UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rebecca Kelly Slaughter

Supporting the Final Rule Banning Noncompete Agreements

Remarks of Commissioner Rebecca Kelly Slaughter[1]
As Prepared for Delivery

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I am so pleased and proud to support the final rule against noncompete agreements in employment contracts. I have always believed that effective competition policy is an important way to improve the everyday lives of real Americans, but for too long, discourse about antitrust was relegated to an inaccessible ivory tower. It's hard to conceive of a topic that brings competition down to earth more than the efforts to tackle noncompete clauses. Anticompetitive conduct against workers is so pernicious because work is such an important component of our lives and identities. Reading the stories in the record from so many commenters who have been harmed by noncompetes, it's clear that the freedom to leave your job and take another job is fundamental to a free and fair economy. It is so profoundly un-free and unfair for people to be stuck in jobs they want to leave not because they lack better alternatives, but because noncompetes would preclude another firm from fairly competing for their labor, requiring workers instead to leave their industries or their homes to make ends meet.

Noncompete agreements bind about one in five American workers. That's astounding. And this is not limited to one sector of the economy or category of workers. Low and high wage workers, skilled and unskilled workers; this problem affects so many. And in fact, it really affects all of us. Even if no one in your family is subject to a noncompete agreement for their own employment, the record in our rulemaking proceeding makes clear: noncompetes prevent new business formation, slow innovation, and deprive consumers of the better products and better prices we expect from competitive markets.

I want to highlight the incredible work of our staff on this rule. An immense amount of labor went into reviewing the more than 26,000 comments and incorporating that feedback into the final rule. I also really appreciate the participation in this process of so many workers, labor organizations, non-profits, and businesses. Your perspective has helped us make the rule stronger and informed policymakers in and outside of the FTC.

At the same time that we celebrate this huge step forward for American workers, I am mindful of the work left to do. The FTC Act and our rulemaking process have limitations, and we don't have the authority or ability to effectuate all of our policy preferences through rulemaking. We must be mindful of the boundaries of our authority, and today's final action is

[1] The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other commissioner.

consistent with those boundaries. But I want to mention two areas in particular that warrant further focus.

First, this rulemaking process has focused on non-compete agreements in the employment setting, but we received numerous comments about ways to expand the rule. While we ultimately did not expand the rule to cover franchisee/franchisor relationships, I do want to note that this is an area of continued interest for me, and I believe it's appropriate for the FTC to continue case-by-case enforcement against anticompetitive conduct by franchisors against franchisees, including through noncompetes. Similarly, "no-poach" agreements among franchisees are an appropriate subject of heavy scrutiny, as we laid out in our amicus brief over a year ago against McDonald's.[2] And of course, employees of franchisees are protected by the rule and will not be subject to noncompete agreements in their employment contracts.

Second, due to limitations on the FTC's jurisdiction, there are still some workers who will not be able to take advantage of the critical benefits of this rule, specifically employees of certain not-for-profit corporations. Our rulemaking record includes powerful stories from healthcare workers who are employed by nonprofits about how noncompetes hurt patients and providers.[3] As a matter of policy, I do not think there is a good justification for them to be excluded from this rule. As a matter of law, I am mindful of the fact that Congress has limited our jurisdiction to entities organized for profit. I want to be transparent about the limitations of our jurisdiction, and recognize that there are workers, especially healthcare workers, who are bound by anticompetitive and unfair noncompete clauses that our rule will struggle to reach. To be clear, as the rule stresses, "both judicial decisions and Commission precedent recognize that not all entities claiming tax-exempt status as nonprofits fall outside the Commission's jurisdiction." If you claim non-profit tax status but are really organized for the profit of your members, you are within our jurisdiction and covered by the rule. But true non-profits are not.

But that is also why I am glad that this rulemaking effort is only one angle of attack on noncompete clauses. I am hopeful that other agencies with different jurisdiction, especially over the healthcare industry, can also take up this charge and identify ways that noncompetes may violate their authorizing statutes. I also support efforts in Congress to ban noncompetes by legislation. Bipartisan legislation has already been introduced in Congress such as the Workforce Mobility Act from Senators Murphy, Young, Kaine, and Cramer, and Congressmembers Scott Peters, Gallagher, and Eshoo, as well as the narrower Freedom to Compete Act, from Senators Rubio and Hassan.

I am so proud to support today's approval of the final rule to ban noncompete clauses.

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[2] Fed. Trade Comm'n, *FTC Joins Justice Department in Amicus Brief Supporting Workers' Challenge to McDonald's "No Hire" Franchise Restrictions* (Nov. 10, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-joins-justice-department-amicus-brief-supporting-workers-challenge-mcdonalds-no-hire-franchise.

[3] For example, Individual commenter, Doc. No. FTC-2023-0007-20676.