CCIA Comments on the U.S. Federal Trade Commission Non-Compete Clause Rulemaking, Matter No. P201200 (88 CFR 3482)

The Computer and Communications Industry Association (CCIA)[1] welcomes the opportunity to comment on the U.S. Federal Trade Commission (FTC or Commission) Non-Compete Clause Rulemaking (NPRM), released on January 5, 2023, and posted on January 19, 2023.[2] In general, CCIA agrees that it is important to prevent employment-related unfair and anticompetitive practices. However, CCIA believes that absent clear evidence, a blanket ban on non-compete clauses would not be justified due to the effect it would have on innovation. Additionally, CCIA has serious concerns about the legal authority under which the FTC intends to issue a binding rule on unfair methods of competition.

Therefore, these comments discuss (i) issues raised in the NPRM (*Part I*), and (ii) CCIA's concerns regarding the FTC's authority to issue a rule on unfair methods of competition (*Part II*).

PART I: Comments Regarding the Content of the FTC's NPRM

1. **Absent Clear Evidence, a Blanket Ban on All Non-compete Agreements Would Not Be Justified on Innovation Grounds**

The FTC states that "the weight of the evidence indicates non-compete clauses decrease innovation,"[3] highlighting this as one of the main reasons to justify a ban on all non-compete agreements. However, non-compete agreements have mixed impacts on research and development (R&D) investment, innovation, and human capital formation. While existing research is inconclusive and does not suggest that implementing a blanket ban on non-compete agreements will increase innovation, further research may support narrower limitations to non-compete agreements.[4]

[1] CCIA is an international, not-for-profit association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks, advocating for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.
[2] U.S. Federal Trade Commission (FTC) Non-Compete Clause Rulemaking (NPRM), released on January 5, 2023, and posted on January 19, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf.
[3] *Id*. at 41.
[4] Much of this literature uses patent counts as a proxy for innovation. This is an imperfect measure. Patents are of widely varying quality and value even within a single region, and may vary even more widely when compared across regions or industries or over time. Further, not all innovation is patentable.

Some scholars argue that not enforcing non-compete agreements leads to greater worker mobility and knowledge spillovers, which in turn spread information to other firms and increase innovation over time. Recent research (Samila & Sorenson 2011) supports this claim.[5] The authors used panel data on metropolitan areas in the United States from 1993 to 2002 to estimate the causal effects of venture capital on innovation. The paper found that venture capital has a positive effect on patenting in all states, but that the effect is stronger in states that do not enforce non-compete agreements.[6] States that do not enforce non-compete agreements were found to experience twice the increases in patents of those that do enforce them, due to an influx of venture capital.[7]

Gilson (1999) also supports this theory and argues that the success of Silicon Valley is due to California's refusal to enforce non-compete agreements.[8] In turn, the workforce is more mobile and able to transfer knowledge from one firm to the next, which has led to more innovation within Silicon Valley and ultimately the technology industry. The author compares this trend with the Route 128 area near Boston, Massachusetts, which saw the opposite effect. He argues that the state's enforcement of non-compete agreements has caused Boston to lose its innovative edge because workers seem to have been unable to transfer ideas from one firm to the next.[9]

However, much research supports the opposite theory – without enforcing non-compete agreements, firms are reluctant to invest in R&D because workers can transfer information to direct competitors. Instead, scholars argue that companies that enforce strict non-competes invest in *more* R&D, which leads to more innovation by reducing information spillovers to competitors. Conti (2014) supports this argument.[10] The research analyzed high versus low non-compete agreement enforceability regimes. It combined a state-level measure of enforceability with data on employee and firm outcomes and found that the enforceability of noncompetes allows firms to engage in riskier R&D investments since concerns regarding leaks are mitigated.[11]

