FTC Act, the Supreme Court has held that the Act’s exclusion for nonprofits was not an accident in drafting, but rather “indicates an intention” by Congress that the FTC Act not apply to certain kinds of companies. *California Dental Association v. FTC*, 526 U.S. 756, 768–69 (1999).

III. The Proposed Rule Misunderstands the Empirical Literature About the Competitive Effects of Noncompete Agreements—Especially for Physicians and Senior Executives, Who Should Be Exempted if the FTC Moves Forward With the Noncompete Rule

A. **The Proposed Rule Ignores the Economic Literature That Consistently Finds That Workers Earn More When They Sign a Noncompete**

The Proposed Rule asserts, based on its interpretation of the empirical literature, that “the use of non-compete clauses by employers has negatively affected competition in labor markets, resulting in reduced wages for workers across the labor force.”³⁴ This interpretation is simply incorrect, and as demonstrated by multiple studies, it reflects a fundamental misunderstanding about the empirical literature on the competitive effects of noncompete agreements.

There is a large body of empirical literature about the use of noncompete agreements. Without exception, these studies find that, all else equal, employees earn more with noncompete agreements than without them. As a recent report summarized:

*[E]very study of NCA use—including studies of the average worker and of physicians and executives—**finds that NCAs themselves are associated with higher earnings** (Starr et al. 2021, Lavetti et al. 2021, Rothstein and Starr 2022, Shi 2022, Kini et al. 2021).*³⁵

Simply put, every time a researcher has measured empirically whether employees earn more or less when they sign noncompetes, the data has shown that, all else equal, employees earn more. This finding guts the whole premise of the Noncompete Rule. That employees earn more when they sign noncompetes means that noncompetes are not unfair, exploitative, or coercive, and do not reflect abuses of uneven bargaining power. To the contrary, noncompetes represent the exact sort of “win-win” agreements that well-functioning, competitive markets are supposed to produce. And far from increasing wages, the evidence is that the Noncompete Rule will instead harm the very workers the FTC intends to protect.

The study with the most direct relevance to the effects of noncompetes in the healthcare industry is Lavetti et al. (2020),³⁶ where the authors examine data from a survey of 1,967 primary care physicians across five States.³⁷ Based on the responses to this survey, the authors find that the average hourly earnings of physicians with noncompetes are 14.0% higher than those of physicians without noncompetes.³⁸ In addition, the authors find that “physicians with

³⁴ 88 Fed. Reg. at 3482.

³⁵ Natarajan Balasubramanian et al., *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* (2023), at 10, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403 (emphasis added).

³⁶ Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. OF HUM. RES. 1025 (2020). The date of “2021” in Balasubramanian et al. appears to be an error.

³⁷ The five States are California, Georgia, Illinois, Pennsylvania, and Texas. *Id.* at 1028.

³⁸ *Id.* at 1051 & Table 6.

NCAAs have much larger initial rates of earnings growth” than physicians without them; specifically, “the predicted cumulative earnings gain over the first ten years among those with NCAAs is 70 percent, compared to 35 percent for physicians without NCAAs.”³⁹ Examining the effects of noncompete agreements over a physician’s entire career, the authors find “there is virtually no period in the career profile in which workers without NCAAs appear to recoup earnings in excess of those physicians with NCAAs.”⁴⁰ Finally, but significantly, the authors “find no significant difference in prices charged by physicians based on the use of NCAAs.”⁴¹

These findings bear repeating: physicians who sign noncompetes not only earn more than physicians who do not, but they also enjoy greater earnings growth. And there is no significant price difference between physicians who sign noncompetes and those who do not. Importantly, this latter finding—based on direct evidence of noncompete usage rather than indirect evidence about noncompete “enforceability”⁴²—is not even mentioned in the Proposed Rule, and contradicts the lone study that is cited in the Proposed Rule for the proposition that increased noncompete enforceability correlates with higher consumer prices.⁴³

In comparison to Lavetti et al., other studies use different empirical methodologies and focus on different industries and job roles. But remarkably, each study consistently shows that, all else equal, workers earn more when they sign a noncompete. For example:

- Starr et al. (2021)⁴⁴ examines data from a survey of 11,505 labor force participants “drawn from all states, industries, occupations, and other demographic categories.”⁴⁵ Applying both “basic” and “advanced” controls,⁴⁶ the

³⁹ *Id.* at 1049.

⁴⁰ *Id.* at 1063.

