



VIA ELECTRONIC SUBMISSION

April 19, 2023

April Tabor
Secretary of the Commission
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20210

Re: Noncompete Clause Rulemaking, Matter No. P201200 (Rin 3084-AB74)

Dear Ms. Tabor:

Associated Builders and Contractors hereby submits the following comments to the Federal Trade Commission in response to the above-referenced proposed rule published in the Federal Register on Jan. 19, 2023, at 88 Federal Register 3482.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 22,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.¹

The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)² and industry workforce employment (more than 82% of the construction industry is

¹ For example, [ABC's 33rd Excellence in Construction Awards program from 2023](#).

² U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

employed by small businesses).³ In fact, construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.⁴ The vast majority of small businesses are not unionized in the construction industry.

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC has signed on to a multigroup comment letter on the FTC's proposed rule, which is being submitted by the U.S. Chamber of Commerce.⁵ ABC supports those comments and hereby incorporates them by reference.

A. ABC's Comments in Opposition to the Proposed Rule

ABC is strongly opposed to the FTC's unprecedented proposal to ban all noncompete agreements nationwide, which is a radical departure from hundreds of years of legal precedent. Further, the proposal would require employers to rescind noncompete clauses and provide notice to current and former workers that the noncompete clause is no longer in effect. Ultimately, this vastly overbroad rule will invalidate millions of reasonable contracts around the country that are beneficial for both businesses and employees.⁶

³ 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://advocacy.sba.gov/wp-content/uploads/2020/06/2020-Small-Business-Economic-Profile-US.pdf>.

⁴ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

⁵ See multigroup comment letter (April 17) at https://www.uschamber.com/assets/documents/CoalitionComments_Noncompetes_FTC_Final.pdf.

⁶ Based on the available evidence, the FTC estimates that approximately 1 in 5 American workers—or approximately 30 million workers—is bound by a noncompete clause; see 88 Federal Register at 3485.

ABC members have valid business justifications for noncompete agreements, such as protecting confidential information and intellectual property. This new rule would have a severe adverse impact on their companies as well as their employees.

As further explained below, ABC urges the FTC to rescind this proposed rule. First, the FTC lacks the statutory authority to issue this rulemaking and regulate competition in the market—there is no congressional authorization for such action. In fact, recent U.S. Supreme Court cases indicate this will likely be viewed by the courts as improper delegation of legislative authority.

Second, there is lack of evidence supporting the need for a federal standard. There is already robust regulation at the state level, and currently state courts do not and should not enforce unreasonably restrictive noncompete clauses.

Third, issuing a categorical ban and rejecting any of several alternatives is an additional arbitrary and capricious act in violation of the Administrative Procedure Act, though the agency lacks authority to impose even the lesser restrictions.

Finally, a blanket ban on noncompete agreements will harm the construction industry overall, especially small businesses.

1) The FTC Lacks the Statutory or Constitutional Authority to Issue This Rulemaking

The FTC lacks the statutory or constitutional authority to issue this proposed rule and regulate competition in the market—there is no congressional authorization for such action. Recent Supreme Court cases indicate this will likely be viewed by the courts as improper delegation of legislative authority.⁷

The FTC was granted statutory authority by Congress to promulgate rules to protect consumers, such as to prevent fraud and false advertising. Congress never gave the FTC the statutory authority to define unfair methods of competition through substantive rulemaking. Rather, Congress has chosen to continue to limit the FTC's authority to addressing questions of unfair methods of competition through its adjudicative function.

Several recent Supreme Court cases have recognized the constitutional limitations on the ability of executive agencies to issue major rules when there has been no express authorization from Congress to take the challenged actions. For example, in *AMG Capital Management v. FTC*,⁸ the Supreme Court unanimously rejected the FTC's claims that it could interpret its own statutes to claim broad authority. Additionally, in cases involving other agencies, courts have cited the major questions and

⁷ See [multigroup letter to Congress](#) (Feb. 28, 2023).

⁸ 141 S. Ct. 1341 (2021).

nondelegation doctrines to preserve the constitutional role of Congress.⁹ The proposed rule plainly violates these Supreme Court precedents and must be found unconstitutional.

In addition to the foregoing constitutional challenges, the proposed rule violates the contracts clause and/or takings clause of the U.S. Constitution by making it unlawful to “maintain” noncompete agreements that were lawfully entered into prior to a final rule taking effect. There is no justification for imposing such a punitive sanction on businesses, and this retroactive aspect of the proposed rule must be rescinded.

2) Noncompete Agreements Are Appropriately Regulated at the State Level

There is lack of evidence supporting the need for a federal standard. Robust regulation and active monitoring of noncompete agreements already exists at the state level, and state courts do not and should not enforce unreasonably restrictive noncompete clauses. Here, as in *West Virginia v. EPA*¹⁰, the agency is improperly intruding into an area that is the domain of state law in a manner never contemplated by Congress.

Currently, 47 states permit the use of noncompete clauses. In the vast majority of states, noncompete agreements are considered on a case-by-case basis and enforced as long as they are reasonable. Further, such states recognize that noncompete agreements benefit the economy as well as both employers and employees, and thus should be enforced in many circumstances.

3) The Proposed Rule Violates the Administrative Procedure Act

Issuing a categorical ban and rejecting any of several alternatives is an additional arbitrary and capricious act in violation of the Administrative Procedure Act, though the agency lacks authority to impose even lesser restrictions. An agency action is arbitrary and capricious if “[T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹¹

⁹ *Nat’l Fed. of Indep. Bus. v. Occupational Health & Saf. Admin.*, 142 S. Ct. 661, 665 (2022) (“We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”) Quoting *Alabama Assn. of Realtors v. Dept. of HHS*, 141 S. Ct. 2485 (2021); see also *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (Gorsuch, J., concurring) (Giving the major questions doctrine particular force “when an agency seeks to intrude into an area that is the particular domain of state law.”).