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[5] Samila, S., & Sorenson, O., "Non-compete covenants: Incentives to innovate or impediments to growth." Management Science, 57(3), 425-438. (2011). https://web.archive.org/web/20171206221842id_/https://core.ac.uk/download/pdf/6575273.pdf.
[6] *Id.*
[7] McAdams, John M., "Non-Compete Agreements: A Review of the Literature." The Federal Trade Commission (2019). https://ssrn.com/abstract=3513639 or http://dx.doi.org/10.2139/ssrn.3513639.
[8] Gilson, Ronald J., "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete." New York University Law Review Volume 74, no. 3: 575-629. https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-74-3-Gilson.pdf.
[9] *Id.*
[10] Conti, Raffaele, "Do Non-Competition Agreements Lead Firms to Pursue Risky R&D Projects." Strategic Management Journal 35, no. 8 (2014): 1230–48. http://www.jstor.org/stable/24037307.
[11] *Id.*

Additional research (Carlino 2017) reinforced this theory by examining startup panel data to understand if the enforceability of employee non-compete agreements affected the entry of new establishments and jobs created by Michigan firms, and ultimately entrepreneurial activity and innovation.[12] The report found that enforcing non-compete agreements had a significant positive effect on the total number of patents issued to Michigan inventors, especially in the mechanical category. However, the researchers found that enforcing non-compete agreements had a significant negative impact on the total number of patents issued in the drug classifications category.[13]

The existing empirical literature on non-compete agreements rather consistently suggests that changes in enforceability produce a relative shift in *where* innovation occurs, rather than a change in the overall *amount* of innovation. The latter remains ambiguous. This is consistent with the underlying theory: as the enforceability of non-compete agreements increases, an established firm would be expected to invest more in risky research and development due to a reduced risk of employees departing for competitors with relevant information. This increased investment leads to an increased likelihood that the established firm can benefit from its investment in innovation. However, this increase in established firm R&D spending would be expected to be significantly offset by a reduction in smaller firm R&D due to reduced information flow from workers leaving established firms to join small firms.

Likewise, the research suggests that the impact of non-compete enforceability on talent acquisition and retention is also ambiguous. A research study (Garmaise 2011) analyzed time-series and cross-sectional variation data on noncompetition agreements across the United States and found both theoretically and empirically offsetting effects on human capital.[14] The empirical component of the study found that firms were more likely to invest in employee training in states with higher enforceability of non-compete agreements. However, this was offset by a reduction in employee personal investment in training in states with higher enforceability. The empirical directional findings are consistent with the theoretical work: increased enforceability should lead firms to have a higher incentive to invest in employee human capital while leading employees to have a less personal incentive to invest in human capital.[15]

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[12] Carlino, Gerald., "Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment." Federal Reserve Bank of Philadelphia Working Paper #21-26 (2017). https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2021/wp21-26.pdf.
[13] *Id.*
[14] Garmaise, Mark J., "Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment." Journal of Law, Economics, & Organization 27, no. 2 (2011): 376–425. http://www.jstor.org/stable/41261726.
[15] *Id.*

Similarly, recent FTC research (McAdams 2019) discussed the implications of non-compete agreements on innovation and entrepreneurship and found ambiguous effects.[16] Specifically, "limiting the flow of workers to competitors, non-compete agreements simultaneously increase the returns to research and development (R&D) at incumbents while reducing knowledge transfer to new or existing competitors, with the next effect on innovation being ambiguous."[17]

CCIA agrees with the FTC on the importance of ensuring that "competition policy is aligned with the current economic evidence about the consequences of non-compete clauses."[18] In this case, however, both the economic theory and empirical research on the enforceability of non-compete agreements are ambiguous with respect to the aggregate impact on innovation. As a result, it is not clear that a blanket ban on enforcing non-compete agreements would increase (or decrease) aggregate R&D investment, patent filings or issuance, innovation, or human capital. Absent clear evidence, a blanket ban on all non-compete agreements would not be justified on innovation grounds. Therefore, CCIA encourages policymakers and researchers to consider further research that may support narrower limitations on the enforceability of non-compete agreements as the proposed rule prohibits conduct that 47 state legislators have chosen to allow (as discussed in more detail below).