⁴¹ *Id.* at 1061.

⁴² Studies focused on “usage” measure the direct effects of noncompetes on the wages of workers who actually sign them. In contrast, studies focused on “enforceability” measure the indirect effects of how easy it is to enforce a noncompete in practice on population-wide wages. *See infra* III.C.

⁴³ *See* Proposed Rule, 88 Fed. Reg. 3490 (citing Naomi Hausman and Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 AM. ECON. J. APPLIED ECON. 258 (2021)). Notably, the Proposed Rule also fails to acknowledge the finding of Umit Gurun et al., *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 J. FIN. ECON. 1218, 1234-35 (2021), that clients of large financial advisory firms that suspended noncompete enforcement saw their fees increase by about 13% after two years, and by about 18% after three years, versus an overall industry average fee increase of 1%.

⁴⁴ Evan Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. AND ECON. 53 (2021).

⁴⁵ *Id.* at 58, 58 n.9.

⁴⁶ The “basic” controls used by these authors are: “indicators for employee type (hourly, salaried, commission); gender; education; employer size; employer’s multi-unit status; linear measures of an employee’s hours worked per week, weeks worked per year, and their interaction; a third-degree polynomial in employee age; the logged number of employers in the county-industry cell; and the logged unemployment rate and labor force size in the state and year in which the employer hired the respondent.” *Id.* at 74 n.30. The “advanced” controls include controls for whether the employee has “other postemployment restrictive covenants (nondisclosure agreements, nonsolicitation provisions, and similar devices);” “controls for poaching rates to and from the employer and in the industry generally;” “control[s] for other human resources (HR) benefits, such as whether the employer offers a retirement plan, health insurance, paid vacation days, sick leave, and life insurance;” and “control[s] for the number of employers the employee has had in the past 5 years (a baseline measure of mobility) and the types of confidential information the employee possesses (for example, access to trade secrets or client information).” *Id.* at 74 n.31.

authors find that workers with noncompetes earn 11.5% or 6.8%, respectively, more than workers do without them.⁴⁷

- Rothstein and Starr (2022)⁴⁸ analyzes data from 3,090 individuals born between 1980 and 1984, whose careers the Bureau of Labor Statistics has tracked through longitudinal surveys dating back to 1997.⁴⁹ Applying no controls, “basic” controls, and “advanced” controls,⁵⁰ the authors find that workers with noncompetes earn 24.7%, 12.7%, or 5.0%, respectively, more than workers do without them.⁵¹
- Shi (2022)⁵² uses the SEC’s EDGAR database to identify some 13,363 employment agreements between executives and publicly traded U.S. firms.⁵³ The author finds that “an executive with a noncompete clause is associated with a starting wage that is 13% higher than one who is free to move.”⁵⁴

All told, despite focusing on different industries and job roles, and despite using multiple empirical methods, the literature uniformly finds that, all else equal, workers earn more by signing a noncompete. The Proposed Rule’s failure to acknowledge these consistent empirical findings is arbitrary and capricious, and in view of these findings, the Noncompete Rule is untenable as a matter of policy. The FTC’s claim that the Noncompete Rule will raise worker wages by some hundreds of billion dollars is simply contrary to the evidence. Instead, the direct empirical evidence is that the Noncompete Rule would ***depress*** the wages of those workers who are subject to noncompetes, both now and in the future.

⁴⁷ *Id.* at 75–76 & Table 8. Notably, between two estimates of increases in earning, the authors give reason to believe that the estimate based solely on “basic” controls is likely more accurate. *Id.* at 75 n.33.

⁴⁸ Donna Rothstein and Evan Starr, *Mobility Restrictions, Bargaining, and Wages: Evidence from the National Longitudinal Survey of Youth 1997* (2021), <https://ssrn.com/abstract=3974897>.

⁴⁹ *Id.* at 5–7.

⁵⁰ The “basic” controls comprise “three education categories, indicators for race and ethnicity, AFQT [Armed Forces Qualification Test] score at 50th percentile or more, gender, and an indicator for whether the State of residence does not enforce NCAs.” *Id.* at 32. The “advanced” controls include the aforementioned “basic” controls, and “add an indicator for for-profit or non-profit status, occupation and industry fixed effects (2 digit SOC and NAICS), and indicators for job tasks including indicators for repetitive work, frequency of contact with others, the length of the longest document read on the job, solving problems, using math to solve problems, supervising others, and the extent of physical tasks.” *Id.* at 32.

