

May 30, 2023

The Honorable Lael Brainard
Director of the National Economic Council
Chair of the White House Competition Council
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Director Brainard,

We write to request that the White House Competition Council look to ensure that all workers are protected from non-compete clauses, in line with the Federal Trade Commission's recently announced ban on these contracts. Non-compete agreements are exploitative, one-sided employment contracts imposed on employees to lock them into lower-paying and worse-quality jobs. They are used to constrain employees of all professional levels, from corporate executives and software engineers to franchise employees of auto parts stores and sandwich shops. It is estimated that approximately one in five American workers is subject to a non-compete agreement, and the comprehensive ban proposed by the FTC takes a giant leap to correct these injustices in the American labor market.

The proposed non-compete ban is also extraordinarily popular with all segments of the public. The FTC has already received over 20,000 public comments regarding the proposed rule, nearly all of which are in support and come from workers at every professional level.¹ The primary opposition to the rule, such as it is, comes from the C-suites of major corporations, either objecting to the rule on procedural grounds or highlighting the narrow benefits of *some* non-compete agreements in limited circumstances, all without any evidence even for those narrow situations.² The actual economic evidence almost unanimously says otherwise: non-compete agreements suppress workers' wages, reduce entrepreneurship by preventing employees from starting their own companies, and reduce innovation in the economy at large.³ The FTC's near-complete ban is entirely appropriate.

However, even though the FTC's proposed rule is comprehensive and prohibits all but a narrow set of non-compete agreements, the FTC's jurisdiction does not extend across the entire economy. As noted in the proposed rule:

¹ Non-compete Clause Rule (NPRM), Rulemaking Docket, FTC-2023-0007-0001, <https://www.regulations.gov/docket/FTC-2023-0007/document>.

² For example, see Ani Huang, "FTC's blanket non-compete ban is solving the wrong problem," The Hill, January 29, 2023, <https://thehill.com/opinion/congress-blog/3835378-ftcs-blanket-non-compete-ban-is-solving-the-wrong-problem/>.

³ See, for example, Sampsa Samila and Olav Sorenson, "Noncompete Covenants: Incentives to Innovate or Impediments to Growth," *Management Science*, Vol. 57, No. 3 (March 2011), pp. 425-438, https://www.jstor.org/stable/41060682#metadata_info_tab_contents; Matt Marx, Deborah Strumsky, and Lee Fleming, "Mobility, Skills, and the Michigan Non-Compete Experiment," *Management Science*, Vol. 55, No. 6 (Jun., 2009), pp. 875-889, <https://www.jstor.org/stable/40539267>; Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Noncompete Agreements," *Management Science*, Vol. 68, No. 1 (Apr. 2021), <https://pubsonline.informs.org/doi/10.1287/mnsc.2020.3918>.

“Some entities that would otherwise be employers may not be subject to the Rule to the extent they are exempted from coverage under the FTC Act. These entities include certain banks, savings and loan institutions, federal credit unions, common carriers, air carriers and foreign air carriers, and persons subject to the Packers and Stockyards Act of 1921, as well as an entity that is not ‘organized to carry on business for its own profit or that of its members.’ Where an employer is exempt from coverage under the FTC Act, the employer would not be subject to the Rule.”⁴

While the exact boundaries of these exemptions may be unclear in some cases, should any of these industries or categories truly be exempt, workers in several key sectors of the American economy could still be subject to non-compete agreements even after the FTC rule goes into effect. There is no defensible reason why these industries should be exempted from a ban on non-compete agreements. Employees of financial institutions, airlines, utilities, internet service providers, oil and gas pipelines, railroads, meatpackers, and nonprofit healthcare systems should all have the same protections from these coercive employment contracts.

Therefore, we write to encourage the White House Competition Council to direct the relevant federal agencies to examine their legal authority and enforcement powers to fill in any potential gaps in the proposed non-compete rule that may be left by the limits of the FTC’s jurisdiction. These agencies should begin rulemaking to directly prohibit non-competes where possible, or they should look for alternative mechanisms to impose an effective ban, such as requiring that companies or entities not use non-compete agreements as a condition of federal funding or reimbursement.

The most critical area of need may be with respect to nonprofit institutions, particularly in healthcare. Many of the country’s largest healthcare systems are considered nonprofits but nonetheless frequently use non-compete agreements to lock physicians and other medical professionals into certain jobs. For example, up to 80% of CRNA’s are subject to non-compete agreements.⁵ Given any possible uncertainty about the FTC’s jurisdiction over nonprofits, we therefore ask that the Department of Health and Human Services examine its authority to ban non-compete agreements throughout healthcare. In particular, we propose that as a condition of accepting Medicare reimbursement—which all healthcare providers effectively must do—providers must not use or enforce any non-compete agreements. This should include, as outlined in the FTC’s proposed rule, any effective non-compete agreements, such as training repayment agreement provisions (TRAPs), which are particularly common in medical professions such as nursing.

With respect to air carriers and foreign air carriers, we respectfully request that the Department of Transportation use its own rulemaking authority to propose a ban on non-compete

⁴ Notice of Proposed Rulemaking, RIN 3084-AB74, Non-Compete Clause Rule, pp. 111-112, https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf.