2. M&A Exception is Inadequate and Its Limitation Should Be Reconsidered

The FTC states that "the proposed rule would include a limited exception for non-compete clauses between the seller and buyer of a business."[19] CCIA strongly agrees with including an M&A exception given the importance of non-compete agreements during merger and acquisition transactions. However, the NPRM unduly limits the exception by establishing that it "would only be available where the party restricted by the non-compete clause is an owner, member, or partner holding at least a 25% ownership interest in a business entity."[20] The proposed rule would thus ban M&A non-competes for employees with less than 25% ownership of the acquired company. In this regard, it is important to consider two points.

First, the proposed rule's exception is far too narrow. The exemption only applies to "substantial owners" of a business (defined as employees who own at least 25% of the target firm's equity), without adequately covering key employees who are central to the purpose of most transactions. However, as the agencies themselves recognize in the context of remedial orders requiring divestiture, "key" employees necessary to protect the value of a transferred business are a much

[16] *Supra* at 7.
[17] *Id.*
[18] NPRM at 3.
[19] NPRM at 5.
[20] *Id.*

broader group than just the 25% owner.[21] Undermining the value of transactions in this way would reduce incentives to start businesses and compete on the merits to grow them into attractive acquisition targets.[22]

In this regard, the proposed rule is more extreme than existing state-level regimes. For example, California ensures that non-compete clauses are enforceable if the parties agree to a non-compete as part of the sale of a business's goodwill,[23] and California courts recognize that non-compete clauses protect the goodwill of a business and preserve the value of the asset for the acquirer.[24]

The proposed rule would make it harder for acquirers to realize the projected benefits of an acquisition – much of which is typically derived from key employees and their unique skills. This will drive down valuations and dampen M&A activity, chilling a startup ecosystem where M&A is a key exit path for founders. Additionally, nearly all founders or other key employees will be diluted to far less than 25% by the time they are acquired; in 2021, the average time from a first dilutive round of venture capital funding to acquisition was 6.1 years, according to the NVCA.[25] Setting the carve out at the 25% and above threshold makes the exception largely meaningless for many deals.

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[21] See, *e.g.,* Final Order, *FTC v. Otto Bock HealthCare North America, Inc.*, Dkt No. 9378, at 4, 9-10 (F.T.C. Nov. 6, 2019), https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalorder.pdf (listing "Key Employees" to the success of the divestiture, instructing the parties to "work together in good faith to determine whether any additional [employee] should be identified as a Key Employee," and subjecting the merged party to a two-year prohibition on re-hiring); Final Judgment, *United States v. Thales S.A.*, No. 1:19-cv-00569, at 5, 9-10 (D.D.C. 2019) (defining "relevant personnel" as "employees who have supported or whose job related to the Divestiture Assets" and prohibiting defendants from re-hiring those relevant employees for a period of two years); Final Judgment, *United States v. CVS Health Corp.*, No. 1:18-cv-02340, at 3, 10 (D.D.C. 2019) (defining "Relevant Personnel" as "every person providing pharmacy network, product development, and actuarial support for" the divested business, and prohibiting Defendants from re-hiring those relevant employees for a period of one year).

[22] Research by Gordon M. Phillips and Alexei Zhadov confirms the hypothesis that the "Possibility of being acquired induces innovation efforts by large and small firms, but especially by the small firms." *R&D and the Incentives from Merger and Acquisition Activity*, The Review of Financial Studies, Oxford University Press (2012). The antitrust laws seek to preserve incentives to compete "on the merits," including exercising "business acumen," which might be understood as building the sort of goodwill that makes a business more valuable than the sum of its tangible assets. See *Verizon Comm. v. Law Offices of Trinko*, 540 U.S. 398, 407 (2004); *United States v. Grinnell Corp.*, 384 U. S. 563, 570-571 (1966).

[23] Cal. Bus. & Prof. Code § 16601.