⁵¹ *Id.* at 14.

⁵² Liyan Shi, *Optimal Regulation of Noncompete Contracts* (2022), <https://www.econometricsociety.org/publications/econometrica/forthcoming-papers/2022/12/02/Optimal-Regulation-of-Noncompete-Contracts/file/18128-3.pdf>.

⁵³ *Id.* at 22 & n.16.

⁵⁴ *Id.* at 29. The author controlled for “the firm’s asset, Tobin’s Q, return on asset, whether the executive is the CEO, and the gender of the executive.” *Id.*

B. Noncompete Agreements Also Promote Investments in Training and Customer Relationships and, in Healthcare, Also Help to Ensure Continuity of Patient Care

In addition to showing that noncompete agreements increase wages, the empirical literature also shows that noncompete agreements promote competition by incentivizing businesses to make investments in training and customer relationships. With respect to training, the Proposed Rule to its credit acknowledges the “evidence that non-compete clauses increase employee training and other forms of investment.”⁵⁵ For example, the Proposed Rule notes the finding that “moving from mean non-compete clause enforceability to no non-compete clause enforceability would decrease the number of workers receiving training by 14.7% in occupations that use non-compete clauses at a high rate.”⁵⁶

With respect to incentivizing investments in customer relationships, the above-referenced work of Lavetti et al. (2020) is instructive. Lavetti et al. propose that the reason why noncompetes result in increased wages for physicians is because, in healthcare, noncompete agreements solve an investment “holdup” problem by allowing medical practices to make productive investments in developing patient relationships without fear of losing the value of those investments when physicians leave. Physicians, firms, and patients all benefit from eliminating this “holdup” problem. As the authors explain:

We find much lower disparities in the allocation of patients between practice owners and employed physicians in firms using NCAs, suggesting *practices that use NCAs are more likely to share patients, for example, though intrafirm referrals.*⁵⁷

By Lavetti et al.’s telling, noncompete agreements solve the “holdup” problem for relationship-assets “[b]y converting general capital into firm-specific capital.” By solving this problem, firms “increase their investments in patient relationships.”⁵⁸ In short, noncompete agreements create incentives for organizations to invest in human capital as well as in customer relationships, and these incentives promote competition to the betterment of all.

Notably, even these benefits to competition tell only part of the story. In healthcare, noncompete agreements also minimize the disruptions to patient care that are caused by physician departures, allowing healthcare organizations to ensure that patients receive continuity of care across their entire care journey, and minimizing the delivery of healthcare in disconnected “silos.” One particular example of why noncompetes are important in today’s evolving healthcare landscape is value-based care models, which require clinical alignment and coordination across separate providers and specialties.

⁵⁵ 88 Fed. Reg. at 3493.

⁵⁶ *Id.* (citing Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 INDUS. & LABOR RELATIONS REV. 783, 796-97 (2019)).

⁵⁷ Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025, 1064-65 (2020) (emphasis added).

⁵⁸ *Id.* at 1027-28.

Importantly, because patients tend to follow their physicians when physicians leave a practice, these investments in training, protecting relationship-assets, and promoting continuity of care across the patient journey cannot be effectively protected by less-restrictive alternatives like nondisclosure agreements or nonsolicitation agreements.

C. **Studies About the Competitive Effects of Noncompete “Enforceability” Are an Exceedingly Poor Proxy for Understanding the Competitive Effects of Noncompete Usage**

Rather than draw upon the robust body of empirical research that consistently shows that workers earn more with noncompetes, the Proposed Rule instead relies on studies about the indirect effects on wages from noncompete “enforceability.” The Proposed Rule makes two arguments to justify this approach. The first argument is “that non-compete clause use and earnings may both be determined by one or more confounding factors. It may be the case, for example, that employers who rely most on trade secrets both pay more and use non-compete clauses at a high rate” This concern, however, is unfounded. The “advanced” controls applied both in Starr et al. (2021) and in Rothstein and Starr (2022) tested for precisely these sorts of confounding factors. In both cases, even after controlling for “advanced” factors, the authors found a significant, positive relationship (a 6.8% and 5.0% increase, respectively) between noncompete use and wages.⁵⁹

More to the point, “confounding effects” cannot explain the findings of Lavetti et al. (2020) that noncompete agreements result in increased wages for physicians. Physicians who sign noncompetes do the same work as physicians who do not. Therefore, a survey tracking the noncompete usage, wages, and wage growth of nearly 2,000 physicians across five states is a direct, apples-to-apples experiment showing that physicians earn more when they sign a noncompete.⁶⁰