⁵ Briana K. Meseroll, Nathaniel M. Apatov, and Carolyn M. Rutledge, “The Noncompete Clause and the Nurse Anesthetist: An Assessment of Knowledge, Perception, and Experience,” *AANA Journal*, Vol. 83, No. 5 (Oct. 2015), https://www.aana.com/docs/default-source/aana-journal-web-documents-1/noncompete-clause-1015-pp329-335.pdf?sfvrsn=a4cd48b1_4.

agreements for airlines.⁶ While not common in airlines, non-compete agreements do exist. PSA Airlines, a subsidiary of American Airlines, has reportedly imposed non-compete agreements on pilots as the country recovered from the crisis of Covid, on the understanding that it would be impossible for the pilot “to perform services for another commercial air carrier which competes with PSA without accessing, using, or disclosing PSA’s Confidential Information.”⁷ TRAPs are more common in the airline industry but should be prohibited all the same. Furthermore, the Department of Transportation has the clear authority to act. Just as the FTC’s rule is proposed under its Section 5 rulemaking authority over unfair methods of competition, Section 41712 authority charges the Secretary of Transportation with the same authority to investigate and stop unfair methods of competition among air carriers.⁸

With respect to entities whose employment practices may be exempt from the FTC’s rule to the degree they are subject to the Packers and Stockyards Act,⁹ we ask that the Department of Agriculture explore its authority to ban non-competes among all entities covered by the Packers and Stockyards Act. An estimated 6% of agricultural workers are subject to a non-compete agreement.¹⁰

With respect to any banks, savings and loan institutions, or federal credit unions that may be exempt from the FTC’s rule, we ask that the Treasury, the Federal Reserve, and any other relevant federal agency to examine possible authority to prohibit the use of non-compete agreements among these financial institutions.

With respect to various common carriers that may be exempt from FTC authority on this issue, such as railroads and telecommunications companies, we request that the Surface Transportation Board, Federal Maritime Commission, and the Federal Communications Commission look for possible rules or guidance to bar non-competes. Non-compete agreements have long been prevalent in the railroad industry,¹¹ and model employment agreements in ocean shipping frequently contain non-compete clauses.¹²

⁶ Letter from American Economic Liberties Project, Open Markets Institute, Student Borrower Protection Center, Towards Justice to Pete Buttigieg, Secretary, U.S. Dept. of Transportation (Jan. 21, 2023), <https://protectborrowers.org/wp-content/uploads/2023/01/1.30.2023-DOT-TRAP-Letter.pdf>.

⁷ “Airline CJO with non-compete clause,” Reddit.com, https://www.reddit.com/r/flying/comments/nmzhkx/airline_cjo_with_noncompete_clause/.

⁸ The DOT has the authority to investigate, decide, and force companies to stop unfair methods of competition. It also has the authority to impose civil monetary penalties. <https://www.govinfo.gov/content/pkg/USCODE-2020-title49/pdf/USCODE-2020-title49-subtitleVII-partA-subpartii-chap417-subchapI-sec41712.pdf>

⁹ The FTC’s statutory language only exempts “persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act.” See 15 U.S. Code § 45(a)(2). Given that the Packers and Stockyards Act primarily governs relationships between packers and ranchers or growers, the FTC’s Section 5 authority likely still covers the employment relationships in meatpacking.

¹⁰ Tyler Boesch, Katherine Lim, and Ryan Nunn, “Non-compete contracts sideline low-wage workers,” Federal Reserve Bank of Minneapolis, October 15, 2021, <https://www.minneapolisfed.org/article/2021/non-compete-contracts-sideline-low-wage-workers>.

¹¹ Erin Mulvaney, “Railroad Worker Challenges ‘Overbroad’ Non-Compete Agreement,” Bloomberg Law, June 20, 2019, <https://news.bloomberglaw.com/daily-labor-report/railroad-worker-challenges-overbroad-non-compete-agreement>.

¹² See All World Shipping Agency Agreement, including a non-compete clause: https://www.allworldshipping.com/Common/download/aws/AGENCY_CONTRACTS/AWS%20Agency%20Agreement.pdf.

The Biden Administration's comprehensive competition agenda has already made significant progress combatting concentrated corporate power in our economy. The FTC's proposed ban of non-competes highlights the need for the whole-of-government approach that was laid out in President Biden's executive order on promoting competition in the American economy. Only by coordinating across agencies to fill in the gaps in the proposed rule will exploitative non-compete agreements be fully prohibited in the American economy.

Sincerely,

American Economic Liberties Project
Demand Progress Educational Fund
Economic Policy Institute
Farm Action
North Carolina Justice Center
Open Markets Institute
People's Parity Project
Public Citizen
Restaurant Opportunities Center United
Revolving Door Project
Student Borrower Protection Center

CC:

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The Honorable Julie Su
Acting Secretary of Labor
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The Honorable Gina Raimondo
Secretary of Commerce
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The Honorable Tom Vilsack
Secretary of Agriculture
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The Honorable Pete Buttigieg

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The Honorable Lloyd Austin
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The Honorable Xavier Becerra
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The Honorable Richard Revesz
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The Honorable Gary Gensler
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The Honorable Marty Oberman
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The Honorable Daniel Maffei
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The Honorable Rostin Behnam
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