[24] Hilb, Rogal & Hamilton Ins. Servs. v. Robb, 33 Cal. App. 4th 1812, 1825 (1995) (allowing reasonable non-compete clauses in connection with the sale of a business's goodwill primarily serves to "protect the buyer's interest in preserving the goodwill of the acquired [entity]"); Monogram Indus., Inc. v. Sar Indus., Inc., 64 Cal. App. 3d 692, 698 (1976) ("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.").

[25] NVCA Yearbook, National Venture Capital Association (2022) at 38, https://nvca.org/wp-content/uploads/2022/03/NVCA-2022-Yearbook-Final.pdf.

The FTC can better serve this legitimate interest by focusing on whether the non-compete agreement contributes to the purpose of transferring a business's goodwill, rather than arbitrary ownership thresholds. One possibility is to allow non-compete clauses for individuals identified as key employees in a sale agreement and who receive significant monetary compensation as part of the transaction (e.g., at least $250,000 or a similar threshold).[26] Although this alternative would leave some discretion to the negotiating parties to select the employees necessary to realize the goodwill of the business, the FTC would be able to review this use of discretion in any individual enforcement action, and application of the rule on a case-by-case basis could ensure reasonable limitations. In any case, the final rule should include an exemption for agreements that prevent key employees or owners of an acquired company from competing against the company post-transaction.

Second, reasonable non-compete agreements that are ancillary to transactions do not give rise to the concerns underlying the FTC's proposed rule because they are neither exploitative nor coercive, either at the time of contracting or at the time of an employee's departure.[27] This is particularly true when the clauses are limited in duration and the seller is compensated at a premium. In many cases, the parties to these transactions are sophisticated and represented by counsel, and the contracts are subject to extensive negotiations.

As described in the NPRM, courts regularly observe that non-compete clauses between the seller and buyer of a business deserve different treatment from non-competes in the employment context due to the relatively equal bargaining power of both parties in the context of a business sale, the need to protect the buyer's right to the goodwill for which it has paid, and the fact that the proceeds from the sale will ensure that the seller will not experience undue hardship.[28] And, because technology firms frequently compete to be seen as a good acquisition partner, market forces ensure that acquiring firms tailor their use of non-compete clauses to ensure the value of the acquired asset without unreasonably burdening founders and other key employees of the selling firm. Accordingly, the FTC should implement a broad exemption in this context.

[26] This alternative could be supplemented by a definition of reasonable limits: for example, by requiring non-compete terms to commence at the time the transaction closes and to expire after two years, the term routinely used by the antitrust agencies in their own divestiture orders.
[27] NPRM at 71.
[28] *Id.* at 56 (citing Woodward v. Cadillac Overall Supply Co., 240 N.W. 2d 710, 715 (Mich. 1976) (bargaining power); Bybee v. Isaac, 178 P.3d 616, 622 (Idaho 2008) (goodwill); Centorr-Vacuum Indus., Inc. v. Lavoie, 609 A.2d 1213, 1215 (N.H. 1992) (undue hardship)).

PART II: Concerns Regarding the FTC's Authority to Issue a Binding Rule on Unfair Methods of Competition

1. The FTC Act Does Not Authorize Legislative-style Rulemaking by the FTC on Competition Issues

The NPRM states that "pursuant to Sections 5 and 6(g) of the FTC Act, the Commission proposes the Non-Compete Clause Rule."[29] Section 5 of the FTC Act prohibits "unfair methods of competition" (UMC), and Section 6(g) states that the Commission "shall have power … [f]rom time to time to classify corporations and … to make rules or regulations for the purpose of carrying out the [Act's] provisions."[30] Specifically, the FTC argues that "Section 6(g) of the FTC Act authorizes the Commission to make rules and regulations for the purpose of carrying out the provisions of the FTC Act, including the Act's prohibition of unfair methods of competition."[31] However, this is contrary to existing jurisprudence on this issue and the Commission's own historic understanding of its authority. In fact, for decades and consistent with the statements in the FTC Act's legislative history,[32] Commission leadership testified[33] that the FTC lacked substantive competition rulemaking authority.