The second argument in the Proposed Rule is that “changes in enforceability are ‘natural experiments’ that allow for the inference of causal effects, since the likelihood that other variables are driving the outcomes is minimal.”⁶¹ There are at least three key problems with this argument.⁶² First, the concept of “enforceability” is at most only directionally relevant to the Noncompete Rule, given that the rule would ban noncompetes outright, not make them incrementally less enforceable. Therefore, the Proposed Rule’s disregard of “usage” studies in favor of “enforceability” studies is asking the wrong empirical question. The right question is how noncompete *usage* affects wages, not how noncompete “enforceability” affects wages.

⁵⁹ Indeed, in the case of Starr et al. (2021), the authors suggest that the “advanced” controls may well be controlling for too much. Evan Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. AND ECON. 53, 75 n.33 (2021).

⁶⁰ For that matter, the study by Shi (2022) of public-company executives also provides a strong, apples-to-apples experiment. Public-company executives are presumptively privy to trade secrets and competitively sensitive information. Therefore, this study, which spans literally every industry in the country, provides even further direct, apples-to-apples experiments about the effects of noncompetes on wages.

⁶¹ 88 Fed. Reg. at 3487.

⁶² For additional criticisms of the enforceability literature, see John McAdams, *Non-Compete Agreements: A Review of the Literature* (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639.

The second problem is that, as the Proposed Rule recognizes, enforceability studies suffer from a serious limitation: they “include both effects on workers with and without noncompete clauses.”⁶³ The enforceability literature does not try to measure the impact of enforceability on the wages of workers who sign noncompetes; rather, the literature tries to measure the impact of enforceability on the wages of a State’s entire workforce, including the large majority of workers who do not have noncompetes. Unsurprisingly, however, noncompete agreements are more prevalent in States with high enforceability than they are in States with low enforceability.⁶⁴ Therefore, it is the enforceability studies, not the usage studies, that suffer from an improper confounding factor: the fact that decreased noncompete enforceability results in decreased noncompete usage. This confounding factor means that enforceability studies tell us nothing about the effects of noncompetes on the wages of the workers who agree to them.⁶⁵

The final problem with relying upon the enforceability literature is that these studies find decidedly mixed effects. The study that the Proposed Rule describes as having “the broadest coverage”⁶⁶ concludes that “[t]he overall effect of NCA enforceability on earnings is ambiguous.”⁶⁷ That study finds that the single enforceability factor with the strongest negative effect on wages and the most statistical significance is the picayune question of whether a noncompete agreement signed at the inception of the employment relationship is deemed to be supported by adequate consideration.⁶⁸ But the same study also finds that some aspects of noncompete enforceability actually have *positive* correlations with wages (albeit not at a statistically significant level). For instance, when State courts require a lower burden of proof on employers to prevail in noncompete cases, the data suggest that wages somehow increase by 4.1%, going from maximal unenforceability to maximal enforceability.⁶⁹ ***In other words, the “enforceability” factor that most directly measures how easy it is for employers to enforce a noncompete agreement actually shows a positive correlation with wages.***⁷⁰ These results show

⁶³ 88 Fed. Reg. at 3487.

⁶⁴ See generally Matthew Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* 6 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381 (“[S]tates with higher NCA enforceability have a larger share of physicians (Lavetti et al., 2018), CEOs (Kini et al., 2019), managers (Shi, 2020), and hair stylists (Johnson and Lipsitz, 2019) that sign NCAs.”).

⁶⁵ Although the Proposed Rule recognizes this problem, its effort to get around it amounts to begging the question: “the Commission believes it is reasonable to conclude based on contextual evidence that the labor-force-wide effects described in the [enforceability] studies above include effects on both workers with and without non-compete clauses.” 88 Fed. Reg. at 3487. But this requires ignoring the robust body of empirical evidence that consistently finds the opposite: that workers who sign noncompete agreements earn more than workers who do not. Simply put, the Proposed Rule assumes the truth of what it is trying to prove, when the empirical literature consistently shows that its assumption is incorrect.

⁶⁶ *Id.*

⁶⁷ Matthew Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* (2021), at 11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.

⁶⁸ *Id.* at app. Table C.2. The decrease in earnings is estimated to be -5.4%, going from maximal unenforceability to maximal enforceability.

