

September 30, 2021

VIA Electronic Delivery

The Federal Trade Commission
Office of the Secretary
Room H-113 (Annex H)
600 Pennsylvania Ave, NW
Washington, DC 20580

RE: Comments on the President Biden’s Executive Order on Promoting Competition in the American Economy and the Petition for Rulemaking to Prohibit Worker Non-compete Clauses (FTC-2021-0036-0001)

Dear Commissioners:

The Center On Executive Compensation (“Center”) is pleased to submit comments to the Federal Trade Commission (“FTC”) providing its perspective and opposing a blanket restriction on the use of non-compete clauses in employment agreements, especially at senior executive levels. The Center and our member companies believe that non-compete clauses, when used responsibly, can help companies protect vital investments in their employees, while ensuring the security of research and development, trade secrets, and institutional knowledge.

The Center is a research and advocacy organization that seeks to provide a principles-based approach to executive compensation policy from the perspective of the senior human resource officers of leading companies. The Center is a division of HR Policy Association, which represents the chief human resource officers of over 390 large companies, and the Center’s more than 140 subscribing companies are HR Policy members who represent a broad cross-section of industries.

The Center last submitted comments on the use of non-compete agreements following the workshop held by the FTC on January 9, 2020, which provided insight into the impact of non-compete agreements on labor mobility. Following President Biden’s Executive Order on Promoting Competition in the American Economy, we believe the current discussion on the topic has not addressed the use of non-compete agreements for senior executives or employees with access to sensitive technical knowledge.

We have regularly discussed this issue with our members. While the views of each company differ based on their individual workforce needs and composition, we have broadly heard that non-compete agreements for certain employees, such as senior officers, are a necessary tool for the protection of commercial information. A blanket, one size-fits-all regulation prohibiting non-compete agreements across the board, including senior officers and employees with access to trade secrets and intellectual property, would have a detrimental effect on the ability of companies to implement leadership structures, invest in new technologies, product lines, and retain key employees.

Currently, it is estimated that 18-28 percent¹ of US employees are covered by non-compete agreements (though other estimates have ranged higher). These agreements are more common for senior leadership roles and/or in technical fields involving sensitive, confidential information such as product design, cost, and pricing.

¹ Slide 73 https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-slides.pdf

Evan Starr, Assistant Professor of Management and Organization at University of Maryland, stated that between 70-80 percent of employees in senior level positions have signed a non-compete agreement.² Recent studies have estimated that nearly two-thirds of public company CEOs have entered into non-compete agreements.³ Employees that have access to trade secrets are 25% more likely to be covered by a non-compete.⁴

We would like to focus our comments on two questions which are germane for the current discussion following the executive order.

- **What are the business justifications for non-compete clauses?**

Non-compete agreements are most often included at professional levels where previous experience, training, or education would prepare the employee to negotiate various provisions of an employment agreement. At the senior-most levels, this negotiation may be conducted with the benefit of counsel. The employee can negotiate consideration in exchange for the agreement not to compete – a reduction in market transferability in exchange for additional compensation.

It is worth noting that these employees have a level of sophistication, market experience, wage information, and the ability to effectively advocate for themselves to prevent a power imbalance during negotiations. This labor market expertise and access to negotiation resources clearly differentiates the employment agreement risks faced by senior executives as compared to employees in entry level and mid-career positions. This is very important and clearly differentiates senior executives and employees with highly technical skills that understand implications of noncompete agreements from those who work low wage positions and lack the same resources, experience, and access to counsel.

Companies need to protect their customer and vendor relationships, their brand's reputation or goodwill, strategic plans for future growth, product price and cost sensitivity, and trade secrets inherent in their research and development programs. Using noncompete agreements is an effective way to pursue protection of the above mentioned strategic and competitive advantages.

- **Following President Biden's Executive Order, should the FTC consider limitation on their use?**

We believe an FTC rule regarding non-compete agreements is unnecessary and any review of non-compete agreements should not cover the use non-solicit, non-disclosure, or forfeiture agreements. Such agreements do not prevent employees from taking new jobs, rather they seek to protect existing employees and trade secrets, or (in the case of forfeiture) provide an incentive to avoid direct competition with the departed firm.

² Page 161, https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf

³ Kini, Omesh and Williams, Ryan and Yin, David, Restrictions on CEO Mobility, Performance-Turnover Sensitivity, and Compensation: Evidence from Non-Compete Agreements (May 29, 2018). Available at SSRN: <https://ssrn.com/abstract=3186802> or <http://dx.doi.org/10.2139/ssrn.3186802>

⁴ Nunn, Ryan. Non-compete contracts: Potential justifications and the relevant evidence (Feb. 4, 2020). Available at <https://www.brookings.edu/testimonies/non-compete-contracts-potential-justifications-and-the-relevant-evidence/>

Non-compete agreements must be reasonable in scope and duration to be enforceable. Several instances of companies using these agreements for inappropriately broad segments of their employee population, including hourly employees, have received attention from both the press and state regulatory authorities. Those cases have resulted in positive changes of behavior.

If the FTC were to consider rules on non-compete agreements, the Center would encourage the FTC to draw a clear distinction on the use of such agreements at the senior level and for specific employee classes with access to sensitive technical knowledge or customer/account information. Once again, senior executives, unlike hourly employees cited in the example above, have the resources in sophistication to properly advocate for themselves when negotiating a noncompete. These individuals understand the implications and are not subject to adverse power dynamics.

The Center was pleased to see the presenters at the FTC's February 2020 workshop note this distinction and should the FTC need additional information on this topic, the Center staff would be happy to provide it.

The Center appreciates this opportunity to provide feedback on the FTC's ongoing effort to address the multifaceted issues regarding labor mobility. If you have any questions about the Center's comments, please do not hesitate to contact us at www.execcomp.org.

Sincerely,



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