Although Congress has granted the FTC well-defined and detailed substantive rulemaking authority for unfair or deceptive acts or practices (UDAP) and other specific consumer protection areas, it has *not* authorized legislative-style rulemaking by the FTC on competition issues. When Congress has authorized substantive rulemaking, it has been through very clear grants of well-defined authority. While Congress has granted this authority to the FTC related to consumer protection, it has refrained from doing so on competition issues, instead creating a framework of formal adjudication and investigative powers to enforce competition matters.

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[29] *Id.* at 3.
[30] 15 U.S.C. §§ 45, 46(g).
[31] NPRM at 3.
[32] Noah Joshua Phillips, "Against Antitrust Regulation," American Enterprise Institute Report 3, (2022). https://www.aei.org/research-products/report/against-antitrust-regulation/. "[T]he Conference Committee [considering legislation that created the Federal Trade Commission] was between two bills, neither of which contemplated substantive rulemaking. . .. The legislative history does not demonstrate congressional intent to give the FTC substantive rulemaking power: The House considered and rejected it, the Senate never proposed it, and neither the Conference Committee's report nor the final debates mentioned it."
[33] Ohlhausen, Maureen and Rossen, Ben, "Dead End Road: National Petroleum Refiners Association and FTC "Unfair Methods of Competition" Rulemaking" (April 5, 2022). The FTC's Rulemaking Authority, Concurrences, 2022. ("Consistent with the understanding that Congress did not authorize substantive rulemaking, the FTC made no attempt to promulgate rules with the force of law for nearly 50 years after it was created, 17 and at various times indicated that it lacked the authority to do so.")

In 1973, in *National Petroleum Refiners Association v. FTC,*[34] the FTC attempted to promulgate a rule[35] defining the failure to post octane rating numbers on gasoline pumps at service stations as "an unfair method of competition and an unfair or deceptive act or practice." While the D.C. Circuit – in a decision now largely out of sync with modern principles of statutory interpretation and administrative law – found that Section 6(g) of the FTC Act did confer some rulemaking authority,[36] Congress responded two years later with the Magnuson-Moss Warranty Act, which created a new, far more complex rulemaking scheme that granted the FTC authority to promulgate consumer protection rules only—and expressly did *not* include rulemaking on UMC in its grant of authority.[37] In practice, the FTC's rule never took effect and was ultimately replaced when Congress enacted the Petroleum Marketing Practices Act[38] (PMPA).[39]

As a general matter, it is far from settled that the FTC may conduct legislative-style rulemakings on competition issues.[40] In other contexts, such as privacy and consumer protection, Congress has directed the FTC to use informal notice-and-comment rulemaking in statutes that provide the agency with detailed guidance on rulemaking topics and goals and that specifically exempt it

[34] *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).
[35] P.L. 95-297, 92 Stat. 322 (June 19, 1978).
[36] *Supra* at 37.
[37] 15 U.S.C. § 57a(a)(2) ("The Commission shall have no authority under this subchapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce. . .. The preceding sentence shall not affect any authority of the Commission to prescribe rules. . . with respect to unfair methods of competition in or affecting commerce.").
[38] Petroleum Marketing Practices Act (PMPA). http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-section2821&edition=prelim.
[39] Whereas the FTC's rule invoked both UDAP and UMC authority, the PMPA specifically provides that violations of the statute, or any rule promulgated under the statute, "shall be an unfair or deceptive act or practice in or affecting commerce." Although the FTC testified before Congress that UMC authority was necessary to regulate octane ratings, after Magnuson-Moss was enacted, Congress declined to include UMC rulemaking in the PMPA. Notably, the FTC's written statement on its views (incorporated into the House report on the PMPA) described its original octane ratings rule as UDAP only—suggesting the FTC abandoned its request for UMC authority after Magnuson-Moss. See Ohlhausen, Maureen and Rossen, Ben., "Dead End Road: National Petroleum Refiners Association and FTC "Unfair Methods of Competition" Rulemaking" (2022).
[40] Cong. Rec. 12916 (1914), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4368 (Earl W. Kintner ed.1982). [According to Sen. Cummins "[i]f we were to attempt to go further in this act and to give the commission the authority to prescribe a code of rules governing the conduct of the business men of this country for the future, we would clash with the principle that we cannot confer upon the commission in that respect legislative authority; but we have not made any such attempt as that, and no one proposes any attempt of that sort." Similarly, Rep. Covington stated that "the Federal trade commission will have no power to prescribe the methods of competition to be used in the future. In issuing orders, it will not be exercising power of a legislative nature . . . The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, if it finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature." Sen. Walsh also stated that "we are not going to give to the trade commission the general power to regulate and prescribe rules under which the business of this country shall in the future be conducted; we propose simply to give it the power to denounce as unlawful a particular practice that is pursued by that business."]