⁶⁹ *Id.*

⁷⁰ Importantly, these predictions are not limited to the wages of workers who have signed noncompetes; rather, these predictions purport to show the wage effects across *all* workers, including those who do not have noncompetes.

that the enforceability literature shows mixed effects, and the Commission should not extrapolate these studies' findings beyond their limited, inconclusive scope.

Finally, the FAH must observe that the Proposed Rule relies upon the same enforceability study referenced immediately above for the proposition “that a nationwide ban on noncompete clauses would increase average earnings by 3.3-13.9%.”⁷¹ The low range of this estimate is the basis for the FTC’s assertion that the Noncompete Rule would increase wages by “nearly \$300 billion per year.”⁷² However, the Proposed Rule fails to note that the authors of that very study describe that estimated range as simply a “back of the envelope calculation using an out-of-sample extrapolation.”⁷³ It would be arbitrary and capricious to use a “back of the envelope” extrapolation as the basis for radically transforming American employment law.

D. In View of the Empirical Evidence, the FTC Should Exempt Both Physicians and Senior Executives from the Noncompete Rule

The FAH respectfully submits that the Proposed Rule should be abandoned entirely, as it reflects a fundamental misunderstanding of the empirical literature. At a minimum, however, the Noncompete Rule should be amended to exclude both physicians and senior executives—jobs for which there is clear evidence that noncompete agreements are wage- and efficiency-enhancing. The Proposed Rule’s suggestion that less-restrictive alternatives like nondisclosure or nonsolicitation agreements are sufficient to protect employers’ interests is not plausible. As noted above, nondisclosure and nonsolicitation agreements cannot solve the investment “holdup” problem inherent in a relationship-based service enterprise like medicine, where developing relationships requires investments by the employer. Moreover, a nondisclosure or nonsolicitation agreement only works when the former employee has both the desire and the discipline not to take advantage of information that resides in his or her brain. In practice, this does not work. When a worker leaves Company A to join Competitor B, that worker typically ceases being loyal to Company A and instead dedicates his or her efforts to serving Competitor B. Forcing businesses to try to protect their confidential information by resort to trade-secret litigation is unrealistic, and is a prescription for an explosion of expensive, intrusive litigation between competitors.

Beyond this, there are three particular reasons why the Noncompete Rule should exempt physicians. First, for physicians, any concern about deterring entry is misplaced, because physicians, by definition, have all the necessary education and licenses that are needed to establish themselves as independent competitors before they are even hired.⁷⁴ Put differently,

⁷¹ 88 Fed. Reg. at 3486; *see also id.* at 3522 (characterizing this study as “[t]he study containing the most direct estimate of the increase in workers’ earnings given a prohibition on non-compete clauses”).

⁷² Press Release, FTC, *FTC Proposed Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>.

⁷³ Matthew Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility 2* (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.

⁷⁴ *See generally* Statement of Interest of the United States at 6, *Beck v. Pickert Medical Group, P.C.*, Case No. CV21-02092 (Feb. 25, 2022), *available at* <https://www.justice.gov/atr/case-document/file/1477091/download> (“Here, the plaintiffs are doctors who perform anesthesiology services—whether as members of a medical group like defendant Pickert Medical Group, or as individual practitioners. . . . Because individual plaintiffs were board-

physicians do not need to join an established medical practice in order to compete. Instead, those physicians who choose to join a medical practice do so for multiple benefits, including but not limited to increased compensation. The tradeoff for those benefits is a reasonable noncompete agreement that protects the investment of the medical practice. Otherwise, the medical practice transforms from a mutually beneficial collaboration into a model that underinvests in patient development and training and incentivizes the delivery of care in silos.⁷⁵

Second, more so than perhaps any other profession, a number of States have already drawn very specific laws for when physician noncompetes will be enforceable or not.⁷⁶ The FTC should not disturb the reasoned judgments of these State legislatures, especially as there is no statutory basis or precedent authorizing the FTC to adopt unfair methods of competition rules that preempt State law.

Finally, physicians (unlike many other classes of workers) often have the upper hand in negotiations with prospective employers. Physicians are among the most educated and sophisticated professions in the world, and they have a much greater incentive and means than most people to be represented by legal counsel. In addition, the U.S. suffers from a serious, longstanding shortage of physicians. According to projections published by the Association of American Medical Colleges, the national physician shortage is projected to grow from a shortage of 19,800 physicians in 2019, to a shortage of between 37,800-124,000 physicians by 2034.⁷⁷ This shortage means that physicians have a wide range of options for either self-employment or employment by a practice, giving them leverage to negotiate fair compensation arrangements with prospective employers.

certified and licensed anesthesiologists at the time they signed their agreements with defendants, they were actual or potential competitors of Pickert when they agreed to the non-competes.”).