¹⁰ 142 S. Ct. 2587 (Gorsuch, J., concurring).

¹¹ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Insurance*, 463 U.S. 29, 43 (1983). See also *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (“*State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis must consider the “alternatives” that are “within the ambit of the existing policy.”).

The proposed rule fails each of the foregoing tests and further fails to give adequate consideration to the reliance interests of the regulated stakeholders with regard to their previously agreed to noncompete agreements.¹²

4) A Blanket Ban on Noncompete Agreements Will Harm Construction Employers and Employees

A blanket ban on noncompete agreements will harm the construction industry overall, especially small businesses. ABC members have valid business justifications for utilizing noncompete agreements, such as protecting confidential information and intellectual property. This new rule will have a harmful effect on their companies as well as their employees. The noncompete ban will force companies to rethink their compensation and talent strategies.

Approximately 41% of ABC members surveyed in February 2022 use noncompete clauses. Surveyed members listed the following valid business reasons for utilizing noncompete agreements to protect:

- Trade secrets and business intellectual property
- Confidential information
- Customer lists
- Proprietary pricing and software
- Pricing metrics

Employees that are subject to a noncompete include:

- Named executive officers (18%)
- All executives (27%)
- All equity recipients (18%)
- All or nearly all employees, even those not receiving equity (21%)
- Other (17%), which includes sales positions

Surveyed ABC members also explained how noncompete agreements serve pro-competitive interests and encourage investment in employees:

- Noncompete agreements encourage members to invest thousands of dollars in training and tools for each employee, which takes a tremendous amount of time and resources to do.
- Noncompetes help companies to protect the whole team, not just the owner's interest. That includes the interests of other employees and their families, who depend on the work generated for them to perform their crafts.

¹² *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016).

In addition to the investments made into training employees, the survey demonstrates that employees benefit from additional compensation:

- A surveyed member indicated that employees who sign noncompete agreements receive either equity distributions or deferred compensation and are privy to confidential information that pertains to their overall business strategy.
- Another member stated that everyone with a noncompete also has a bonus plan tied to company profits.
- One ABC member indicated that the FTC fails to consider the unique circumstances of businesses that are 100% employee-owned through an Employee Stock Ownership Plan.
 - The member stated it incentivizes its leadership group with stock appreciation rights and, in exchange, these leaders execute noncompete and nonsolicitation agreements.
 - Without the incentive, the company value languishes. And if those leaders depart, taking clients, employees and proprietary information, the value of the company can take a significant hit. Thus, this business arrangement works to the benefit of both the employee-owners and the leaders that commit to noncompete agreements.
 - These SARs align the leadership and the other employee-owners to achieve the same goal of growing the stock value and become a component of the compensation plan for those people providing the extra effort to lead and grow the company.

Surveyed members also responded to how the proposed noncompete ban would adversely impact their companies' talent and compensation strategy:

- 55% of surveyed ABC members indicated that a prohibition on noncompete agreements would have a negative impact on talent strategy.
- 35% indicated a blanket ban would have a negative impact on compensation strategy.

Further, 70% of surveyed members responded that they do not have reasonable alternatives to noncompete clauses for protecting their investments.

Unfortunately, this proposal will clearly have a harmful effect on a significant segment of the construction industry: small businesses. The vast majority of ABC's contractor members are small businesses. And as explained above, the construction industry has one of the highest concentrations of small businesses (82% of all construction firms

have fewer than 10 employees)¹³ and industry workforce employment (more than 82% of the construction industry is employed by small businesses).¹⁴

In fact, the U.S. Small Business Administration Office of Advocacy has expressed significant concerns about the economic impact of the FTC's proposed rule on small entities in its comments, saying: "The FTC has ignored potential important small business impacts to consider, such as the costs of hiring additional legal resources if the proposed rule went into effect. There may also be increased costs of hiring and retaining workers, which some small entities are currently struggling with."¹⁵

Additional important points made by the SBA that the FTC should consider include:

- Small businesses use noncompete clauses to protect assets such as client lists, business practices, teaching techniques, technology, intellectual property and others.
- If the critical competitive information they have built and created is not protected adequately, some small businesses could face a serious risk of loss and potential closure.
- Although there may be other legal avenues to protect assets like technology, the legal process often involves protracted proceedings and astronomical legal fees, which small entities may not be able to afford.
- The FTC should estimate the full costs associated with complying with the proposed rule for directly affected small entities, such as increased costs for legal services; process changes; and changes to training, hiring and retaining workers.¹⁶

Finally, the SBA argues that the FTC's current approach is not appropriate. As Advocacy states in its comments: "Small entities have different views on noncompete clauses depending on the industry and the reason for usage. Because of the wide range of industries and the nature of the economic impacts, Advocacy asserts that a universal ban on noncompete clauses is inappropriate."¹⁷

¹³ U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

¹⁴ 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://advocacy.sba.gov/wp-content/uploads/2020/06/2020-Small-Business-Economic-Profile-US.pdf>.

¹⁵ See U.S. Small Business Administration Office of Advocacy's comment letter (March 20, 2023) at page 3: <https://advocacy.sba.gov/wp-content/uploads/2023/03/FTC-Noncompete-Clause-Comment-Letter-Filed.pdf>.

¹⁶ Id. at page 3.

¹⁷ Id. at pages 3-4.

ABC agrees that a universal ban on noncompete clauses is inappropriate and urges the FTC to withdraw the proposal.

Conclusion

For the reasons stated above and in other comments submitted by the business community, the FTC should withdraw this proposed rule. And even if the FTC decides to move forward and impose lesser restrictions than a blanket ban, it still lacks authority to do so.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck".

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