from the additional burdens of Magnuson-Moss rulemaking.[41] In those instances, Congress made a clear grant of authority to the FTC and the Congressional delegation of power to the FTC is well-defined, either in terms of the substantive scope of the proposed rule or the procedural path that must be taken to provide the rule with the force of law. For these reasons, former Commissioners have acknowledged the agency's lack of power in this area, repeatedly disclaiming any competition rulemaking authority.[42]

Finally, well-settled jurisprudence on agency authority counsels against the FTC's adopting the proposed rule. *Whitman v. Am. Trucking Associations,* for example, established the "Elephants-in-mouseholes Doctrine," developed by the Supreme Court, according to which Congress should not alter the fundamental details of a regulatory *scheme* in vague terms or ancillary provisions—it does not, one might say, "hide elephants in mouseholes."[43] Similarly, in *AMG Capital Management, LLC v. FTC,* the Supreme Court stated that "to read those words as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to obtain monetary relief as well, is to read the words as going well beyond the provision's subject matter. In light of the historical importance of administrative proceedings, that reading would allow a small statutory tail to wag a very large dog."[44] Hence, since Congress has not made a clear grant of UMC rulemaking authority to the FTC, the FTC Act grants the agency ministerial, but not legislative, rulemaking authority.

2. The Major Questions Doctrine Applies, and the Commission Lacks Clear Congressional Authorization to Undertake this Initiative

An assertion of broad UMC rulemaking authority would run afoul of the major questions doctrine,[45] which states that an agency cannot come up with a wholesale regulatory scheme of "economic and political significance" without "clear congressional authorization." The Supreme

[41] Some examples of such statutes include the Telephone Disclosure and Dispute Resolution Act (1992), the Children's Online Privacy Protection Act (1998), and the Telemarketing and Consumer Fraud and Abuse Prevention Act (2001).
[42] Maureen K. Ohlhausen and James Rill, Pushing the Limits? A Primer on FTC Competition Rulemaking (2021). https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf. [Applying the principles enunciated in *Whitman* and *AMG*, Section 5 is best read as specifying the sole means of UMC enforcement (adjudication), and Section 6(g) is best understood as permitting the FTC to specify how it will carry out its adjudicative, investigative, and informative functions. Thus, Section 6(g) grants ministerial, not legislative, rulemaking authority. In *AMG*, the Court emphasized "the historical importance of administrative proceedings" and declined to give the FTC a shortcut to desirable outcomes in federal court.]
[43] *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).
[44] 141 S. Ct. at 1348.
[45] American Enterprise Institute for Public Policy Research., "The Major Questions Doctrine, National Petroleum, and the Federal Trade Commission's Competition Rulemaking Authority" (2022). https://www.aei.org/wp-content/uploads/2022/12/The-Major-Questions-Doctrine-National-Petroleum-and-the-Federal-Trade-Commissions-Competition-Rulemaking-Authority.pdf?x91208.