⁷⁵ See generally Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025, 1064-65 (2020) (“We find much lower disparities in the allocation of patients between practice owners and employed physicians in firms using NCAs, suggesting practices that use NCAs are more likely to share patients.”); John McAdams, *Non-Compete Agreements: A Review of the Literature* (2019), at 13, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639 (“The bulk of the empirical literature finds that workers signing non-compete agreements, or workers who reside in areas with a higher incidence of NCAs, receive more training, more access to information, and more access to client lists.”).

⁷⁶ Some States specifically prohibit noncompete agreements for physicians, even where noncompetes would otherwise be allowed. See, e.g., Mass. Gen. Laws. 112 § 12X; N.H. Rev. Stat. Ann. § 329:31-a; N.M. Stat. Ann. § 24-11-1 *et al.*; R.I. Gen. Laws § 5-37-33(a); S.D. Cod. Law § 53-9-11.1. Other States do the opposite, affirmatively allowing noncompete agreements for physicians. See, e.g., Ala. Code § 8-1-196; Ark. Code Ann. § 4-75-101(j)(2). And yet other States carve out a middle path, specifying precisely when physician noncompete agreements are enforceable and when they are not. See, e.g., Colo. Rev. Stat. § 8-2-113(3)(a) (a physician noncompete is void, but payment of damages may be required); Conn. Gen. Stat. § 20-14p (physician noncompetes may not be more than one year in duration and fifteen miles in radius); D.C. Code § 32-581 *et seq.* (permitting noncompetes for physicians who earn at least \$250,000 per year); Fla. Stat. Ann. § 542.336 (barring noncompetes where one entity employees all of the physicians of a particular specialty in a county); Tex. Bus. & Com. Code § 15.50(b) (physician noncompetes require a buyout option and other requirements); W.V. Code § 47-11E-2 (physician noncompetes may not be more than one year in duration and thirty road miles in radius, and are not enforceable upon termination by the employer).

⁷⁷ *The Complexities of Physician Supply and Demand: Projections from 2019 to 2034* (2021), at x, <https://www.aamc.org/media/54681/download>.

Importantly, this national physician shortage is especially acute in traditionally under-served communities and rural areas. Factoring in the disparities of care experienced by under-served communities, the true national physician shortage grows to between 102,400-180,400 physicians by 2034.⁷⁸ Thus, against this backdrop, health systems face serious challenges in recruiting physicians—especially specialists—to a rural or inner-city community. Health systems’ investment in those physicians, including through training and economic incentives, is key to successful recruitment initiatives, which promote access to and continuity of care for patients. However, this investment only makes sense if the health system can ensure the physician’s commitment to continue to provide services to patients and the community for some period of time. This is what non-competes in this context are designed to do. Without noncompete agreements, health systems would become even more challenged than they currently are to attract physicians to under-served and rural communities. And importantly, this would be an especially challenging dynamic for tax-paying health systems due to the unlevel playing field that would result from this proposed rule. Therefore, tax-paying health systems may be dissuaded from making investments in communities that would clearly benefit from the additional access to healthcare that tax-paying systems can provide in rural and under-served communities.

IV. The Proposed Rule’s Retroactivity Would Disturb Settled, Bargained-For Contractual Terms and Amount to an Improper, Uncompensated Regulatory “Taking”

The FAH opposes the Noncompete Rule’s purported retroactivity and rescission requirement. “Retroactivity is generally disfavored in the law, in accordance with fundamental notions of justice that have been recognized throughout history.”⁷⁹ Thus, as a matter of statutory interpretation, “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”⁸⁰

Here, the Noncompete Rule would require businesses to surrender contractual rights that were valid and enforceable under State law when they were made and, as the evidence cited above shows, resulted in increased compensation for at least some of the workers who signed them. To force businesses to retroactively forfeit these contractual rights, after they have already paid workers increased compensation in consideration for their agreement not to compete, would amount to an uncompensated regulatory “taking,” in violation of the Fifth Amendment.⁸¹

⁷⁸ *Id.* at viii-ix.

⁷⁹ *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) (citation, quotation, and internal alteration omitted).

⁸⁰ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

⁸¹ See generally *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (“Contract rights are a form of property and as such may be taken for a public purposes provided that just compensation is paid.”); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (“The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property . . .”).

V. The Proposed Exception for Mergers and Acquisitions is Arbitrarily and Impracticably Narrow

Proposed §§ 910.1(e) and 910.3 of the Noncompete Rule would make noncompetes enforceable in the limited situation where a worker sells his or her ownership interest in a business entity, so long as that worker holds “at least a 25 percent ownership interest” in that entity. The FAH appreciates the FTC’s recognition that noncompetes entered into in connection with the sale of a business pose special competitive considerations that warrant an exemption from the Noncompete Rule. However, the FAH believes the 25% threshold is arbitrary and too narrow. Even in California, where noncompete agreements are broadly forbidden, an exception is made where a person sells his or her ownership interest in a business entity.⁸² In fact, proposed § 910.3 appears to be modeled very closely after California’s statute, but with one critical difference: in California, the concept of “ownership interest” is not pegged to some arbitrary ownership percentage. Instead, all that is required in California is that the person bound by a noncompete must have sold “all of his or her ownership interest in the business entity.” Whether that ownership percentage is 25%, 2.5%, or 0.25% is immaterial.

By contrast, the Noncompete Rule’s proposed 25% ownership threshold is so restrictive as to nullify the entire exception. To take a simple example, suppose that a five-physician medical practice wishes to be acquired. If each physician in the practice owns an equal, 20% share, then the medical practice would effectively become unbuyable. No buyer (or, more precisely, no *tax-paying* buyer) would be able to purchase the medical practice with any assurance that the physician-sellers would remain with the business after the sale. (A nonprofit buyer, by contrast, would be able to negotiate such an assurance from the sellers. This would give nonprofits a key competitive advantage over tax-paying competitors in M&A transactions—a facially anticompetitive result.)

Notably, California’s policy of recognizing noncompete agreements made as part of the sale of a business derives from the same ultimate goal as Section 5 of the FTC Act: the prevention of unfair competition. In this respect, California’s analysis of the issue is instructive.

In the case of the sale of the goodwill of a business *it is “unfair” for the seller to engage in competition which diminishes the value of the asset he sold.* In order to protect the buyer from that type of “unfair” competition, a covenant not to compete will be enforced to the extent that it is reasonable and necessary in terms of time, activity and territory to protect the buyer’s interest.⁸³

In this light, proposed §§ 910.1(e) and 910.3 do not serve the interests of fair competition. It is neither fair nor procompetitive for a person to sell his or her interests in a business to a buyer, only to pocket the proceeds and start up a new competitor the next day.

⁸² See CAL. BUS. & PROF. CODE § 16601.

⁸³ *Monogram Industries, Inc. v. Sar Industries, Inc.*, 134 Cal. Rptr. 714, 718 (Cal. Ct. App. 1976) (emphasis added).

The FAH respectfully requests that proposed § 910.1(e) be stricken entirely, and that proposed § 910.3 be revised to provide: *The requirements of this Part 910 shall not apply to a non-compete clause that is entered into by a person who is selling the goodwill of a business entity or otherwise disposing of all or substantially all of the person’s ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity’s operating assets. Non-compete clauses covered by this exception would remain subject to Federal antitrust law as well as all other applicable law.*

VI. The Noncompete Rule Should Not Apply to Independent Contractors or Sole Proprietors

The definition of “worker” in § 910.1(f) of the Noncompete Rule should be revised to exclude both “independent contractor[s]” and “sole proprietor[s].” The Proposed Rule offers no evidence about the competitive effects of noncompete agreements entered into by either independent contractors or sole proprietors. Instead, the Proposed Rule merely begs the question: “the Commission has no reason to believe noncompete clauses that apply to workers such as independent contractors or interns negatively affect competitive conditions to a lesser degree than noncompete clauses that apply to employees.”⁸⁴ This, however, is insufficient. The FTC cannot use the *absence* of evidence to support the open-ended expansion of a regulation—especially when the empirical evidence consistently shows that noncompete use actually results in increased compensation.⁸⁵

VII. Claims that Noncompete Agreements Silence Whistleblowers Are Without Merit

At the February 16, 2023 Forum on the Proposed Rule, a concern was raised that noncompete agreements may “silence physicians from whistleblowing.” This concern is unfounded. For one, federal law protects healthcare workers from retaliation when they report a wide array of workplace safety violations or federal crimes, including reporting on workplace safety violations,⁸⁶ violations of the Fair Labor Standards Act,⁸⁷ and federal false claims.⁸⁸ These federal laws complement State laws that also prohibit retaliation against employees who report violations of law, safety, or ethics,⁸⁹ including an array of special protections for healthcare workers who report safety concerns.⁹⁰

⁸⁴ 88 Fed. Reg. at 3511.