Court has increasingly applied the major questions doctrine to limit the scope of Congressional delegation to the administrative state in areas of major political or economic importance. In *Utility Air Regulatory Group v. EPA,* the Court invoked the major questions doctrine to strike down EPA's greenhouse-gas emissions standards as an impermissible interpretation of the Clean Air Act, finding that "EPA's interpretation is unreasonable because it would bring about an enormous and transformative expansion in [the] EPA's regulatory authority without clear congressional authorization."[46] Importantly, in his concurring opinion, Justice Gorsuch set out the factors for determining when the major questions doctrine applies: when Congress has "considered and rejected" bills authorizing something akin to the agency's proposed course of action; the agency "seeks to regulate 'a significant portion of the American economy'"; and when the agency "seeks to 'intrud[e] into an area that is the particular domain of state law.'"[47]

By the FTC's own admission, the proposed rule seems to clearly satisfy each one of these factors. The NPRM includes the FTC's estimates that one in five American workers is bound by a non-compete clause at a cost of close to $300 billion per year – a significant portion of the American economy.[48] The FTC has also acknowledged that non-competes have historically been regulated by the states.[49] And Congress has considered legislation on non-competes as recently as 2021.[50] In addition to establishing a framework for the application of the major questions doctrine, the Supreme Court in West Virginia made it clear that broad UMC rules are unlikely to survive judicial scrutiny.[51]

3. Assuming the FTC Does Possess the Authority to Engage in this Rulemaking, It Is an Impermissible Delegation of Legislative Authority Under the Non-delegation Doctrine

Even if the FTC is able to overcome these significant hurdles to its claimed rulemaking authority, promulgating a substantive competition rule would run afoul of the non-delegation doctrine. The non-delegation doctrine requires Congress to provide "an intelligible principle" to assist the

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[46] 573 U.S. 302, 324 (2014).
[47] *Id.*
[48] NPRM at 15.
[49] Statement of Chair Lina Khan Joined by Commissioners Slaughter and Bedoya regarding the Proposed Rulemaking for the Non-Compete Clause Rule (January 5, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioners-slaughter-bedoya-concerning-notice-proposed. ("Initiatives by several states to limit the use of noncompetes has given researchers the opportunity to closely study their effects").
[50] See February 2021 re-introduction of the Workforce Mobility Act following an earlier iteration introduced in 2018, (2023). https://www.murphy.senate.gov/newsroom/press-releases/murphy-young-reintroduce-bill-to-protect-american-workers-limit-non-compete-agreements.
[51] *West Virginia v. Environmental Protection Agency*, 142 S. Ct. "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices," 2609 (2022).

agency to which it has delegated legislative discretion.[52] For example, in *Jarkesy v. SEC*, Congress unconstitutionally delegated legislative power to the SEC by failing to provide an "intelligible principle" by which the SEC would exercise delegated authority.[53] Similarly, in *National Federation of Independent Business v. OSHA,* the Supreme Court narrowly construed the Occupational Health and Safety Act to find that the Occupational Health and Safety Authority (OHSA) lacked authority to impose a nationwide vaccine mandate because the statute authorizes OSHA to enact only "occupational safety and health standards" rather than "broad public health measures."[54]

Here, the potential breadth of the FTC's contemplated rules and the lack of guidance in the FTC Act's Section 6(g) mean that substantive competition rulemaking could likewise run afoul of the non-delegation doctrine. For all these reasons, the FTC does not have the legal authority to issue a binding rulemaking relating to unfair methods of competition since, as the Supreme Court has recently stated, Congress, not the executive branch, possesses the Article I authority to legislate.

CCIA is pleased to provide this input on the NPRM and welcomes any questions from the FTC.

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[52] *Id.*; *see* also *Alabama Association of Realtors v. US Department of Health and Human Services*, 141 S. Ct. 2485 (2021).
[53] *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).
[54] *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.,* 142 S. Ct. 661, 665 (2022) (*per curiam*).