⁸⁵ The reason that the Noncompete Rule proposes to exclude franchisees from the definition of “worker” is precisely that the FTC “is not aware of research” about the competitive effects of noncompete agreements in the franchisor-franchisee context. *See* Proposed Rule, 88 Fed. Reg. at 3511. But there is equally an absence of evidence about the competitive effects of noncompete agreements in the independent contractor or sole proprietor contexts.

⁸⁶ 29 C.F.R. § 1977.3.

⁸⁷ 29 U.S.C. § 218c.

⁸⁸ 31 U.S.C. § 3730(h).

⁸⁹ *See, e.g.*, Haw. Rev. Stat. § 378-62; N.J. Stat. Ann. § 34:19-3; N.M. Stat. Ann §§ 10-16C-3, 10-16C-4, Or. Rev. Stat § 659A.199; 43 Pa. Cons. Stat. § 1423; Tenn. Code. Ann. § 50-1-304.

⁹⁰ *See, e.g.*, Ariz. Rev. Stat. Ann. § 36-420.03; Cal. Health & Safety Code § 1278.5; Colo. Rev. Stat. § 8-2-123; Del. Code Ann. tit. 16 § 5184; Ga. Code Ann. § 31-8-87; 240 Ill. Comp. Stat. 86/35; Mass. Gen. Laws 111 § 72G; Minn. Stat. §§ 144.6512, 144.566; Miss. Code Ann. § 43-47-37; Mo. Laws §§ 198.070, 192.2475, 208.912, 630.167; Nev. Rev. Stat §§ 630.415, 630.417, 449.205; N.H. Rev. Stat. Ann. §§ 151:27, 151:53; N.M. Stat. Ann §

In addition, to the limited extent that the effect of noncompetes on employee misconduct has been analyzed empirically, the evidence is that noncompetes actually *lessen* employee misconduct. An empirical analysis of the financial advisory industry shows that when certain large investment firms agreed to suspend their use of noncompetes, these firms also stopped firing advisors for misconduct. As a result, the large investment firms that suspended their use of noncompetes experienced a stunning 42% increase in misconduct by their advisors.⁹¹ While no comparable empirical study has yet been done in the healthcare sector, if the same mechanism holds, then the abolition of noncompete agreements in healthcare would be expected to reduce employers' ability to ensure employee conduct consistent with the mission of the hospital and to help ensure compliance with quality- and safety-related protocols.

The Noncompete Rule would undermine competition in the hospital industry. Because the FTC lacks Section 5 authority over nonprofits, the Noncompete Rule would only apply to a minority of businesses in the hospital sector and would only increase the challenges inherent in attracting physicians and senior executives, including for under-served and rural communities, and especially in the current workforce shortage environment. At the same time, the Proposed Rule has ignored direct empirical evidence showing that noncompete agreements result in *increased* wages, especially for physicians and senior executives. By banning these procompetitive, win-win agreements, the Noncompete Rule would undermine competition and harm the very workers the Noncompete Rule is meant to protect.

The FAH appreciates this opportunity to submit these comments. If you have any questions, or if there is any other way that we can assist the FTC as it considers the Proposed Rule, please contact me or any member of my staff at (202) 624-1534.

Sincerely,



30-47-9; N.Y. Labor Law § 741; N.Y. Pub. Law §§ 2308-c, 2803-d, 2508-t; Ohio Rev. Code Ann. §§ 2903-36, 3721.21, 3721.17; 23 R.I. Gen. Laws § 23-17.8-5; Tenn. Code. Ann. § 68-11903; Tex. Health & Safety Code Ann. § 161.134(a); Va. Code Ann. §§ 32.1-125.4, 32.1-138.4; Wash. Rev. Code § 18.51.220; W.V. Code § 16-39-4; Wis. Stat. § 46.90.

⁹¹ Umit Gurun et al., *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 J. FIN. ECON. 1218, 1234 (2021). The increase in misconduct is calculated as ((47 bps + 20 bps) ÷ 47 bps). The authors report this number as “over 40%.”